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FOR USE IN RELATION TO

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SUBJECT TO THE COMPANIES (CONSOLIDATION) ACT, 1908.

Part I.

ARRANGED AS FOLLOWS:—

PROMOTERS.	NOTICES.	PLEADINGS.
PROSPECTUSES.	RESOLUTIONS.	JUDGMENTS AND ORDERS.
UNDERWRITING.	CERTIFICATES.	APPEALS TO HOUSE OF LORDS.
AGREEMENTS.	POWERS OF ATTORNEY.	RECONSTRUCTION.
MEMORANDA & ARTICLES OF ASSOCIATION.	BANKING & ADVANCE SECURITIES.	AMALGAMATION.
PRIVATE COMPANIES.	PETITIONS.	ARRANGEMENTS.
EMPLOYÉS' BENEFITS.	WRITS.	

With Copious Notes,

AND AN

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ELEVENTH EDITION.

BY

SIR FRANCIS BEAUFORT PALMER,

Bencher of the Inner Temple,

ASSISTED BY

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AND

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LONDON:

STEVENS AND SONS, LIMITED,

119 & 120, CHANCERY LANE.

TORONTO: CANADA LAW BOOK COMPANY, LIMITED.

PHILADELPHIA: CROMARTY LAW BOOK COMPANY.

1912.

BY THE SAME AUTHOR.

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PREFACE

TO ELEVENTH EDITION.



WHEN upwards of thirty years ago *Company Precedents*—in a volume of some 700 pages—first appeared, the Author by no means foresaw the future of the work. He trusted that it would “be found practically useful to members of both branches of the Profession,” and the outcome has surpassed his most sanguine expectations.

Many judges, law officers of the Crown, officials of the High Court, and numerous members of both branches of the Profession, have again and again testified to the utility of the work, in its various editions, and thousands of users of it have become clients of the Author.

Moreover a large proportion of the companies registered since the publication of the work show, in their constitution, regulations, contracts, securities and proceedings, the influence of the work, or the hand of the Author, and often the views and principles advocated in the work have prevailed in the Companies.

When the work was first published the paid-up capital of companies under the Acts of 1862 to 1877 was about 307,000,000*l.*, whereas the paid-up capital under the Companies (Consolidation) Act, 1908, now exceeds 2,222,000,000*l.* (a), besides which

(a) The late Viscount Goschen in his *Essays and Addresses*, 1905, refers to the wonderful development of the company system between 1877

the debentures and debenture stock of such companies represent, it is believed, a further sum of 500,000,000%.

The Author took part in the various Committees appointed by the Board of Trade, which resulted in the Companies Acts of 1900 and 1907, and in the Consolidation Act of 1908. It has been a pleasure to bring this part of the work up to date, and the Author trusts that the result of his labours will merit that kindly consideration which has been so liberally accorded to former editions.

Cordial thanks are due from the Author to the Honourable CHARLES MACNAGHTEN, K.C., to Mr. EDWARD MANSON, and to Mr. ROBERT MORRIS, all of the Chancery Bar, for kind assistance in passing the work through the press, and preliminary thereto, and to many members of both branches of the Profession, as well at home as abroad, for valuable communications and suggestions.

F. B. P.

5, NEW SQUARE, LINCOLN'S INN,

May, 1912.

and 1903, when the paid-up capital amounted to 1,850,000,000%, and says, "Surely such stupendous amounts are instructive, as showing by their magnitude how large a proportion of the business of the country is concentrated in the hands of joint stock companies. . . . The number of shareholders has grown even in a much larger ratio than the colossal growth of the aggregate capital; the profits and risks of nearly every kind of business have been spread from year to year over fresh thousands of individuals, and the middle class with moderate incomes are more and more participating in that accumulation of wealth, from business of every description, which formerly built up the fortunes of individual traders, or of bankers, or of single families."

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ADDENDA AND CORRIGENDA.

Page 102.—*Liverpool and London and Globe Co. v. Bennett*, reported also in (1912) 2 K. B. 41.

453.—Refer also to *Kingston, Miller & Co. v. Thomas Kingston & Co.*, (1912) 1 Ch. 576; following *Fine Cotton Spinners and Doublers' Association v. Harwood, Cash & Co.*, (1907) 2 Ch. 184.

554.—*F. Stacey & Co., Limtd v. Wallis*, also reported in 106 L. T. 554.

689.—Clause 56, in note refer to *Gardner v. Iredale*, (1912) 1 Ch. 700.

691.—Note to clause 59 on the construction of clause 66 of Table A., see *Fruit and Vegetable Growers' Assoc. v. Kekewich*, 28 T. L. R. 411; W. N. (1912) 139.

1081 at foot.—Add also reference to p. 1048.

1286.—	{	Refer to <i>Oceana Development Co.</i> , W. N. (1912) 121 and p. 138, 17 April and 7 y, 1912, from which it appears that the
1306.—Form 648		ute approved by the Court should, where requisite, show the denoting numbers of the shares, but that the advertisement need not set out the minute.

1339, line 18 from top.—Substitute "Richard Burdon, Viscount Haldane of Cloan" for "Robert Threshie, Earl Loreburn."

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COMPANY PRECEDENTS.

CHAPTER I.

PRELIMINARY NOTES.

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The Formation and Registration of Companies.

THE Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), now governs the formation of companies, and has taken the place of the Companies Act, 1862 (25 & 26 Vict. c. 89), and of the many Acts amending and extending the provisions of that Act.

The Act of 1862 was amended and extended by the following Acts:—

1. The Companies Seals Act, 1864 (27 Vict. c. 19).

This Act empowered companies in certain cases to have official seals for use abroad.

2. The Companies Act, 1867 (30 & 31 Vict. c. 131).

This Act provided for reduction of capital, issue of share-warrants to bearer, sub-division of shares and other matters.

3. The Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104).

This Act extended the powers of the Court in winding-up as to compromises and arrangements with creditors.

4. The Companies Act, 1877 (40 & 41 Vict. c. 26).

This Act provided further for reduction of capital.

5. The Companies Act, 1879 (42 & 43 Vict. c. 76).

This Act provided for re-registration with limited liability of unlimited companies, and also for the creation of reserve capital.

6. The Companies Act, 1880 (43 Vict. c. 19).

This Act provided for payment off of profits in reduction of capital, and empowered the Registrar to strike names of defunct companies off the register.

7. The Companies Colonial Registers Act, 1883 (46 & 47 Vict. c. 30).

This Act provided for colonial registers in certain cases.

8. The Companies Act, 1886 (49 Vict. c. 23).

This Act amended the Act of 1862, as to winding-up in Scotland in certain respects.

9. The Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), though not one of the Companies Acts, nevertheless affects the winding-up thereof. See also the Act of 1897, *infra*.

10. The Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62).

This Act provided for the extension of objects, &c.

11. The Companies Winding-up Act, 1890 (53 & 54 Vict. c. 63), largely modified provisions of the Act of 1862 in regard to winding-up.

12. The Directors' Liability Act, 1890 (53 & 54 Vict. c. 64).

This Act modified the liabilities of directors in regard to prospectuses, &c.

13. The Companies Winding-up Act, 1893 (56 & 57 Vict. c. 58), modified the Bankruptcy Act, 1883, in relation to winding-up.

14. The Preferential Payments in Bankruptcy Amendment Act, 1897 (60 Vict. c. 19).

15. The Companies Act, 1898 (61 & 62 Vict. c. 26), modified sect. 25 of the Companies Act, 1867.

16. The Companies Act, 1900 (63 & 64 Vict. c. 48), extensively amended the Companies Acts, 1862 and 1867.

17. The Companies Act, 1907 (7 Edw. 7, c. 50), amended the above Acts in a number of important particulars.

18. The Companies Act, 1908, enabled certain foreign and colonial companies to hold land and other property.

"The Act" and other expressions.

In the following pages the Companies (Consolidation) Act, 1908, is generally referred to as "the Act," but sometimes as "the Act of 1908," and sometimes as "the Consolidation Act."

The Act contemplates the formation of three classes of companies—(1) companies limited by shares; (2) companies limited by guarantee; (3) unlimited companies. Unlimited companies will be found discussed at p. 808; companies limited by guarantee at p. 492. It is with the first class (companies limited by shares) that this work is mainly concerned. This class may be called the normal type of company, that is to say, it is to this category that an overwhelming majority of the companies formed belong. It has proved itself to be the most convenient and effective form for the working of a co-operative business enterprise.

The company limited by shares being then the main objective, it may be useful at the outset to summarise the steps to be taken for

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forming and establishing such a company. Under the Act of 1862 this was a comparatively simple matter, but the Companies Acts, 1900 and 1907, now incorporated in the Companies Act, 1908, introduced certain distinctions—new varieties of formation and constitution as regards the company limited by shares—and with these some degree of complication. Thus a company limited by shares may be either—

- (1) A public company, differentiated again into
 - (a) "A prospectus company," that is to say, a company which is formed on this footing, that on its formation there is to be an invitation to the public by prospectus to subscribe for shares.
 - (b) "A non-prospectus company," that is to say, a company which is formed on the footing that it is not to be a prospectus company or a private company, but is to file a statement in lieu of prospectus; or
- (2) "A private company," that is to say, a private company as defined in sect. 121 of the Act.

The formation and constitution of a private company is dealt with separately in Chapter X., *infra*, and it will make for clearness if the preliminary steps to be taken respectively in the case of the public company, including therein the prospectus company and the non-prospectus company, are here summarised.

The Public Companies.

Prospectus and Non-Prospectus Companies.

The following are the requisite steps for formation:-

- (1) Prepare the memorandum of association in accordance with sect. 3 of the Act—taking care to state therein—
 - (1) The name of the proposed company, not forgetting the word "limited" as the last word of the name;
 - (2) In what part of the United Kingdom—England, Scotland, or Ireland—the registered office is to be situated;
 - (3) The objects of the company;
 - (4) That the liability of the members is to be limited; and
 - (5) The amount of the capital and of the shares into which it is divided. See Form 79, *infra*, p. 490.

There must be at least seven subscribers to the memorandum: no subscriber is to take less than one share, and the number each takes must be set opposite his signature. (Sects. 2 and 3 of the Act of 1908.)

- (2) The memorandum must bear a 10s. stamp, and must be signed by each subscriber in the presence of and be

- attested by one witness at the least. (Sect. 6 of the Act of 1908.)
- (3) Prepare also the articles of association, unless the inconvenient course of registering without articles is to be adopted, and let those articles be framed with due regard to the requirements of the Act of 1908. (See *infra*. Form 251.) And take care that the articles specify the minimum subscription on which the directors may proceed to allotment, as provided for in sects. 85 and 87 of the Act of 1908, unless the company is prepared to postpone allotment until the alternative offered by the section is obtained.
- (4) The articles of association should be expressed in separate paragraphs and numbered arithmetically. They must be printed, and may adopt or exclude all or any of the provisions contained in Table A in the first schedule to the Act. (Sects. 12 and 14 of the Act.)
- (5) The articles must bear a 10s. stamp, and must be signed by the subscribers to the memorandum of association. (Sect. 12 of the Act.) Each subscriber should write opposite his signature his address and description. (See *infra*. 491.) Each subscriber must sign in the presence of and his signature must be attested by one witness at the least. (Sect. 12 of the Act.) See Form 79, *infra*. p. 490.
- (6) If any person is appointed by the articles a director, he must, before the articles are registered, sign a consent in writing to act as such (sect. 72 of the Act, see Form 229); and if the articles require the directors to hold a share qualification, he must, also before such registration, either subscribe the memorandum of association for his qualification or enter into an agreement to take such qualification. *Ibid.* See Form 36.
- (7) Persons who have consented to be directors should, besides signing an assent in writing, as above mentioned, sign an authority to file the assent with the Registrar. (Sect. 72 of the Act.)
- (8) Prepare a list of persons (if any) who have consented to be directors, as by sect. 72 (2) of the Act required. See Form 231.
- (9) Let a statutory declaration be made (if the company is registered in England) by a solicitor of the High Court engaged in the formation of the company, or by a person named in the articles of association as a director or secretary of the company, of compliance with the requisitions of the Acts in respect of registration, and of matters

PROSPECTUS AND NON-PROSPECTUS COMPANIES.

precedent and incidental thereto. See Form 227, and sect. 17 (2) of 1908.

- (10) Take the memorandum and articles of association, and (p. 606, *infra*) the consents (Form 228), and the consent list (Form 231), and declaration (Form 227), and any agreement to take qualification shares, to the Registrar of Companies, Somerset House, Strand, for registration, together with an authority in writing by each director to file his consent to act and to file his contract to take qualification shares. Pay to the Registrar the requisite fees on registration, namely, those fixed by Table B in the first schedule to the Act, and the additional fee of 5s. per 100l. of capital imposed by the Finance Act, 1899.

- (11) In due course the Registrar will issue the certificate of incorporation. As to the effect of which, see *infra*, p. 24 *et seq.*

So much for formation, but in the case both of the prospectus company and of the non-prospectus company the Act prescribes further conditions which must be complied with before the company can commence business or exercise its borrowing powers.

These differ somewhat, as appears below:

In the case of a Prospectus Company. In the case of a Non-prospectus Company.

Frame prospectus of the company inviting subscriptions for shares, taking special care to comply with sects. 72 and 81 of the Act, and having due regard to sects. 85 and 87 of the Act, and let such prospectus be printed, dated and signed in duplicate, contain a statement that it has been filed, and be in fact filed in pursuance of sect. 80 of the Act. After the prospectus has been filed let it be issued, and having obtained the minimum subscription (see sect. 85, *infra*, p. 9), let the company go to allotment, and in due course file the declaration mentioned in sub-sect. (1) of sect. 87 of the Act, and obtain the Registrar's certificate under sub-sect. (2) of same section, that it is entitled to commence business.

Fill up statement in lieu of prospectus, taking special care to comply with sect. 82 of the Act, and let such statement be dated and signed in accordance with the said section and the form set forth in the second schedule to the Act (*infra*, p. 264). After the statement has been filed, let the minimum subscription be obtained, and let the company go to allotment, and in due course file the declaration mentioned in sect. 87 of the Act, and obtain the Registrar's certificate under sub-sect. (2) of the same section, that it is entitled to commence business.

According to the latest Board of Trade return, the total number of companies registered in 1910 was 7,184, that is, 5,459 private companies, 1,685 public with a prospectus, and 40 public companies with a statement in lieu of prospectus.

Restrictions on naming Directors (sect. 72).

One of the first steps in the formation of a company is the choice of directors. With reference to this sect. 72 of the Act provides that:—

Restrictions
on naming
directors.

(1.) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company, or in any statement in lieu of prospectus filed by or on behalf of a company, unless before the registration of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorized in writing—

- (i) signed and filed with the Registrar of Companies a consent in writing to act as such director; and
- (ii) either signed the memorandum for a number of shares not less than his qualification (if any), or signed and filed with the Registrar a contract in writing to take from the company and pay for his qualification shares (if any).

(2.) On the application for registration of the memorandum and articles of association of a company, the applicant shall deliver to the Registrar a list of the persons who have consented to be directors of the company; and if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding fifty pounds.

(3.) This section shall not apply to a private company nor to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business.

Not capable,
&c.

Shall not be capable of being appointed director of a company by the articles unless," &c. These words, so far as the articles are concerned, deal only with actual appointment.

Persons can still, it would seem, without complying with those conditions, be named in the articles (though not in the prospectus) as "proposed" directors, and a power can be inserted for someone (*e.g.*, the subscribers to the memorandum of association, or a majority of them) to appoint such persons to be directors. If no share qualification is required by the articles, a person can be named as a director, subject only to the consent being signed and filed as required by sub-sect. (1) (i). It is not uncommon for the qualification clause in the articles to except the first directors from its operation.

Shall not be
named, &c.

"Shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company, or in any statement in lieu of prospectus, unless," &c. These words plainly apply to a prospectus issued after the registration of a company, but it seems very doubtful whether they can be held to apply to a prospectus issued before the company's incorporation. Where they apply they cover both persons named as actual directors and persons named as proposed directors.

RESTRICTIONS ON NAMING DIRECTORS.

7

If no share qualification is required, a director may be named in the prospectus, subject only to the signing and filing of the consent as required by sub-sect. (1) (i).

"Articles." These words refer to the articles in force, whether in their original form or as altered by special resolution. See sect. 285.

"Or by his agent authorized in writing." Where a person is named in the articles as a director the authority under which the agent is authorized to sign must, if required, be produced to the Registrar, and a copy filed (see note to Form 42, Board of Trade Orders, March 29, 1909), in order that he may ascertain whether the statutory requisition has been complied with.

"Consent in writing." This may be a separate document for each director, or several proposed directors may concur in one consent. See Form 42, Board of Trade Orders, March 29, 1909, Form 228, *infra*, p. 606.

If preferred, an agent to sign and file can be appointed thus:

I, the undersigned, hereby authorize Messrs. —, of —, to sign my consent to act as a director of The — Company, Limited, now about to be registered under the Companies (Consolidation) Act, 1908, and to file such consent on my behalf with the Registrar of Companies pursuant to sect. 72 of the said Act. As witness my hand this — day of —.

Where the director wishes to postpone as long as possible the filing of his consent, or is about to go abroad, he may in writing authorize his agent not only to file the consent, but also to sign it.

"Either signed the memorandum of association," &c. If the articles do not contain any clause requiring a qualification in shares, the conditions in sect. 72 (ii) have not to be complied with; but if the articles contain such a clause, (ii) must be complied with.

In subscribing the memorandum of association it must be borne in mind that a firm contract is thereby constituted as from the moment of incorporation to take and pay in money or money's worth for the shares subscribed for, and that the subscriber will be liable, even though the company should not become entitled to commence business, under sect. 87. Hence, if the directors subscribe the memorandum for their qualifications and then the company does not float, they will, to the extent of their qualifications, be liable to pay up, e.g., to provide for expenses. But if the alternative is adopted, namely, the filing of a contract, the position of the directors is made easier, for the contract to be filed may be made provisional on the company becoming entitled to commence business.

either signed.

It is presumed that where such a contract is required as a condition precedent to the naming of a person as a director in the prospectus of a company not yet registered, the contract should, as the company will not be in existence at the time, be made with some one as trustee for the company. *Hartley's case*, 10 Ch. 157. The Registrar, however, appears to be satisfied with the filing of an instrument which does not operate as a contract, see *infra*, Form 56.

Where the contract is to be filed *after* incorporation, *e.g.*, as a condition precedent to naming some person as a director in a prospectus, it should be made with the company itself or with a duly authorized agent of the company.

"Shall deliver to the Registrar a list of the persons." This sub-sect. (2) in terms only operates on the application for registration of a memorandum *and (sic)* articles of association, and therefore does not apply to a company which is registered without articles, *e.g.*, where Table A is to apply. Perhaps, however, the Court will read in the words "if any" after the words "articles of association."

The list is to specify the persons who have consented to be directors, and is therefore not in terms confined to those who are appointed by the articles. It is apprehended that a person cannot be treated as having consented if his consent be merely conditional, *e.g.*, if he has signed a consent in writing to act as a director conditionally on the company being registered with a specified memorandum and articles, or conditionally on a specified board being appointed as the first directors. If, however, the list is to include such persons, it is apprehended that any condition should be stated in it, for otherwise a penalty would be incurred under sub-sect. (3). The consent need not be in writing; a verbal consent brings the person giving it within the words, unless, as seems possible, the consent mentioned in sub-sect. (2) means the signed consent referred to in paragraph (i) of the preceding sub-section. On the other hand, there does not seem to be much object in filing lists of consenting directors when their written consents are already on the file. But for the safety of the applicant a written consent is desirable.

The applicant is to deliver the list to the Registrar, and this statutory duty the applicant must perform. There is no penalty for not delivering the list; but if the list contain the names of any persons who have not so consented, the applicant is to be liable to the fine specified. See Form 43, Board of Trade Order, March 29, 1909, and Form 231, *infra*.

"(3) This section shall not apply," &c. This sub-section is of great importance. It enacts in effect that the section shall not apply—

(a) To a private company; or,

- (b) To a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business.

The Minimum Subscription (sect. 85).

The abuse, too common at one time, of going to allotment on a wholly inadequate subscription led to the interference of the Legislature, and sect. 85 of the Act, replacing sect. 4 of the Act of 1900, now provides as follows:-

1.) No allotment shall be made of any share capital offered to the public for subscription, unless the following conditions have been complied with, namely,— Sect. 85 of Act.

a.) The amount (if any) fixed by the memorandum or articles, and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; or

b.) if no amount is so fixed and named, the whole amount of the share capital so offered for subscription, has been subscribed, and the sum payable on application for the amount so fixed and named, or for the whole amount offered for subscription, has been paid to and received by the company.

2.) The amount so fixed and named and the whole amount aforesaid shall be reckoned exclusively of any amount payable otherwise than in cash, and is in this Act referred to as the minimum subscription.

3.) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

4.) If the conditions aforesaid have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to the applicants without interest, and, if any such money is not so repaid within forty-eight days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per centum per annum from the expiration of the forty-eight days: Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

5.) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

6.) This section, except sub-section (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

7.) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say

a.) The amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment; or,

b.) if no amount is so fixed and named therein, the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash, has been subscribed, and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

This sub-section shall not apply to a private company or to a company which has allotted any shares or debentures before the first day of July nineteen hundred and eight.

Special points
in section.

In regard to the above section the following points must be borne in mind:-

- (1) It applies to prospectus companies. See *supra*, p. 3.
- (2) It applies to non-prospectus companies. See *supra*, p. 3.
- (3) It does not apply to private companies. See p. 3.
- (4) Except as regards paragraph (7) it does not apply unless share capital is offered to the public for subscription.
- (5) It does not apply to a company which offers only debentures or debenture stock for public subscription.
- (6) It is not confined to an offer made by or on behalf of the company after incorporation: it applies also, it would seem, to an offer made before the incorporation.

The section evidently contemplates that the offer will be made by a prospectus. (See sub-sects. (1) and (4).) But it must not too readily be assumed that an oral offer would not come within the section.

- (7) Where it has once applied, and the company has proceeded to allotment, it will not (except as regards para. (3)) apply a second time should the company make a second or subsequent offer of shares.
- (8) The section prohibits allotment unless the minimum subscription has been subscribed for, and the sum payable on application for the sum fixed (which must not be less than 5 per cent. of the nominal amount of the shares) has been paid. But "subscribed" here means *applied* for—not taken; and as long, therefore, as the *applications* are sufficient, the directors can make as small an allotment as they choose, so far as this section is concerned; but, having regard to sect. 87, the company cannot commence business until the minimum subscription is *allotted*, and until the company is entitled to commence business it is apprehended that the contract constituted by the application and allotment so made must be regarded as provisional only. See sub-sect. (3) of sect. 87.
- (9) The section leaves it to the parties to fix the amount of the minimum subscription upon which the directors may proceed to allotment. They may by the articles fix a large or small amount; but it must be borne in mind that the prospectus or statement in lieu of prospectus (see sect. 81 (1) (d), *infra*) has to specify the minimum subscription, and if an unduly small minimum subscription is fixed, it may discredit the company and deter possible

subscribers, especially if newspapers call attention to the fact and comment thereon unfavourably.

- (10) An allotment made by directors before the minimum subscription is obtained is voidable, not void (sect. 86), and may be avoided by the allottee at any time within one month after the statutory meeting. In the case of a company to which the statutory meeting (sect. 65) does not apply there is no limit of time on the allottee's right to repudiate. See *Finance and Issue, Limited v. Canadian Produce Corp.*, (1905) 1 Ch. 37, more fully referred to under sect. 86. The allottee only, and not the company, is entitled to repudiate. *Burton v. Beran*, (1908) 2 Ch. 240. Considering that the section absolutely prohibits allotment, except under defined conditions, it might well be held that non-compliance rendered the allotment void, except in cases coming within sect. 86 (*infra*), where the company is one which must hold a statutory meeting, that is to say, a company registered after December 31st, 1900.

- (11) The articles may fix the "minimum subscription" at a specified number of the shares or a specified proportion of the share capital or at a specified percentage or proportion of the shares offered to the public for subscription. *West Yorkshire Darracq Agency*, 25 T. L. R. 77.

- (12) The section applies not only in the case of a company which issues a prospectus in England, but to the case of a company which issues a prospectus abroad. *Roussell v. Burnham*, (1909) 1 Ch. 127. In that case the company had issued in France an abridged prospectus not stating the minimum subscription. The plaintiff, a Frenchman resident in France, subscribed for some shares and received an allotment thereof, but the minimum subscription was not subscribed within one month after allotment. He sued the company for the return of what he had paid, relying on sects. 4 and 5 of the Companies Act, 1900, corresponding to sects. 85 and 86 of the Act of 1908. It was held that he was entitled to recover, and that, in his case, "the prospectus" in sub-sect. 4 (85) was the defective prospectus on which he subscribed.

Where the minimum subscription is fixed at a small amount, the prospectus sometimes seeks to justify the fixing of such a figure, or endeavours to anticipate adverse criticism, *e.g.*, by some such statements as follow:—

"The minimum subscription is fixed by the articles of association at — per cent. of the shares offered, but the directors do not propose to allot unless what they consider to be a sufficient subscription is obtained." Examples

"Having regard to the stringent provisions of sect. 85 of the Companies (Consolidation) Act, 1908, the minimum subscription has by the articles of association been fixed at a nominal amount, namely, — per cent. of the shares offered; but, having regard to the amount underwritten [or to the magnitude of the undertaking], the directors have resolved that a considerably larger subscription is required, and will exercise their discretion accordingly."

"Looking to the fact that the vendors are willing to subscribe for shares to such extent, not exceeding the cash portion of the purchase-money, as the company may require, the minimum subscription has been fixed at 100 shares, thus making it certain that the company will proceed to allotment."

The amount of the minimum subscription may be stated either as so many shares or so many pounds, or as a specified percentage of what is offered for subscription. *West Yorkshire Darracq Agency, W. N.* (1908) 236. The statement must be express. *Roussell v. Burnham*, (1909) 1 Ch. 127.

Offer to the public.

What is an offer to "THE PUBLIC" remains to be settled. The Act contains no definition, and an offer "to the public" is not a technical expression: it should therefore be read in its popular sense. Now, in common parlance, an offer to the public signifies an offer made by advertisement or circular to the general public, or some section thereof, as distinguished from an offer made privately, that is, to a select and small circle of friends, customers, or connections. Thus, where a business is converted into a private company, shares offered by the vendors to their friends, relations, or to selected customers, have not hitherto been regarded as having been offered to the public. In such cases it is common to announce publicly that "none of the shares will be offered to the public, the whole having been taken up by the vendors and their friends and customers."

So, too, if a company is formed by the members of a club to provide a house for the club, and the offer of shares is made exclusively to members of the club, it would not in common parlance be termed an offer to the public. Again, an offer by a company of further shares to its own shareholders, however numerous, is not regarded as an offer to the public, but as a domestic transaction.

An offer by a promoter to a few of his friends, relations, and customers was held in a Scotch case (*Sleigh v. Glasgow and Transvaal Options*, F. 420, Ct. of Sess.) not to be an offer to the public.

So where a syndicate had had a prospectus printed marked "Strictly private and confidential: not for publication," and some of the directors sent copies of it to their friends. *Sherwell v. Combined Incandescent Mantles Syndicate*, 23 T. L. R. 482

An offer, too, upon the reconstruction of a company, of shares in the new company to members of the old company in respect of their shares in that company is not an offer to the public. *Booth v. New Africander Co.*, (1903) 1 Ch. 295.

On the other hand, where a prospectus marked "Private and confidential" was filed with the Registrar of Companies, and not exceeding 3,000 copies were issued by the promoter to shareholders in certain gas companies in which he was interested, it was held by Eady, J., that it was an offer to the public. *South of England Natural Gas, &c. Co.*, (1911) 1 Ch. 373.

The offer, to come within the section, must, it has been said, be an offer by the company not an offer by some individuals, but this is not the case, for the section applies to every prospectus issued by or on behalf of a company or by or on behalf of *any person who is or has been engaged* in the formation of the company, and sect. 80 provides for filing a prospectus "in relation to any intended company," so that shares may clearly be offered to the public though the offer is made by a promoter or director and to a limited circle.

The test seems to be this—is there a sufficient subsisting connection between the company or the person making the offer and the persons to whom the offer is made as friends, customers, or co-adventurers &c., or are the persons mere *outsiders*? If they are mere outsiders the offer is an offer to the public, and in such a case the fact that the offer is made to a limited circle—*e.g.*, to the members of a single company (not being the company offering its shares, or on whose behalf the offer is made), or to the members of a few companies, or to the members of a particular profession, or to the investors in a particular class of companies—or that the prospectus states that a preference in allotment will be given to a particular class or section of the public, does not make it the less an offer to the public. And it is apprehended that the mere fact that an offer is made by circular addressed by name to a number of persons does not of itself take it out of the category of offers to the public.

In *Burrows v. Matabele Gold Reefs*, (1901) 2 Ch. 23, 27 (overruled by *Hilder v. Dexter*, (1902) A. C. 474), Farwell, J., appears to have thought that the terms of sub-sect. (4) of sect. 10 of the Act of 1900 providing that the section "shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe for further shares or debentures," might be treated as a "clue" to what was meant by the word "public," not only in that, but in other sections. And some persons have assumed that the learned judge meant to suggest that every offer of shares, however private or domestic, is to be regarded as an offer to the public, unless the offer is made to the shareholders or debenture holders only; but it is more than doubtful whether his Lordship meant thus to interpret the word "public" throughout the Act, and in any case it is submitted that such an inferential definition of the word as regards other sections ought not to be adopted, (a) because the definition, clause of the Act does not thus define the term "offer to the public", and (b) because the words of sub-sect. (4) of sect. 10 (Act of 1900, s. 81) are confined to that section; and (c) because thus to construe the

words would be to depart without sufficient reason from their plain ordinary meaning. And see *infra*, p. 284.

If a prospectus addressed to the general public, or to a section of the public, is published, that no doubt constitutes an offer to the public, even though none of the public come in. There is no obligation to allot to the public; all that is requisite to bring the case within the section is that there shall be an offer, but possibly if this offer is made without any intention to let the public take up any of the shares (e.g., as where all the shares were already taken firm), it might be found as a fact that there was no real offer to the public. See further as to this, the notes to sect. 89 of the Act of 1908, *infra*, p. 279.

The promoters, before applying for the certificate to commence business under sect. 87, *infra*, p. 20, have to determine whether or not an offer has been made to the public, for the application for a certificate that the company is entitled to commence business has to be accompanied by a statutory declaration stating the amount of the share capital offered to the public for subscription, unless, indeed, the company files a statement in lieu of prospectus. See Form 232a.

The following notes in elucidation of expressions in sect. 85 may be added:

For subscription.

"For subscription." The term, offered to the public "for subscription," evidently means an offer of unpaid shares which is to be accepted by allotment, for the section is dealing with and qualifying the right to proceed to allotment. Hence it would not seem to apply to a case in which the company, at the request of the vendors or promoters, offers for public sale fully paid up shares to which they have become entitled.

So also where on a reconstruction paid up or partly paid up shares in the new company are offered to the shareholders in the old company, that would not appear to be an offer to the public "for subscription." *Booth v. New Africander Gold Mining Co.*, (1903) 1 Ch. 295.

Subscribed.

"Has been subscribed," &c. As no allotment is to be made until the specified amount has been subscribed, it follows that "subscribed" here means applied for, and does not mean applied for and taken up.

If, then, 50,000 1*l.* shares are fixed as the minimum subscription, and 50,000 shares are applied for and 1*s.* per share (i.e., 5 per cent.) has been paid up on application, the company may proceed to allotment of the whole or any part of the shares applied for. The section does not preclude allotment unless and until the allotment comprises the minimum subscription: it contains nothing to prevent the directors from going to allotment on less than the minimum sub-

scription, if only the minimum subscription has been applied for and the application money has been paid up. Thus, supposing that the minimum subscription is 50,000*l.* and that 30,000*l.* of shares have been applied for. The directors can at once, if they choose, go to allotment as regards the 30,000 shares, or any part thereof; but of course they must bear in mind, regard being had to sect. 87, that they will not be able to commence business until the full amount of the minimum subscription has been *allotted*; and, what is more, that the contracts for the taking of the shares actually allotted will be provisional only. See sect. 87 (3).

The sum payable on application . . . has been paid to and received by the company." The sum must be paid in cash, it is not enough that the money has been sent by cheque in the ordinary way, for the cheques must be cleared before the allotment can be properly made. *Mears v. Western Canada Pulp and Paper Co.*, (1905) 2 Ch. 427 (C. A.); *National Motor Mail Coach Co.*, (1908) 2 Ch. 228; *Burton v. Bevan*, (1908) 2 Ch. 240.

Exclusively of any amount payable otherwise than in cash." Exclusively
Considering that by the words at the commencement of the section its operation is limited to shares "offered to the public for subscription," it is not easy to understand the above words. It is not allowable to go into the history of the section in committee, or to refer to the discussion in Parliament. The intention must be gathered from the words of the section. Perhaps this can best be ascertained by reading into paragraphs (a) and (b) of sub-sect. (1), after the concluding word, the words "such amount to be reckoned exclusively of any amount payable otherwise than in cash." In the result the words probably refer to shares to be issued to vendors and to shares which must be taken to be made payable otherwise than in cash, *e.g.*, by the transfer of shares in or securities of another company, or other equivalent of cash.

Five per cent." Thus, upon a 1*l.* share, the amount payable on application must be at least 1*s.* (whereas before the Act it was very commonly 2*s.*), and so upon a 10*l.* share the amount payable on application need only be 10*s.*, whereas it is very commonly 1*l.*, or more, per share. Five per cent.

If the conditions," &c. Looking to the very onerous provisions of sub-sect. (4), directors will do well to take the utmost care to preclude any danger to themselves; thus— If conditions.

They may fix the minimum subscription so low that there will be a practical certainty of its being obtained, regard being had to underwriting and to what they themselves will be prepared to do towards making up any deficiency:

They should take care that the application money is made payable into a sound bank, that it cannot be drawn out without their privity and consent, and that it is ear-marked:

They should take care that, until the minimum subscription is obtained and the application money is paid in, no part of the application money is paid out:

If within forty-eight days the minimum subscription is not obtained, and the application money satisfied, they will be enabled at once to repay the application moneys.

The period of forty-eight days runs from the "first issue of the prospectus," which is applicable, unless the contrary be proved, *the date of the prospectus*. See *Roussell v. Burnham*, (1909) 1 Ch. 127. See also sect. 80 (2), and the notes on that section, *infra*.

These precautions are necessary because, looking to sub-sect. (4) it is apprehended that the application money is specifically appropriated for return in the event mentioned, and, until that event, does not become the absolute property of the company. Accordingly *Moseley v. Cresney's Co.* (1 Eq. 435) will not apply.

"Any condition requiring," &c. These words probably refer to a condition in the prospectus or in the form of application, but the words would not appear to preclude a fresh *contract* by the applicant, for, although the words at the commencement of sect. 85 ("no allotment shall be made") are very emphatic, it is clear from sect. 86 that they do not make an allotment in contravention *illegal*, for sect. 86 expressly provides that such an allotment is only to be "voidable at the instance of the applicant within one month after the statutory meeting." Suppose then that the minimum subscription is not reached, the directors can send out a circular stating the fact, and proposing a modification of the scheme which would render a much smaller subscription sufficient, and ask applicants to sign a fresh application for shares, and agreeing to waive sub-sect. (4) of sect. 85, and sub-sect. (1) of sect. 86; or, in the alternative, the directors might send out a circular stating the facts, and proposing a modification in their scheme and the adoption, by special resolution, of a reduced minimum subscription, and enclosing a fresh prospectus altered accordingly, and then ask the parties to sign and send in fresh applications with reference to that prospectus.

Difficulties, however, beset each of these courses, and they render it very desirable that a company should make sure, as far as it possibly can, of obtaining its minimum subscription. The consequences of disregarding the statutory restrictions on going to allotment are stated in sect. 86, as follows:—

Effect of
irregular
allotment.

Sect. 86.—(1.) An allotment made by a company to an applicant in contravention of the last foregoing section shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the

company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

(2.) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions [of sect. 85] with respect to allotment he shall be liable to compensate the company and the allottee respectively for any loss, damages, or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover such loss, damages, or costs shall not be commenced after the expiration of two years from the date of the allotment.

Voidable at the instance of the applicant.—An allotment in contravention of sect. 85 is not void, but merely voidable. The distinction between void and voidable contracts is well recognized.

Where the contract is void there is no contract in existence; but in the case of a voidable contract there is a contract, and although that contract is capable of being avoided, it is valid and binding until effectually avoided. See *Oakes v. Turquand* (L. R. 2 H. L. 325, 346), in which Lord Chelmsford, L. C., said: "The distinction between void and voidable contracts is one which will be found very necessary to be borne in mind when we come to consider the words of the Companies Act, 1862, upon which the question of Oakes's liability will ultimately turn. It is a settled rule of law, as Crompton, J., said in *Clarke v. Dickson* (E. B. & E. 148), 'that a contract induced by fraud is not void, but voidable only at the option of the party defrauded.' If it were otherwise, if a contract induced by fraud were void, there would be an end of the question in this case, because a contract void in itself can have no valid beginning, and Oakes never would have become a shareholder of the company." Hence if an applicant entitled to avoid on the ground that the allotment was made in contravention of sect. 85 does not in fact avoid the contract within one month after the holding of the statutory meeting, he loses his right to make it void *on that ground*; and further, it is apprehended that if before the expiration of the month he elects unequivocally to affirm the contract, he will be estopped from subsequently avoiding it on such ground, for that is the general rule as to voidable contracts; *infra*, pp. 196, 197. Thus, if the allottee, after discovery that an allotment has been made in contravention of sect. 85, treats the contract as subsisting—*e.g.*, by endeavouring to sell the shares (*Ex parte Briggs*, 1 Eq. 482), by executing a transfer of the shares (*Crawley's case*, 4 Ch. 322), by paying calls or instalments or receiving dividends (*Scholey v. Central Rail. Co.*, 9 Eq. 266; *Kent v. Freehold Land Co.*, 4 Eq. 588; and *Shearman's case*, 75 L. T. 385), or by attending and voting at a general meeting in person or by proxy (*Sharpley v. Louth, &c. Co.*, 2 C. D. 663)—he may lose his right to avoid the allotment. See, further, *infra*, p. 197.

It is not necessary that the applicant electing to avoid the contract under sect. 86 should take actual legal proceedings to avoid the contract within the month. Notice of avoidance followed by prompt

legal proceedings, though after the month, is sufficient. *Re National Motor Mail Coach Co.*, (1908) 2 Ch. 228.

It is only the applicant who is entitled to avoid the contract. The company cannot insist on paying back the application moneys, for the applicant may prefer to keep the shares. *Burton v. Bevan*, (1908) 2 Ch. 240. But in such a case the fact that the applicant keeps the shares will not disentitle him to his remedy against the directors who have "knowingly contravened" the section, the right to compel them to make good the loss occasioned to him by the irregular allotment. *Ibid.*

Statutory meeting.

"The statutory meeting." See as to this, sect. 65 of Act of 1908, *infra*, Appendix.

This meeting is to be held within a period of not less than one month, nor more than three months, from the date at which the company is entitled to commence business. See sect. 87.

But the only company which is required by sect. 65 to hold the statutory meeting thus referred to is a company "limited by shares," and therefore sect. 86 (1), giving a right to repudiate an irregular allotment within one month after the date of the statutory meeting, would appear to be inapplicable in other cases, *e.g.*, guarantee companies, or unlimited companies having, in either case, a share capital.

Moreover, sect. 65, under which the statutory meeting is to be held, only applies to companies registered after Jan. 1, 1901. It is obvious therefore that sect. 86 (1) does not apply to companies which were registered before Jan. 1, 1901.

But it was held under the corresponding section of the Act of 1900 that where such a company for the first time went to the public after 31st December, 1900, and allotted shares in violation of that section, an allottee was entitled to repudiate the allotment although sect. 5 of the Act of 1900, corresponding to sect. 86 of the Consolidation Act, was inapplicable. *Finance and Issue, Ltd. v. Canadian Produce Corporation*, (1905) 1 Ch. 37.

Winding-up.

"And shall be so voidable notwithstanding that the company is in course of being wound up." This is a new and noteworthy provision for the protection of the allottee, for apart from this provision it would no doubt have been held that the principle of *Oakes v. Turquand* (L. R. 2 H. L. 325) was applicable, namely, that a voidable contract of membership cannot be avoided after the commencement of a winding-up, that is to say, after the rights of creditors of the company have intervened.

How avoided.

How to be avoided. In order to effectually avoid the contract, the applicant should notify to the company that he avoids the contract and demands repayment of his money and the removal of

his name from the register of members. If the company complies with this request he will be free (*Wright's case*, 7 Ch. 55; *Reese River Co. v. Smith*, L. R. 4 H. L. 64 and 74); but if the company refuses to assent to the avoidance the allottee should, by action or by motion or summons under sect. 32 of the Act, proceed to enforce his repudiation.

It is not necessary, however, that the allottee should take actual legal proceedings to avoid the contract within the month. Notice of avoidance followed by prompt legal proceedings, though after expiration of the month, is sufficient. *Re National Motor Mail Coach Co.*, (1908) 2 Ch. 228. See further, *infra*, Chap. XX. The proceedings should be taken in the Court having jurisdiction to rectify the register, or where there is a winding-up, in the Court having jurisdiction to wind up the company.

When a winding-up has commenced, the notice should be addressed not only to the company, but also to the liquidator. The form of proceeding will depend on whether the applicant has or has not been placed on the list of contributories. See Part II., and *infra*, Chapter XX.

Knowingly contravenes," &c. "Knowingly" contravening the section means contravening it with knowledge of the facts upon which the contravention depends. It is immaterial whether the director had knowledge of the law or not. *Barton v. Beran*, (1908) 2 Ch. 240; and see *Treyeross v. Grant*, 2 C. P. Div. 542. It may be that if a director wilfully shuts his eyes to the facts he is to be held to have knowingly contravened the section. *Tait v. Mackay*, (1904) 2 Ch. 631; (1906) A. C. 24.

A director merely hearing the minutes read of a preceding meeting, at which the resolution for irregular allotment had been passed, and voting for their confirmation, will not be fixed with knowledge so as to make him liable under this section. *Barton v. Beran*, *supra*.

"Compensate the company and the allottee respectively." Compensation.
This is a heavy burden to cast on the directors, for the number of allottees claiming compensation may be as many as there are applicants for shares. The magnitude of this risk emphasizes the necessity for making the minimum subscription small, or absolutely ensuring the subscription thereof, and in either case taking scrupulous care to comply in all respects with the provisions of sect. 85.

As to the company's "loss, damages and costs," these would appear to include all expenses incurred by reason of the allotment having been made in contravention; but it is apprehended that the words do not include damage occasioned by reason of the loss of membership, for the contravention would be the allotment, and it can scarcely be held that the company is entitled to damages for the

avoidance by the allottee of an allotment which ought not to have been made.

As to the loss, damages and costs of the allottee, these should include all his legal expenses of enforcing the repudiation and obtaining repayment of the money paid by him with interest, but should not include damages for loss of the shares. But if the allottee has elected to affirm the contract and keep the shares, or if the time has passed for exercising the right to avoid, it would seem that the measure of damages, if any, must be regulated with reference to the value of the shares. *Peek v. Derry*, 37 C. D. 592.

Two years.

"Two years from the date of allotment." These words preclude any question as to the period of limitation. The commencement of proceedings is to be reckoned from the issue of the writ.

Commencement of Business.

Commencement of business.

Prior to the commencement of the Companies Act, 1900 (1st January, 1901), a company registered under the Companies Act, 1862, could, by virtue of sect. 18 thereof, commence business immediately after its incorporation, for by that section it was made "capable forthwith of exercising all the functions of an incorporated company," and this power of starting business at once is still conceded to a private company and to a company registered before the 1st of January, 1901, or to a company registered before the 1st day of July, 1908, which does not issue a prospectus inviting the public to subscribe for its shares. See sub-sect. 6 of sect. 87, replacing sub-sects. (6) and (7) of sect. 6 of the Act of 1900 below set forth.

But as regards every company having a capital divided into shares formed after 31st December, 1900, where there is an invitation to the public to subscribe for its shares, the powers of the company to commence business or borrow are restricted by sect. 87 of the Companies Act, 1908, replacing sect. 6 of the Companies Act, 1900. This section provides as follows:

Restrictions on commencement of business.

87. (1.) A company shall not commence any business or exercise any borrowing powers unless

- (a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription [*supra*, p. 9]; and
- (b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription; or in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares on the shares payable in cash; and
- (c) there has been filed with the registrar of companies a statutory declara-

tion by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with; and

(d.) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar of companies a statement in lieu of prospectus.

(2.) The registrar of companies shall, on the filing of this statutory declaration, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled.

Provided that in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3.) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4.) Nothing in this section shall prevent the simultaneous offer for subscription of any shares and debentures or the receipt of any money payable on application for debentures.

(5.) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding fifty pounds for every day during which the contravention continues.

(6.) Nothing in this section shall apply to a private company or to a company registered before the first day of January nineteen hundred and one or to a company registered before the first day of July nineteen hundred and eight which does not issue a prospectus inviting the public to subscribe for its shares.

The policy of these provisions is obviously to secure a certain degree of substantiality in a company before it enters into engagements with outsiders or obtains money by borrowing.

The following notes deal with the above section in detail:—

"Commence any business." These words are very wide, but they evidently do not include the issue of prospectuses or the making of provisional contracts, or the allotment of shares, or the employment of experts, or the taking of other preliminary steps. See sub-sect. (1) (a) and sub-sect. (4). Unless a company could take these preliminary steps it could never qualify to commence business at all. "Business," looking at the evident purpose of the section, must be construed accordingly.

"Exercise any borrowing powers." Borrowing might seem to be covered by the words "commence any business," but the presence of the additional words emphasizes the intention that borrowing is not to be allowed. Nothing is said about raising money on perpetual debenture stock. Whether that is or is not borrowing, it would seem to fall within the words "commence business."

Under sect. 85 there can be no allotment unless the minimum subscription has been applied for, and under sect. 87 (1), clause (a), the company is paralysed unless the minimum subscription, at least, is allotted; that is to say, until then it cannot commence business.

An allotment of not less than the minimum subscription is a breach of sect. 85, but the company cannot repudiate the allotment and insist on paying back the money. *Burton v. Bevan*, (1908) 2 Ch. 240.

Directors' payments.

"Every director of the company has paid." Directors are not to favour themselves or any one of their number in this matter of payment. This seems the moral of the condition. Conf. *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56. The words, it may be noted, put it in the power of any director to preclude the company from commencing business by abstaining from paying up the allotment money on his shares. In view of this risk it would be well to provide in the articles that a director shall *ipso facto* vacate office if he does not, within a specified period, pay up in accordance with sub-sect. (1) (b) on every share, whether forming part of his qualification or not, which is taken by him.

Statutory declaration.

"A statutory declaration." It is to be noted that, although the filing of the declaration is made a condition precedent to commencing business or borrowing (see sub-sect. (1) (c)), the obtaining of the certificate is not a condition precedent to either of such acts. It is, of course, desirable to obtain the certificate, for that certificate is conclusive evidence that the company is entitled to commence business; but the company is not bound to obtain it before commencing business. It is only evidence of the right. When the conditions (a), (b) and (c) have, in fact, been satisfied, it may at once proceed to business, and obtain the certificate subsequently in due course. See form of declaration, *infra*, Form 232a.

The Registrar is not given any discretion as to the issue of the certificate; his duty is purely ministerial: the section enacts that on the filing of the declaration the Registrar *shall* certify that the company is entitled to commence business.

Conclusive.

"Conclusive" evidence. As to the meaning of "conclusive," see the cases cited in the notes to sect. 17, *infra*, p. 25.

Any contract.

"Any contract," &c. (Sub-sect. (3).) These words are very wide and appear to include every contract, including contracts of membership. It would seem, therefore, that even where the company has allotted not less than the whole of the minimum subscription, and has given notice thereof to the allottees, and so completed contracts with them, each such contract still remains provisional, and will not become absolutely binding until the conditions (b) and (c) have been satisfied.

Provisional.

"Shall be provisional only." "Provisional" here means that the contract is to be read as if it contained a stipulation that it shall not be binding on the company unless and until the company becomes

entitled to commence business. *Re Otto Electric Manufacturing Co., Jenkin's case*, (1906) 2 Ch. 390. There is, therefore, no need to insert an express condition to that effect in each contract, for the statute implies it. Nevertheless, it may be convenient to set out the condition in the contract in some cases.

"And on that date shall become binding." These words on the face of them would make every such provisional contract on that date become binding, and thus confirm by statute every such provisional contract, whatever its merits; but probably the words merely operate to terminate the provisional status of the contract and to make it absolute, but only for what it is worth, so that any right to repudiate or rescind—*e.g.*, for misrepresentation—will remain undisturbed.

"Nothing in this section shall," &c. Under this sub-section Shares or debentures a company is left at liberty to issue a prospectus offering simultaneously shares and debentures or debenture stock for subscription.

"If any company commences." This stringent provision will, Breach of section. no doubt, discourage those who are aware of it from acting in contravention of the section, but it seems not unlikely that the section will be overlooked in a great many cases.

"Every person who is responsible for the contravention." Liability These words include the directors, managers, and other executive officers who take part in any contravention of the section, and, having regard to sub-sect. (1) (c), the secretary will in many cases be hit by the clause.

The person charged will not be responsible, *semble*, unless he knew or ought to have known the facts. *Conf. Burton v. Bevan*, 1908) 2 Ch. 240.

"This section shall not apply," &c. Three classes of companies Where not to apply. are exempt:—

1. A private company. See sect. 121, and Chapter X.
2. A company registered before the 1st January, 1901.
3. A company registered before the 1st July, 1908, which does not issue a prospectus inviting the public to subscribe for its shares.

This last exemption, of course, means a company which issues no invitation upon its formation to subscribe for its shares. Thus, if a company on its formation merely issues a prospectus inviting public subscriptions for debentures or debenture stock, the section does not apply. So, too, if the company is a mere reconstruction, and only notifies the shareholders in the old company, through the liquidator, of their right to subscribe, the section would not apply.

Once the company has legitimately commenced business without breach of the section, it is exempt for the future from the provisions of the section. Thus, if a company makes arrangements to purchase a business and to issue its shares or part of them credited as paid up in payment for that business, and determines not to invite the public to subscribe for shares, it can commence business without complying with the conditions of the section, and then later on it can offer shares or debentures or debenture stock for public subscription.

Insufficient Subscription.

Insufficient
subscription.

Where the minimum subscription is not forthcoming, it is open to the company by special resolution to alter the amount specified in its articles and then to get the applicants to re-apply on a fresh prospectus. "Articles of association" in sect. 85 clearly means the articles for the time being in force— not merely the original articles. But the company must be careful to return the application moneys on the original subscription within the forty-eight days after the issue of the prospectus, as required by sect. 85 (4).

Effect of Incorporation.

Older law.

The Companies Act, 1862, s. 18, prescribed various conditions that must be complied with prior to the issue of the certificate of incorporation of a company, and went on to provide as follows: "A certificate of the incorporation of any company given by the Registrar shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with."

Speaking with reference to this provision, Lord Cairns said in *Peel's case* (1867), 2 Ch. 674: "When once the memorandum is registered and the company is held out to the world as a company undertaking business, willing to receive shareholders, and ready to contract engagements, then it would be of the most disastrous consequences if, after all that has been done, any person was allowed to go back and enter into an examination (it might be years after the company had commenced trade) of the circumstances attending the original registration, and the regularity of the execution of the document."

Peel's case.

And founding himself on this principle, the same learned judge held in the same case that, where the memorandum of association had, after signature and before registration, been altered without the privity of the signatories so materially that "the alteration entirely neutralised and annihilated the original execution and registration of the document," yet the Registrar's certificate of incorporation was conclusive, and said: "The certificate of incorporation is not merely a *primâ facie* answer, but a conclusive answer to such objections,

... when once the certificate of incorporation is given nothing is to be inquired into as to the regularity of the prior proceedings."

And shortly afterwards, Lord Chelmsford, L. C., in *Oakes v. Tarquand*, L. R. 2 H. L. 323, said: "I think that the certificate prevents all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive that all previous requisitions have been complied with."

Salomon v. Salomon & Co., (1897) A. C. 22, is to the same effect. The Court of Appeal there, whilst holding that the defendant company had been formed "for an illegitimate purpose," and "for objects not authorized by the Act," nevertheless held the certificate of incorporation conclusive that it was incorporated, although sect. 6 requires that the subscribers should be persons associated together for some "lawful purpose." On the other hand, in *National Debenture Corporation*, (1891) 2 Ch. 505, a learned judge refused to treat a certificate of incorporation as conclusive where he found as a fact that the memorandum of association had been subscribed by six persons only instead of seven, as required by the Act of 1862; thus in effect treating the words "conclusive evidence" as meaning "*prima facie* evidence," although the Legislature had obviously used the words "conclusive evidence" in contradistinction to the words "*prima facie* evidence" used by it in sects. 31 and 37 of the same Act. This decision, however, was reversed on appeal on the ground that the evidence did not establish the fact so found. Unfortunately, however, the judges of the Court of Appeal let fall some *dicta* to the effect that if the judge below had been right as to the facts, his decision would have been correct in point of law. The Court, however, had no power to overrule the decision of the L. J.J. in *Peel's case*, and of course these mere *dicta* could in no way derogate from the authority of the decision in that case. With reference to these *dicta*, Vaughan Williams, J., in *Laxon & Co.* (2), (1892) 3 Ch. 555, said that he did not understand how they could be reconciled with the decision and words of the judgment of Lord Cairns in *Peel's case*, *ubi supra*. And it is to be noted that the Court of Appeal in *Salomon v. Salomon & Co.*, as appears above, followed *Peel's case*. And in *Ladies' Dress Association v. Pulbrook*, (1900) 2 Q. B. 376, 381, a decision on the word "conclusive" in another section of the Act of 1867, where these *dicta* were relied on, Romer, L. J., whilst holding them not applicable, significantly added that "if it were not so it might be necessary for us to consider whether these *dicta* could be justified."

The new section (sect. 17 of the Act of 1908, reproducing sect. 1 of the Companies Act, 1900) expressly provides that a certificate of incorporation given by the Registrar of Companies in respect of any association shall be conclusive evidence that "all the requisitions of this Act, in respect of registration and of matters precedent and

*Salomon v.
Salomon & Co.*

Conclusive-
ness of
certificate.

incidental thereto, have been complied with, and that the association is a company authorized to be registered and duly registered under this Act." The incorporation of a company is to take effect from the date of incorporation mentioned in the certificate of incorporation. See sect. 16 of the Act.

Looking to the above decisions and to sect. 17, it is clear that there is no further room for questioning the conclusiveness of certificates of incorporation. Thus, even if the seven signatories to a memorandum were all written by one person, or were all forged, the certificate would be conclusive that the company was duly incorporated. So, too, if the signatories were all infants, the certificate would be conclusive, whether the remarkable decision in *Laxon & Co.* (2), (1892) 3 Ch. 555, that an infant is a "person" within sect. 6, can or cannot be supported. See also *Gold Co.*, 11 C. D. 718; *Hadleigh Castle Gold Mines*, (1900) 2 Ch. 419; *Arnot v. United African Lands*, (1901) 1 Ch. 518; and *Walker v. Smith*, W. N. (1903) 82, which all decide that "conclusive" means what it says.

Notwithstanding, however, this weight of authority, Hamilton, J., has in *British Association of Glass Bottle Manufacturers v. Nettlefold*, 27 T. L. R. 527, held that the certificate is not conclusive that the company is validly registered—*e.g.*, is not a trade union.

As to impeaching
incorporation
by *scilicet* *fa.*

The question whether a company, once registered under the Act of 1862, could by *scire facias* or otherwise be removed from the register and disincorporated, was touched on by the Lord Chancellor (Lord Halsbury) in *Salomon v. Salomon & Co.*, (1897) A. C. 22; but the point had been previously adjudicated on by the House of Lords in *Princess of Reuss v. Bos* (1871), L. R. 5 H. L. 176. The question there arose as to the regularity of the constitution of a company—"The General Company for the Promotion of Land Credit, Limd." All the subscribers to the memorandum of this company were foreigners, and there was no intention to carry on business in England. Neither of these circumstances affected its validity, but the articles of association contained provisions contrary to the Companies Act, and Lord Hatherley, L. C., said: "All we have to ask ourselves is this . . . Has this company come into existence? Has it been born? . . . The question is therefore simply whether it has been created. If created, there is no power given in this Act of Parliament, nor in any other Act of Parliament that I am aware of, by which, through any result of a formal application, like an application for *scire facias* to repeal a charter, the company can be got rid of, unless by winding up"; and the observations of Lord Cairns and Colonsay were to the same effect. See, also, what was said by Fry, J., in *Glover v. Giles* (1881), 18 Ch. D. 180. The same principle applies to a company under the Act of 1908.

The Registrar of Companies has now, however, jurisdiction under sect. 242 of the Companies Act, 1908 (replacing sect. 7 of the Companies Act, 1880, and sect. 26 of the Companies Act, 1900), to strike

the names of defunct or derelict companies off the register, subject to the observance of certain formalities, but the Court has power to reinstate them on the register. See *infra*, Chap. XVII.

Corporate Powers and Duties.

A company registered (or to be treated as registered, see sects. 245-248) under the Act—whether as an unlimited company or as a company limited by shares or by guarantee—becomes, by virtue of sect. 16 (2) of that Act, upon the issue of the certificate of incorporation, “a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands.”

Nature of incorporated company.

The body corporate thus created is a “legal entity.” It is not, like a partnership or a family, a mere collection or aggregation of individual units; it is a distinct entity, existing in contemplation of law but having no physical existence. “The company is a mere abstraction of law.” Per Lord Selborne, C., *G. E. Rail. Co. v. Turner*, 8 Ch. 152. “A corporation is a legal *persona* just as much as an individual.” Per Cave, J., *Sheffield and South Yorkshire Building Society*, 22 Q. B. D. 476. “The corporation is not a mere aggregate of the shareholders.” Per Cotton, L. J., *Flitcroft's case*, 21 C. Div. 536. If all the existing members be collected together, we do not see the corporation, but only the existing members thereof. “A corporation is a different thing from the individuals who compose it.” Per Kay, L. J., *Foster v. Commrs. of Inland Revenue*, (1891) 1 Q. B. 530. And, as was said by Lord Langdale, M. R., in *Society of Practical Knowledge v. Abbott*, 2 Beav. 567, great confusion arises from not distinguishing the body corporate from the individual persons who at one time constitute, “not the corporation, but all the members of the corporation.”

Distinction between corporation and its members.

See, for example, the erroneous decision of the Court of Appeal (*Broderip v. Salomon*, (1895) 2 Ch. 323), reversed by the House of Lords in *Salomon v. Salomon & Co.*, (1897) A. C. 22, and further considered *infra*, Chap. X.

If the corporation is entitled to property, the title is in the body corporate, not, as in the case of a partnership, in the members collectively. “An incorporated company's assets are its property, and not the property of the shareholders for the time being.” Per Lindley, L. J., *George Newman & Co.*, (1895) 1 Ch. 685. “In the case of a corporation it is the whole body—the abstraction of law—that is seised. The members are no more seised than the members of a man's body could be said to be seised of his estate.” Per Maule, J., *Baxter v. Browne*, 7 M. & G. 210. “The individual shareholders are quite distinct from the corporation; they are en-

titled to no direct interest in the land [of the corporation]; no part of the realty is held in trust for them." Per Parke, B., *Walson v. Spratley*, 24 L. J. Ex. 53. They have individually no seisin, legal or equitable. *Acland v. Lewis*, 30 L. J. C. P. 29. The interest of the shareholder in the company while it continues a going concern "is not an interest in the real or personal property of the company, including its business or goodwill; but it is merely a right to have a share of the profits of the company when realized and divided amongst its members." Per Bovill, C. J., *Bank of Hindustan v. Alison*, L. R. 6 C. P. 73. "The individual members of the corporation no doubt are interested, in one sense, in the property of the corporation, as they may derive individual benefit from its increase or loss from its destruction, but in no legal sense are the individual members the owners." Per Denman, C. J., *Reg. v. Arnaud*, 9 Q. B. 806; 16 L. J. Q. B. 55. Hence a registered company may hold land, although all the members are aliens and disqualified from doing so.

Even in the case of a so-called "one man company," where the great bulk of the shares in the company are held by one person, the company is a distinct person. "The company," said Lord Macnaghten (*Salomon v. Salomon & Co.*, (1897) A. C. 51), "is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable in any shape or form except to the extent and in the manner provided by the Act."

Some consequences of such distinction.

Many important consequences flow from the distinction thus emphasized between the incorporated company and its members. Thus:—

- (1) A contract by the company does not give to the other party to such contract any right of action against the members of the company. A creditor of the corporation is not a creditor of the members. The direct remedy of a creditor is solely against the incorporated company. He has no dealing with any individual shareholder, and if he is driven to bring an action to enforce any right he may have acquired, he must sue the company, and not any of the members of whom it is composed. Per Lord Cranworth, *Oakes v. Turquand*, L. R. 2 H. L. 357. "The creditor has no debtor but that impalpable thing, the corporation." Per Jessel, M. R., *Flitcroft's case*, 21 C. D. 533. Even if the company incurs liabilities in a foreign country, by the laws of which the shareholders are liable, they cannot be sued in respect of that liability in England. *Ridson Iron and Locomotive Works v. Furness*, (1906) 1 K. B. 49. The

shareholders and the company do not stand in the relation of principal and agent or trustee and beneficiary. *Salomon v. Salomon & Co.*, *supra*; *Ferguson v. Wilson*, 2 Ch. 77, 89.

- (2) As a general rule, the members of the company cannot sue in respect of contracts made with, or wrongs done to, the company; for "where there is a body corporate, that body corporate is the proper plaintiff, and the only proper plaintiff." Per James, L. J., *Gray v. Lewis*, 8 Ch. 1050; *Mozley v. Alston*, 1 Ph. 790; *Macdougall v. Gardiner*, 1 C. Div. 13; *Russell v. Wakefield Waterworks Co.*, 20 Eq. 474; *Burland v. Earle*, (1902) A. C. 83; *Normanby v. Ind. Coope & Co.*, (1908) 1 Ch. 84.
- (3) A member of the company can contract with and become a creditor of the company, and can sue the company and levy execution on its property just as if he were a stranger. "A member of a corporation is for this purpose [suing on a contract] as distinct from a corporate body as any third person." Per Parke, B., *Dunston v. Imperial Gaslight Co.*, 3 B. & Ad. 125. And in the event of winding-up, a member, *quâ* creditor, can, in respect of such matter, prove and take dividends in competition with outside creditors. *Grissell's case*, 1 Ch. 528. "A sale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by a person to himself. To hold that it is would be to ignore the principle which lies at the root of the legal idea of a corporate body, and that idea is that the corporate body is distinct from the persons composing it." Per Lindley, L. J., *Farrar v. Farrars, Limited*, 49 C. Div. 395, 409. And this is so even where the vendors are the only members of the corporation; in such case they are not selling to themselves, but to a third party, namely, the corporation. Per Lindley, L. J., *Foster v. Commrs of I. R.*, (1894) 1 Q. B. 516, 528. See also *Ryhope, &c Co. v. Foyer*, 7 Q. B. D. 485; and *North-Western Transportation Co. v. Beatty*, 12 A. C. 589.
- (4) Payment to a member of the company of a debt due to the company is not payment to the company, unless the member has authority from the corporation to receive the money.
- (5) The bankruptcy of all or any of the members of the company or body corporate does not affect the property of, or dissolve, the company; the members have become bankrupt, not the corporation.
- (6) The unanimous consent of the members of the company cannot invest the company with powers not given to it by its constitution, or ratify, as the act of the company, that which the

company has no power to do. *Ashbury, &c. Co. v. Riche*, L. R. 7 H. L. 653; *Flietcroft's case*, 21 C. Div. 519; *Ashbury v. Watson*, 30 C. D. 376; *Faure Electric Co.*, 40 Ch. D. 141; *British, &c. v. Couper*, (1894) A. C. at p. 405; *Wellton v. Saffery*, (1897) A. C. 299, 321.

And in such a case a judgment by consent gives no greater validity. *Great North-West Central Railway v. Charlebois*, (1899) A. C. 114.

Functions of
company
under Com-
panies Acts.

Although sect. 16 (2) of the Act of 1908 (replacing sect. 18 of the Act of 1862) says that the company when registered is "capable forthwith of exercising *all the functions of an incorporated company*," these words must be read subject to the other provisions of the Act, and those provisions (and notably sect. 7 (reproducing the Companies Act, 1862, s. 12)), affirming the unalterability of the company's memorandum of association, do undoubtedly limit and restrict the functions of the company to carrying out the objects specified in its memorandum of association, and to the doing of those things which are incidental thereto.

Distinction as
to functions
between such
company and
a common law
or chartered
company.

In this respect the company differs essentially from a common law corporation constituted by royal charter. The company is a statutory corporation with limited capacities, and accordingly stands on the same footing as railway and other corporations constituted by special Acts of Parliament. As Lord Selborne said, in *Ashbury, &c. Co. v. Riche*, L. R. 7 H. L. 693: "A statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act. The present and all other companies incorporated by virtue of the Companies Act of 1862, appear to me to be statutory corporations within this principle. The memorandum of association is under the Act their fundamental, and (except in certain specified particulars) their unalterable, law; and *they are incorporated only for the objects and purposes expressed in that memorandum*."

Bowen, L. J.,
on such dis-
tinction.

The distinction between *common law corporations* and *statutory corporations* was defined by Bowen, L. J., in *Baroness Wenlock v. River Dee Company*, 36 C. D. p. 685, n., as follows:—

"At common law a corporation created by the King's charter has, *primâ facie*, and has been known to have ever since *Sutton's Hospital case* (10 Rep. 13), the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to; and even if by the charter creating the corporation the King imposes some direction which would have the effect of limiting the natural capacity of the body of which he is speaking, the common law has always held that the direction of the King might be enforced through the Attorney-General; but although it might contain an essential part of the so-called bargain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King had created. When you come to corporations created by *statute*, the

question seems to me entirely different, and I do not think it is quite satisfactory to say that you must take the statute as if it had created a corporation at common law, and then see whether it took away any of the incidents of a corporation at common law, because that begs the question; and it not only begs the question, but it states what is an untruth, namely, that the statute does create a corporation at common law. It does nothing of the sort. It creates a statutory corporation, which may or may not be meant to possess all or more or less of the qualities with which a corporation at common law is endowed. Therefore, to say that you must assume that it has got everything which it would have at common law unless the statute takes it away is, I think, to travel in a wrong line of thought. What you have to do is to find out what this statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found the definition of this new creature. It is no use to consider the question of whether you are going to classify it under the head of common law corporations. Looking at this statutory creature one has to find out what are its powers, what is its vitality, what it can do. It is made up of persons who can act within certain limits, but in order to ascertain what are the limits, we must look to the statute. The corporation cannot go beyond this statute, for the best of all reasons, that it is a simple statutory creature."

See also what Blackburn, J., said to the same effect in *Ashbury, de. Co. v. Riche*, L. R. 9 Ex. p. 263; also *British South Africa Co. v. De Beers*, (1910) 2 Ch. 502.

A company under the Act of 1908 (consolidating and replacing the Acts of 1862 to 1907) is, by that Act, endowed with certain specified privileges, and is subjected to certain specified obligations and liabilities, which may be summarized thus:—

Special characteristics of a company under the Companies Acts.

As to the privileges:

1. A company may appoint and act by agents. This power is involved in the provision that the company may exercise all the functions of an incorporated company, and is beyond question absolutely essential to the prosecution of the company's objects. See further, *infra*, p. 36.
2. It is able, by proper provisions in its articles of association, to define, limit and restrict the powers of its directors or other agents in such manner as may seem expedient.
3. It may have a common seal (sect. 16 (2)), and it is empowered to have an official seal for use in foreign parts (sect. 79).
4. It is relieved from the common law rules which require, in general, all contracts by corporations to be under seal, and is empowered to contract without seal, except in specified cases. See sect. 76.
5. It may hold land in perpetual succession without licence, and is thus relieved from the operation of the mortmain laws; and as it may hold land, it may also acquire land.
6. Its members become bound by its constitution and regulations without signing any document; and they may sue

and be sued by the company as if they were strangers. See *supra*, p. 29.

7. In the case of a limited company it is empowered to admit persons to participate, as members, in its profits without involving them in unlimited liability, and is thus enabled to obtain capital from that large class of small capitalists which is undispensed to undertake the burden of and anxiety attending unlimited liability.
8. The shareholders and strangers dealing with the company are fixed with notice of the memorandum of association, and also of the articles (if any) under which it is constituted. *Infra*, p. 77. The members are, by membership, without signature, bound by the memorandum and articles. Sect. 14.
9. The powers of the company are limited to the objects specified in its memorandum of association. It may do nothing beyond those objects, and may only apply its funds in furtherance of such objects. See *infra*, pp. 455 *et seq.* Nevertheless the members may from time to time, by special resolution, alter certain provisions of its memorandum and articles of association, subject, as to the memorandum, in some cases to the sanction of the Court or the Board of Trade being obtained thereto, thus:
 - (a) The name may be changed with the sanction of the Board of Trade. Sect. 8 (3).
 - (b) The objects in the memorandum may be altered by special resolution sanctioned by the Court. Sect. 9.
 - (c) The articles of association or other regulations may from time to time be altered by special resolution, or new regulations may be thereby adopted. Sect. 13.
 - (d) In the case of a company limited by shares, the capital may be reduced with the sanction of the Court (sects. 46 - 56), and without such sanction the capital may be increased, and the shares may be consolidated or subdivided, or converted, where paid up, into stock. Sect. 4. And such stock may be reconverted into paid-up shares of any denomination. Sect. 41.
10. In the case of a company limited by shares, stock warrants to bearer may be issued in respect of paid-up shares. Sect. 37.
11. In the case of a company limited by shares, any portion of the uncalled capital may be converted into reserve capital. Sect. 59.
12. Underwriting and other commissions may be paid on conditions and subject to the provisions of the Act, whether the company is a public or a private.

13. If it carries on business abroad, in British Colonies, it is empowered to have a local register of members.

14. Inasmuch as it is capable of exercising all the functions of an incorporated company, it has the right and power

(a) To resist any unlawful interference with its right and property: *Thorley's Cattle Food Co. v. Mossam*, C. D. 763, e.g., a trade libel on the company; *Qua. Hill & Co. v. Brall*, 20 C. D. 501; a libel imputing insolvency to the company; *Metropolitan Sanitation v. Hawkins*, 4 H. N. 90.

(b) To claim the protection and assistance of the law in support of its rights as an individual: *City of London Brewery Co. v. Tennant*, 9 Ch. 212, 216; *Erlanger v. New Sombbrero*, 3 App. Cas. 1218; *South Hetton Coal Co. v. V. E. Nemes Association*, (1894) 1 Q. B. 133; *Manchester Corporation v. Williams*, (1891) 1 Q. B. 94; *South Wales Miners' Federation v. Glamorgan Coal Co.*, (1905) A. C. 239.

(c) To defend or oppose any legal proceedings that may be brought against it.

(d) To compromise any claims made against it. *Bath's* Div. 3.

It may, however, refuse to impeach, any wrong which may have been done to it, and to waive or abandon any claim it may have. *Maddisgall v. Gardiner*, 1 C. D. 12.

To petition Parliament, see *Munt v. Shrewsbury Rail Co.*, 13 Ben.

The following are the most notable of the company's obligations and liabilities:

1. The company is bound, under penalty, to supply its members on demand with printed copies of its memorandum of association and regulations. Sects. 18, 70 (3).

2. If under its articles the ordinary shareholders have a right to receive and inspect the balance sheets and auditor's reports, and the company is not a private company, the holders of preference shares and debentures and debenture holders of the company have the same right, and the company is bound to conform thereto. Sect. 114.

3. The company is bound, under penalty, to keep a register of its members. Sect. 25. This register is to be open for public inspection. Sect. 30. Trusts are not to be entered in it. Sect. 30. It may be rectified by the Court. Sect. 32.

4. The company is bound, under penalty, to make certain annual returns as to its members, capital, assets and liabilities to the Registrar of Companies. Sect. 26. And, in addition,

every company limited by shares must within a month after allotment make certain returns as to the allottees and capital, and in case of shares issued otherwise than for cash, file certain contracts. Sect. 88. See *infra*, p. 610.

- (e) Prospectuses issued by or on behalf of any company or in relation to any intended company, must, as a general rule, be dated and signed and then filed, before publication, and the fact of filing must be stated thereon before they are issued. Sect. 80. And prospectuses must, according to circumstances, comply with all or some of the requisites of sect. 81. See *infra*, p. 165. If the company (not being a private company) does not issue a prospectus, it must file a statement in lieu of prospectus. Sect. 82.
- (f) The company is bound to give notice to the Registrar of increase of capital or members (sect. 44); and of consolidation of shares and conversion of shares into stock (sect. 42), but not apparently of the reconversion of stock into shares. And as to special resolutions. Sect. 70.
- (g) The company is bound to have a registered office (sect. 62), and notice of the situation thereof for the time being has to be given to the Registrar. Sect. 62.
- (h) The company, if limited, is bound to have its name up outside every place where it carries on business, and on its seal and on all bills, &c. Sect. 63.
- (i) Notices and other documents may be served on the company by leaving the same, or sending them by post, addressed to the company at its registered office. Sect. 116.
- (j) The company, if limited, is bound, under penalty, to keep a register of mortgages. Sect. 100. And every mortgage or charge coming within sect. 93, must be filed for registration in the public register at Somerset House within twenty-one days. The Registrar is to keep a register, which is open to inspection by any one, and the company must keep copies of the mortgages, &c. at the registered office, where they are open to inspection by members and creditors. Sect. 93 (2). Effect of non-registration and penalties. *Ib.*, and sect. 99.
- (k) The company, where sects. 85 and 87 apply, must refrain from allotting shares or commencing business until the requirements of these sections have been complied with.
- (l) The company may not directly or indirectly pay underwriting, placing, or other commissions in contravention of sect. 89.
- (m) The company, if limited and carrying on the business of banking or insurance, is bound, under penalty, to publish annually a statement of its affairs in the statutory form. Sect. 108.
- (n) The company must send a list of directors to the Registrar

each year, and notify to him any change in its directorate. Sect. 75.

- (o) If the company carries on business for six months after the number of its members is reduced below seven, its members may incur unlimited liability. Sect. 115.
- (p) Instead of the general meeting within four months after its incorporation, the company, if "limited by shares" and registered after the end of 1900, must hold its "statutory" meeting not less than one month nor more than three months from the date at which it is entitled to commence business. Sect. 65. The report then discussed must be filed with the Registrar. *Ib.*
- (q) The company must hold an annual meeting. Sect. 61.
- (r) The company, if limited by shares, must not prior to the statutory meeting vary the terms of a contract referred to in the prospectus except subject to the approval of the statutory meeting. Sect. 83.
- (s) The members may apply to the Board of Trade to appoint inspectors to examine the affairs of the company (sect. 109); and inspectors can be appointed by special resolution. Sect. 110.
- (t) The company must comply with sects. 112 and 113 as to audit.
- (u) If a banking company, its accounts must be annually audited, in accordance with sect. 113, and it may be that sect. 112 applies.
- (v) General meetings must be called on requisition, as provided by sect. 66.
- (w) The members of the company are entitled to the assistance of the Court to restrain the doing of that which is *ultra vires* of the company.
- (x) The company may be wound up by the Court (sect. 129) on the petition of a member or creditor, or of the company itself (sect. 137), or of the official receiver in companies winding-up, if it is already in voluntary liquidation. *Ib.*
- (y) Its members may voluntarily place it in liquidation ("voluntary liquidation" so called), and so end the business; and bring into operation efficient provisions for the winding-up of its affairs and its dissolution. Sect 193 enables creditors to apply in a voluntary winding-up, as the liquidator or any contributory might apply under sect. 138 of 1862.
- (z) It is subject to the general law, so far as applicable, and if it carries on the business of a money-lender as defined by the Money-Lenders Act, 1900 (63 & 64 Vict. c. 51), it must comply with the requirements of that Act as to registration and otherwise, unless exempted from registration by the Board of Trade. Penalties are imposed on officers of a

money-lending company by sect. 4 of the Act. See further, *infra*, p. 528.

Agents.

The most essential power of a corporation is the power to act by agents. It is a power, however, which it is not necessary to specify in the objects of the company; for it is implied—inherent in the constitution of a company—by sect. 16 of the Act the company is made “capable forthwith of exercising all the functions of an incorporated company,” and those functions undoubtedly include the power to act by agents, since a corporation “cannot act in its own person: for it has no person.” Per Lord Cairns, *Ferguson v. Wilson*, 2 Ch. 89. Unless, therefore, the company were permitted to act by agents, it could not act at all.

The powers of the directors, managers, or other agents of the company are usually specified in the articles of the company. See further, *infra*, Form 251.

If the articles do not appoint or provide for the appointment of agents, a general meeting of the members can appoint agents, and authorize them to act on behalf of the company.

Whatever the company can do, its agents can be empowered to do: for instance, they may perform a contract by the company to teach its apprentice his business. *Burnley Equitable Society v. Casson*, (1891) 1 Q. B. 75. But it is clear that the agents of the company cannot by any means be invested with power to do on behalf of the company that which is *ultra vires* the company. The scope of their agency must always be circumscribed by the powers of the company. *Wellon v. Saffery*, (1897) A. C. 229, 321; *Trevor v. Whitworth*, 12 App. Cas. 409. Nor can its agents be empowered to exercise powers which the Acts vest in the members, and make exerciseable only by resolutions of general meetings, *e.g.*, the power to reduce capital, or to sub-divide shares, or to wind up voluntarily.

As the law by necessary implication confers on an incorporated company the power to act by agents, it holds the company, like any other principal, responsible for the acts or defaults of its agents within the scope of their employment. *Ranger v. Gt. W. Rail. Co.*, 5 H. L. C. 86; *Barwick v. English Joint Stock Banking Co.*, L. R. 2 Ex. 259; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 326.

Liability of company for acts of agent.

Thus, if the duly authorized agent of the company enters into a contract on its behalf, the company is bound thereby; and if the company's agents commit a breach of that contract, the company is responsible accordingly.

Where, in contracting, particular formalities as to the mode of affixing the common seal are not prescribed, whoever in practice manages the affairs of a trading corporation can use the seal for those acts which he is authorized to perform. *Barned's Banking Co.*, 3 Ch. 105, 116.

And, *prima facie*, the clerks in a company's registered office, at any rate in the absence of the secretary, may receive notices on

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other communications on behalf of the company. *Truman's case*, (1891) 3 Ch. 272.

But a company will not, it seems, be bound by any acceptance of a bill of exchange unless the person accepting for the company under sect. 47 of the Companies Act, 1862 (Companies Act, 1908, s. 77), actually, and not merely ostensibly, accepts. *Premier Industrial Bank, Ltd. v. J. & W. Crabtree, Ltd.*, (1909) 1 K. B. 106.

And a company can, *ex post facto*, ratify that which has been done on its behalf without authority, where the act ratified is not *ultra vires* the company. *Grant v. Switchback Co.*, 40 C. D. 135; *Wilson v. West Hartlepool Co.*, 2 De G. J. & S. 475; *Irvine v. Union Bank of Australia*, 2 App. Cas. 366; *London and New York Investment Corp.*, (1895) 2 Ch. 860. Ratification.

A company is liable, moreover, not only in respect of contracts made on its behalf, but in respect of wrongs committed by its agents in the course of their employment, and for the benefit, or intended benefit, of the company. The principle embodied in the maxim, *Qui sentit commodum sentire debet et onus*, is applied, and the body corporate is held responsible accordingly, although in the result its funds may become applicable to purposes not specified in its memorandum of association, *e.g.*, payment of damages to the injured party, without any corresponding benefit to the company. Torts.

Thus, if the agents of a company are guilty of negligence, that negligence may be imputed to the company, and the company may be held liable in damages to those who are injured thereby. *Parnaby v. Lancaster Canal*, 11 Ad. & E. 223; *Mersey Docks Board v. Gibbs*, L. R. 1 H. L. 93; provided, that is, the agent is acting within the scope of his authority, the onus of proving which lies on the plaintiff. *Beard v. London General Omnibus Co.*, (1900) 2 Q. B. 530; *Cooke v. Midland Great Western Rail. of Ireland*, (1909) A. C. 229; *British Mutual Bank v. Charnwood Forest Rail.*, 18 Q. B. D. 714. Negligence.

And the extent of the company's liability is not limited because its constitution limits the amount of its expenditure. *Gallsworthy v. Selby Dam Commissioners*, (1892) 1 Q. B. 348; *United Service Co.*, 6 Ch. 212—a case as to the loss of deposited securities.

The agents, not the company, have in fact been guilty of the negligence; "for a body corporate never can either take care, or neglect to take care, except through its servants." Per Blackburn, J. (L. R. 1 H. L. p. 104). Nevertheless the company is answerable for the negligence.

So where a company is formed to promote other companies, it is responsible for the acts and omissions of its directors in such promotion. Per Lindley, M. R., in *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, 423.

A corporation may also be sued for a trespass committed by its agent (*Mound v. Monmouthshire Canal Co.*, 4 M. & Gr. 452); and it

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- may be sued for wrongful detention of goods (*Yarborough v. Bank of England*, 16 East, 6.), and for wrongful disposition of plaintiff's shares (*Bahia Rail. Co.*, L. R. 3 Q. B. 584), although in fact the agent has committed the wrong. Moreover, although doubts on the point have from time to time been suggested, it seems clear that a corporation may be liable to an action for intentional acts of misfeasance by its agents, provided such acts are sufficiently connected with the scope and object of the company's incorporation. Thus, in *Whitfield v. South Eastern Rail. Co.*, E. B. & E. 121, a company was held liable for a malicious libel; and Lord Campbell said: "The ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails. . . . Considering that an action of tort and trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate, both for commission and omission, to be followed up by fine, though not by imprisonment, there may be great difficulty in saying that, under certain circumstances, express malice may not be imputed to and proved against a corporation." Although the servant of the corporation may have had no actual authority, express or implied, to write the libel, if he did so in the course of an employment which is authorized, the corporation is liable. So the Privy Council held in *Citizens' Life Assurance Co. v. Brown*, (1904) A. C. 423. And see *Nevill v. Fine Arts Insurance Co., Ltd.*, (1895) 2 Q. B. 156. And in *Green v. London Gen. Omnibus Co.*, 7 C. B. N. S. 290, it was held, on demurrer, that an action would lie against a corporation for driving its omnibuses so as wrongfully to molest the plaintiff in the use of the highway. And see *Limpus v. London Gen. Omnibus Co.*, 1 H. & C. 526; explained in *Vickery v. Great Eastern Rail. Co.*, 79 L. T. 121.
- Libel.**
- Nuisance.** A corporation may also be liable for a nuisance. *Rapier v. London Tramways Co.*, 69 L. T. 361.
- Malicious prosecution.** In *Edwards v. Midland Rail. Co.*, 6 Q. B. D. 287, Fry, J., reviewed the authorities, and held that a company was liable to an action for malicious prosecution. And this was followed in *Cornford v. Carlton Bank*, (1899) 1 Q. B. 392; affirmed, (1900) 1 Q. B. 22, the point being conceded at the bar. See also *Abrath v. G. E. Rail. Co.*, 11 App. Cas. 247.
- Assault.** And a corporation may be sued for assault. *Butler v. Manchester & Sheffield Rail.*, 21 Q. B. Div. 207; *Eastern Counties Rail. v. Broome*, 6 Ex. 314.
- Statutory duty.** Where a duty is imposed by statute upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then if there is nothing in the statute either expressly or impliedly to the contrary the breach of the statute is an offence which can be visited upon the company by means of an indictment. *The Queen v. Tyler*, (1891) 2 Q. B. 588, 592.

In *Reg. v. Birmingham and Gloucester Rail. Co.*, 3 Q. B. 223. Rattison, J., in delivering the judgment of the Court, said: that "on general principles . . . a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony or for crimes involving personal violence, as for riots or assaults." That was a case of non-misfeasance; but the same doctrine was applied in cases of misfeasance. In *Reg. v. Great North of England Rail. Co.*, 2 Q. B. 315, where Lord Denman, who delivered the judgment of the Court, said: "The argument is that for a wrongful act a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is, assuming in the first place that there is a plain and obvious distinction between the two species of offence. No assumption can be more unfounded."

In *Reg. v. Tyler, supra*, it was held that a proceeding before a magistrate under sect. 27 of the Companies Act, 1862 (now sect. 265) of the Act of 1908), to recover penalties for default in forwarding a list of its members to the Registrar as required by sect. 26 of the Act of 1862 (now sect. 26 of the Act of 1908), was a criminal proceeding, and accordingly that where the Queen's Bench Division granted a rule nisi for a mandamus directing a magistrate to hear and determine the application for a summons, there was no appeal, inasmuch as judgment was a judgment in "a criminal cause or matter" within sect. 47 of the Judicature Act, 1873. It was argued in that case that although the sect. 26 imposed a duty on the company, the non-performance of that duty was not a criminal offence by the company. But the Court held otherwise. Bowen, L. J., in the course of his judgment, said: "It would indeed be a remarkable view for the Legislature to take that the obligation imposed upon a company was of such a nature that its breach by the company was not an offence, and yet that a director or manager of the company who stood by and acquiesced in the breach was guilty of an offence. Such a reading of the statute would emancipate the corporation upon whom the duty was imposed from the position of offender and would introduce into the class of offenders the directors and managers only who stood by and knowingly acquiesced. I cannot think that that is the true reading of the sections. . . . Therefore a breach of the provisions of sect. 26 is an offence, and it is none the less an offence because sect. 27 imposes a pecuniary penalty as the punishment for the offence. Sect. 27 gives a summary remedy either in addition to, or in place of, an elaborate and circuitous one. . . . If it is an offence for the company to fail to comply with the requirements of sect. 26, then the proceeding against the company under sect. 27 is a proceeding in the nature of a criminal cause or matter, its object being the punishment of an offence. That appears to me to be the true meaning of the section. . . . The Act says that a company shall do certain things, and a company which neglects to do those things is a criminal offender." Kay, L. J., in the course of his judgment said:

Breach by
company of
sect. 26 of
the Act

"It is not necessary to inquire whether the company could be indicted for the non-feasance under this Act because the Act meant to impose upon the company a positive duty, the omission to perform which would be in the nature of a criminal offence, and even if the remedy given by the Act is the only remedy, as to which I express no opinion, it does not follow that the omission to do the act is any the less a criminal omission on the part of the company." Accordingly it was held that there was no appeal.

Fraud.

Again, a corporation may be held liable for the fraud of its agents. "Strictly speaking, a corporation cannot of itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, . . . these objects can only be accomplished by the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail when the principal under whom the agent acts is a corporation." Per Lord Cranworth, *Ranger v. G. W. Rail. Co.*, 5 H. L. C. 86. And the law seems to be the same in Scotland. *Hockey v. Clydesdale Bank*, 36 Sc. L. R. 120.

In *Barwick v. English Joint Stock Banking Co.*, L. R. 2 Ex. 259, a company was held liable for the fraudulent misrepresentation of its agent. Willes, J., in delivering the judgment of the Exchequer Chamber, said: "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running-down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad improperly selling the cargo. It has been held applicable to actions of false imprisonment in cases where officers of railway companies, intrusted with the execution of bye-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye-laws. It has been acted upon where persons employed by the owners of boats to navigate them, and to take fares, have committed an infringement of a ferry, or such like wrong. In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

This case was followed by the Privy Council in *Mackay v. Commercial Bank*, L. R. 5 P. C. 394; and in *Citizens' Life Ass. Co. v. Brown*, (1904) A. C. 423. And in *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 326, Lord Selborne referred with approval to the principle laid down by Willes, J., in the passage cited above, and said: "That principle received full recognition from this House in *The National Exchange Co. v. Drew*, 2 Macq. 103; and *New Brunswick Rail. Co. v. Congbeare*, 9 H. L. C. 711; and was certainly not meant to be called in question by either of the learned Lords who decided *Addie v. The Western Bank of Scotland*, L. R. 1 H. L. Sc. 145. It is a principle, not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual; and the decisions in all these cases proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because, as was well put by Mr. Justice Willes in *Barwick's case* (L. R. 2 Ex. 259), 'with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong.'"

Thus a company may be liable for misappropriation by its clerk. *Trott v. National Discount Co.*, 17 T. L. R. 37.

In *Addie v. Western Bank of Scotland*, L. R. 1 H. L. Sc. 145, 167, above referred to, Lord Cranworth said: "Corporate bodies may be made responsible for the frauds of [their] agents *to the extent to which the companies have profited from these frauds*." But it is submitted that this dictum, if it imports that the liability of the corporation is limited to its profit, rests on no satisfactory principle, and cannot be supported. The corporation, as above appears, is liable by virtue of the law of agency. Now, the liability of a principal who is not a corporation is not so limited to the amount of his profit. Why, then, should a distinction be drawn in favour of a corporation? There is no such limit where a corporation is sued for an intentional trespass committed by its agents contrary to its express instructions (*Limpus v. London General Omnibus Co.*); why, then, should there be a limit in the case of fraud? In *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317, 329, Lord Selborne said that the words in italics might require "some enlargement or explanation."

It is, however, to be borne in mind that a corporation is not liable where the act of its agent is for *his own benefit* and not that of the company (*British Mutual Co. v. Charnwood, &c. Rail. Co.*, 18 Q. B. Div. 714); or where he is acting outside the scope of his authority (*Barnett, Hoares & Co. v. South London Tramways Co.*, 18 Q. B. D. 815; *Beard v. London Gen. Omnibus Co.*, (1900) 2 Q. B. 530; *Ruben v. Gt. Fingall Consolidated*, (1906) A. C. 430).

A corporation may be indicted for a breach of duty imposed on it Indictable
offences.

by the law, whether of commission or omission, for misfeasance or nonfeasance. *Reg. v. Birmingham Rail. Co.*, 3 Q. B. 223; *Reg. v. Great North of England Rail. Co.*, 9 Q. B. 315; *Reg. v. Mayor of Liverpool*, 3 East, 86. And a company which omits to do that which the law requires it to do is a criminal offender. Per Bowen, L. J., *Reg. v. Tyler & Co.*, (1891) 2 Q. B. 588, 596.

Laches and acquiescence.

A corporation may be guilty of laches, and bound by acquiescence (*Erlanger v. New Sombrero Co.*, 3 App. Cas. 1218; *Metropolitan Bank v. Heiron*, 5 Ex. Div. 319; *London Financial Assoc. v. Kelk*, 26 C. D. 107; *Nicol's case*, 29 C. D. 429), except in respect of *ultra vires* matters (*Ashbury, &c. Co. v. Riche*, L. R. 7 H. L. 653). In matter *intra vires* the company is bound by the consent of all the members, and general consent may be inferred where a course of dealing is pursued which was within the knowledge of most of the members. *Felix Hadley & Co. v. Hadley* (1897), 77 L. T. 136; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Evans v. Smallcombe*, L. R. 3 H. L. 249. A corporation, though it has no eyes of its own, may nevertheless be treated as having seen what its agents might see; for "although it may not have eyes and see what is going on, it has agents who can see." *Crook v. Corporation of Seaford*, 6 Ch. 551; *Mersey Docks Co. v. Gibbs*, L. R. 1 H. L. 93; *Baudeen v. London, Edinburgh & Glasgow Co.*, (1892) 2 Q. B. 534. It must be credited, too, with intelligence and with understanding what the consequences of its acts will be. *Merchants' Banking Co. v. Phoenix Bessemer Co.*, 5 C. D. 205, 217. So, too, a corporation may be estopped by the acts of its agents, *e.g.*, where its directors issue a certificate under the common seal stating untruly that A. is the holder of certain paid-up shares, and B. acts thereon; as against B. the company is estopped from saying that the shares are not paid up. *Burkinshaw v. Nicolls*, 3 App. Cas. 1004; *Macdonald, Sons & Co.*, (1894) 1 Ch. 89. For other cases of estoppel, see *Bahia Rail. Co.*, L. R. 3 Q. B. 584; *Coventry, &c. Co. v. G. E. Rail. Co.*, 11 Q. B. D. 776; *Shaw v. Port Philip Gold Co.*, 13 Q. B. D. 103; *Bloomenthal v. Ford*, (1897) A. C. 156; *Robinson v. Montgomeryshire Brewery Co.*, (1896) 2 Ch. 841.

Estoppel.

But "it is quite clear that a company cannot do what is beyond its legal powers by simply going into Court and consenting to a decree which orders that the thing shall be done. If the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in Court, like any other disputed matter." *Great North-West Central Railway v. Charlebois*, (1899) A. C. 115, 124 (P. C.).

A corporation is subject to the general rules of equity, *e.g.*, it may be held to be a trustee. *South Llanharran Co.*, 12 C. D. 503. It may be held to be an executor *de son tort*. *Att.-Gen. v. New York Breweries*, (1898) 1 Q. B. 205; affirmed *sub nom. New York Breweries v. Att.-Gen.*, (1899) A. C. 62. It is liable for moneys

borrowed *ultra vires* by its agents to the extent to which such moneys have been applied to the payment of its debts. *Baroness Wenlock v. River Dee Co.*, 19 Q. B. D. 155. And a charge on its assets, which is *ultra vires* as regards part of the money advanced, may be good as regards the money which finds its way to the hands of the company. *Johnston Foreign Patents Co.*, (1904) 2 Ch. 234. It may by debt lose the right to enforce specific performance of a contract. *Nicol's case*, 29 C. D. 429. It may be held bound in equity by a parol contract in relation to land where there has been such part performance as would take the case out of the Statute of Frauds if natural persons were parties to the contract. *Wilson v. West Hartlepool Co.*, 2 De G. J. & S. 475. So, too, a company which issues an instrument in a form which will enable the holder to raise money on it may in equity be precluded from setting up a lien as against those who act on the instrument. *Merchants' Banking Co. v. Phoenix Bessemer Co.*, 5 C. D. 205.

The property of a company may be taken in execution, but the execution creditor, as such, can only reach uncalled capital—which is not strictly *property*—by means of a winding-up. See *Prec.*, Part III.

A company cannot be committed to prison for contempt or otherwise (*Re Hooley*, 79 L. T. 706), but may be restrained by injunction from continuing that which is a contempt. *Coats (J. & P.) v. Chadwick*, (1894) 1 Ch. 347.

Moreover, by Ord. XLII. r. 31, it is provided that any judgment or order against a corporation wilfully disobeyed may by leave of the Court or a judge be enforced by sequestration against the corporate property or by attachment against the directors or other officers thereof, or by writ of sequestration against their property; but an order against a corporation will not be enforced by the attachment of a director unless he has been personally served with the order. *McKeown v. Joint Stock Institute, Limited*, 80 L. T. 641. 1899.

A corporation cannot be the true and first inventor within the Patents, Designs and Trade Marks Acts, 1883--1888, but it may apply, in conjunction with the true and first inventor, for a patent (sect. 117 (1) of the Act of 1883); and it seems that in the case of a communication from abroad a patent may be granted to a corporation alone, if in this country. *In re Carey*, 6 Rep. Pat. Cas. 552.

In the construction of Acts of Parliament questions sometimes arise as to whether the provisions thereof apply to corporations. In each case the answer depends on the terms and objects of the statute.

There can be no doubt that the word 'person' may, and I should be disposed myself to say *prima facie* does, in a public statute, include a person in law, that is, a corporation, as well as a natural person; but although that is a sense which the word will bear in law, and which, as I said, perhaps ought to be attributed to it in the construction of a statute, unless there should be any reason for a contrary

Execution.

Patentee.

When within provisions of statutes.

construction, it is never to be forgotten that, in its popular sense and ordinary use, it does not extend so far. Statutes, like other documents, are constantly conceived according to the popular use of language; and it is certain that this word is often used in statutes in a sense in which it cannot be intended to extend to a corporation. Per Lord Selborne, C., *Pharmaceutical Society v. London and Provincial Supply Association*, 5 App. Cas. p. 861, and *Hirst v. West Riding, &c. Co.*, (1901) 2 K. B. 560; and sect. 19 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), now gives statutory effect to the above dictum of Lord Selborne by providing that "in this Act, and in every Act passed after the commencement of this Act, the expression 'person' shall, unless the contrary intention appears, include any body of persons, corporate or unincorporate." But the nature of the punishment e.g., whipping may impliedly exclude a corporation. *Hawke v. Hulton*, (1909) 2 K. B. 93.

In *Standard Manufacturing Co.*, (1891) 1 Ch. 627, the Court of Appeal was of opinion that the Bills of Sale Act, 1878, did not apply to companies under the Act of 1862. And see *Richards v. Kidderminster Overseers*, (1896) 2 Ch. 212.

The Deeds of Arrangement Act, 1887, does not apply to arrangements by limited companies. *Rileys, Limited*, (1903) 2 Ch. 590.

A corporation cannot be treasurer of a friendly society within the meaning of the Friendly Societies Act, 1875. *West of England Bank*, 11 C. D. 768. Or a common informer, unless expressly authorized. *Guardians of St. Leonard's v. Franklin*, 3 C. P. D. 377.

Nor can it in its corporate name carry on the business of pawnbroking. In practice the licences and pledge tickets are in the names of the directors. Per North, J., in *Attenborough v. Jay*, 14 T. L. R. 365, affirmed *Ibid.* 439.

A company has been held to be a "person" under the Sale of Food and Drugs Act, 1873. *Pearks, Gunston & Tee v. Ward*, (1902) 2 K. B. 1. And under Dentists Act, 1878, see *Att-Gen. v. George Smith, Limited*, (1909) 2 Ch. 534.

And a corporation has been held to be a person within sect. 6 of Lord Tenterden's Act (9 Geo. 4. c. 14) and therefore not liable for a misrepresentation as to credit made by its agent. *Hirst v. West Riding Union Banking Co.*, (1901) 2 K. B. 560.

A company may be a "respectable and responsible" person within a lease. *Willmott v. London Road Car Co.*, (1910) 1 Ch. 754.

Appearance
by company.

A company can only "appear" by solicitor. *Re London County Council and London Tramways*, 13 T. L. R. 254; An. Pr. p. 116.

On the other hand, a company cannot appear or plead by attorney at Courts of Oyer and Terminer, gaol delivery, or sessions of the peace; for no one can appear by attorney to indictment at such Courts. *Reg. v. Birmingham and Gloucester Rail. Co.*, 9 Car. & P. 469. But it is otherwise in the King's Bench Division, and perhaps at the Central Criminal Court.

Membership.

Having thus briefly discussed the powers and duties of a company in its corporate capacity, it may now be convenient to say a few words about the members of the company--how they become members, what is their relation to the company, and how they cease to be members--with special reference to a company limited by shares.

And first, who may become members?

Any seven, or, in the case of a private company, two or more, persons may subscribe the memorandum of association. Sect. 2 of the Act of 1908. And sect. 24 provides that:--

"The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned [sect. 25, *see infra*, p. 53], and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company."

Who are members.

Thus, as regards subscribers, "any" person may subscribe. There is no limitation: no restriction. Indeed, the word "any" excludes limitation or qualification, per Fry, J., *Duck v. Bates*, 13 Q. B. D. 843, 851. Accordingly, not only may any subject of His Majesty subscribe, but aliens also may subscribe (*Princess of Reuss v. Bow* 1871, L. R. 5 H. L. 176), in which case all the seven subscribers were aliens. And it has even been held that an infant comes within the words "any person" (*Laxon & Co.*, (1892) 2 Ch. 555), and may be one of the seven subscribers. A firm as such is not a "person." The individual partners, or some duly authorized agent on their behalf, must subscribe. This was decided in *Vagliano Anthracite Co.*, 79 L. J. Ch. 739, and (1910) W. N. 187. See, however, *Weikersheim's case* (1872), 8 Ch. 831, in which the Court of Appeal held the firm name to be a sufficient description of the members on the register.

As regards non-subscribers, the words of sect. 24 of the Act are nearly as wide, for they comprise "every other person who has agreed to become a member" and is registered as such.

Looking to the generality of these words, it is well settled that any person not under disability may become a member; that a married woman may take shares (*Leeds Banking Co.*, 3 Eq. 781; Married Women's Property Act, 1893, s. 1; that a company having power to take shares may become a member (*Barned's Banking Co.*, 3 Ch. 112); and that an infant may become a member, subject, however, to the right to repudiate the shares when he attains majority (*Capper's case*, 3 Ch. 458; *Pugh and Sharman's case*, 13 Eq. 566); and of course an alien or a bankrupt may become a member.

Who may take shares.

How a Person may become a Member.

Sect. 24 deals, it will be observed, with two classes:—

Subscribers.

(1) Those persons who have subscribed the company's memorandum of association.

Others.

(2) Those persons who have agreed to be members, and whose names are entered in the register.

These and these only can strictly be called members in the sense of having acquired the full status of membership. *Nicol's case* (1884), 29 Ch. D. 421.

A person may, therefore, become a member or shareholder in any of the following ways:—

- (1) By subscribing the memorandum of association before its registration.
- (2) By agreeing with the company to take a share or shares, and being entered on the register of members.
- (3) By taking a transfer of a share or shares, and being entered on the register of members.
- (4) By registration on succession to a deceased or bankrupt member.
- (5) By allowing his name to be on the register of members or otherwise holding himself out or allowing himself to be held out as a member. See *infra*, pp. 55, 56, 72.

Premising thus much, let us proceed to analyse a little more closely the conditions creating the status of membership; and first of persons subscribing the memorandum.

Subscribers to the Memorandum.

Subscribers to memorandum.

Every subscriber to the memorandum becomes a shareholder *ipso facto* on the incorporation of the company, and liable as the holder of whatever number of shares he has subscribed for. The 23rd section of the Act of 1862 (now replaced by sect. 24 of the new Act), as Bowen, L. J., pointed out (*Nicol's case*, 29 C. D. 447), defines the status of a subscriber of the memorandum of association in a different way from the position of other persons who agree to become members. "It is plain," said Lord Cairns in *Ecans' case* (1867), L. R. 2 Ch. 420, "that the original subscribers are by the Act of Parliament deemed to have taken the shares set opposite their names the object being that the public might rest with confidence on the subscribers of the memorandum becoming members of the company." And see *Migotti's case*, 4 Eq. 238. In the case of the subscribers of the memorandum, therefore, no allotment is necessary (*London and Provincial Co.*, 5 C. D. 525); no entry on the register of members is necessary. *Nicol's case*, *supra*; *Alexander v. Automatic Co.*,

(1900) 2 Ch. 63. And the shares subscribed for are to be regarded as issued on the issue of the certificate of incorporation. *Dutton Time Lock Co. v. Dutton*, 66 L. T. 704 (C. A.). The subscriber is bound to take the shares from the company, and to pay for them *i.e.*, as and when calls are made on him. *Alexander v. Automatic Co.*, *supra*. He cannot satisfy this obligation by taking a transfer of fully paid shares from another member; the only way he can possibly escape liability is by showing that all the shares have been allotted to others. *Mackley's case*, 1 Ch. D. 247; *Evens' case*, *supra*. See also *Esparto Trading Co.*, 12 C. D. 191, where a subscriber who had not been placed on the register was nevertheless held liable for the shares he had subscribed for after a lapse of nine years. In *Argyle & Co.*, 54 L. T. 237, liability was enforced after a lapse of four years.

Nor can a subscriber repudiate the shares he subscribes for on the ground of misrepresentation. *Lord Lurgan's case*, (1900) 1 Ch. 597.

But where the subscriber showed that his subscription was made to be on behalf of his firm, and the shares were allotted to it, it was held that he had discharged his obligation. *Dunlop's case*, (1894) 3 Ch. 173.

As to the subscriber's liability to pay, see *infra*, p. 58.

Other Members.

To come next to the second class of persons dealt with by sect. 24—every *other* person who has agreed to become a member of a company under this Act and whose name is entered on the register of members. Other members.

Here the section contemplates two things:—(1) an agreement; (2) entry on the register. An agreement alone does not create the status of membership. It is a condition precedent to acquiring such status of membership that the shareholder's name should also be entered on the register. Per Fry, L. J., in *Nicol's case*, 29 C. D. 421; see further, *infra*, p. 72.

The Agreement to take Shares.

There is no difference, as Chitty, J., said in *Nicol's case*, 29 C. D. 421, between a contract to take shares and any other contract. A formal agreement is not necessary. If, in substance, an agreement is made, the form is not material. *Ritso's case* (1877), 4 Ch. D. 782. To constitute a binding contract to take shares in a company, when such contract is constituted, as it usually is, by application and allotment, there must be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of such allotment having been made. *Scottish Petroleum Co.*, 23 C. D. 430.

Agreement to take shares.

Application for Shares.

Application
for shares.

An application for shares is usually made in writing signed by the applicant, but an application by word of mouth will do. *Ex parte Blozam*, 33 Beav. 529a; *Levita's case*, L. R. 3 Ch. 36. An application is an offer by the applicant and, like any other offer, it may be withdrawn at any time before acceptance is notified to the applicant, or, if the acceptance is by post, at any time before the letter of acceptance is posted (*Hebb's case*, 4 Eq. 9; *Dunlop v. Higgins*, 1 H. L. C. 381; *Henthorn v. Fraser*, (1892) 2 Ch. 27), i.e., in the usual way (*London & Northern Bank*, (1900) 1 Ch. 220). Withdrawal may be by word of mouth. *Truman's case*, (1894) 2 Ch. 272. Withdrawal by post is not effective unless it reaches the company before notice of allotment is posted. *Byrne v. Van Tienhoven*, 5 C. P. D. 344.

Application
by agent.

The rule *Qui facit per alium facit per se* applies to a contract to take shares, and, accordingly, A. can authorize B. to apply for shares on A.'s behalf, and, if shares are allotted to A., he becomes a member. *Barrett's case*, 4 De G. J. & S. 416; *Honnan's Empress, &c. Co.*, (1896) 2 Ch. 643; *Hindley's case*, (1896) 2 Ch. 121. And it is not essential that the agent should have actual authority: it is sufficient if he is held out as having authority. Thus, where A. gives B. an open letter authorizing him to apply, and gives him private instructions limiting the authority, and B. applies showing his authority but concealing the private instructions, A. is bound, though the application is in contravention of the private instructions. *Henry Bentley & Co.*, 69 L. T. 204. See p. 292, *infra*.

If A. applies for shares in a fictitious name and is allotted some, he will be held liable as a member in respect thereof, and his real name may be entered on the register. *Bute's case*, 13 Eq. 566. Where an application is sent in the name of another not *sui juris* (e.g., an infant son), it has been held that the case is the same as if the application were sent in a false or fictitious name. The transaction is a *fabula acta*, and the applicant himself may be put on the list of contributories (*Pugh and Sharman's case*, 13 Eq. 366; *Richardson's case*, 19 Eq. 588; *G. H. Levita's case*, L. R. 5 Ch. 489; *Savigny's case*, W. N. (1899) 1); but, to constitute liability in such a case, there must be a contract, and there can be no contract where there is no intention of contracting, e.g., where there is a mistake on the applicant's part as to the company's identity. *International Society of Auctioneers*, *Baillie's case*, (1898) 1 Ch. 110. And see *Coventry's case*, *Britannia Fire Association*, (1891) 1 Ch. 202 (C. A.).

So where a director without authority applied in the name of a third party who was *sui juris*, and allotment was made to such third party, it was held that the director could not be made liable as a contributory. So, too, where the applicant makes a mistake as to the

company, there is no contract. See *Cundy v. Lindsay*, 3 App. Cas. 450; *Baillie's case*, (1898) 1 Ch. 110.

Allotment.

Acceptance of an application for shares is ordinarily evidenced by what is termed "allotment."

"What is termed 'allotment,'" said Chitty, L. J., "is generally neither more nor less than the acceptance by the company of the offer to take shares. To take the common case, the offer is to take a certain number of shares, or such a less number of shares as may be allotted. That offer is accepted by the allotment either of the total number mentioned in the offer, or a less number, to be taken by the person who made the offer. This constitutes a binding contract to take that number according to the offer and acceptance. To my mind there is no magic whatever in the term 'allotment' as used in these circumstances. It is said that the allotment is an appropriation of a specific number of shares. It is an appropriation, not of specific shares, but of a certain number of shares. It does not, however, make the person who has thus agreed to take the shares a member from that moment; all that it does is simply this—it constitutes a binding contract under which the company is bound to make a complete allotment of the specified number of shares, and under which the person who has made the offer and is now bound by the acceptance is bound to take that particular number of shares. In most cases the act of placing the person who has agreed to become a member on the register is a mere matter of form, and may be described as a mere ministerial act; but it appears to me that in point of law all that is done by the process I have just indicated, and all that was done in this case, was to make a complete and binding contract." *Nicol's case*, 29 C. D. 421, 426.

This, no doubt, is perfectly sound; nevertheless the term "allotment" is not, in common parlance, confined to an appropriation in response to an application. It is sometimes used where the company, without any preceding application (*e.g.*, upon an increase of capital), allots shares on specified terms in the expectation that they will be accepted. See *Bouch v. Sproule*, 12 App. Cas. 385; *Malam v. Hitchens*, (1894) 3 Ch. 582. In such cases the allotment is an offer, not an acceptance.

It may be useful here to refer to what was said by Stirling, J., in *Spitzel v. Chinese Corporation, Limited*, 80 L. T. 351 (1899). "In the first place," said the learned judge, "I have to consider what meaning is to be attached to these words 'allotment and issue.' First of all, what is an allotment of shares? Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person. The legal effect of the appropriation depends on circumstances. Thus it may be an offer of

shares to the allottee, or it may be an acceptance of an application for shares by the allottee; but of itself an allotment does not necessarily create the status of membership. The allotment may be, and probably generally is (where it is an offer), such as to give a title to the shares the moment the allottee communicates his acceptance of it to the company, whose directors make the allotment; but it seems to me that the allotment may be subject to a condition, as, for example, that the allottee should not only communicate acceptance, but perform some other act, such as payment of a sum of money. In other words, I think that a company may offer specified shares to A. B. on the terms that the title of A. B. should not arise until he had paid a sum of money to the company, and this being so, a contract may provide, as I think, that allotment shall be subject to conditions. Again, the word 'issue' is one which has not any very definite legal import with reference to shares," &c.

But unless otherwise expressed, the term "allotment" in the following pages means allotment in response to an application—that is to say, the acceptance by the company of an offer.

For an example of the shareholder's first communication with the company being an acceptance and not an offer, see *Brown and Tucker's case*, 41 L. J. Ch. 457, and compare *Wallace's case*, (1900) 2 Ch. 671.

To be effective, an acceptance of an application for shares must be unconditional. If it introduces a new term (e.g., says that the shares must be paid up at once under penalty of forfeiture), it is not a good acceptance, and is to be regarded as a new offer made by the company which will not result in a contract unless accepted by the applicant. *Lewis & Clarking Co.*, 24 D. L. Soc. 116; *Addicks' case*, 1 Ex. 22; *Jackson v. Lee*, and L. R. 1 H. L. 305.

To constitute a valid allotment there must *per se* be a duly constituted board of directors. *Hunter v. South Western Miners*, 39 C. D. 416; *Hunter v. The Redgrave and Manning Co.* (1900) 2 Ch. 572. But the rule in *Central British Bank v. Lee*, and *Lee v. Lee*, p. 79, n. v. sometimes render an allotment by an irregular board effective, and the rule is now supplemented by sect. 74 of the Act of 1908, providing that acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification. Most companies' articles contain a similar provision for curing defects or irregularities; conf. Table A, Art. 94. An allotment by a board irregularly constituted may be subsequently ratified by a regular board. *Portuguese Consolidated Coffee*, 42 C. D. 160. A director who has joined in an allotment to himself will be precluded from alleging the invalidity of the allotment. *York Trust Co. v. Willbanks* (1882), 8 Q. B. D. 685.

When first Allotment may be made.

In the case of a private company allotment may be made immediately after registration of the company or at any subsequent time. In all other cases the first allotment is by sect. 85 of the Act postponed till certain conditions are complied with by the company. See *supra*, p. 9 *et seq.*

Restrictions on where offered to public.

Moreover, by sect. 86 (replacing sect. 5 of the Companies Act, 1900) it is provided that an allotment made by a company to an applicant in contravention of the last foregoing section shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting (*infra*, p. 689) of the company and so later, and shall be so voidable notwithstanding that the company was in course of being wound up. See also *supra*, pp. 16, 17.

Effect of irregular allotment.

Notice of Allotment.

"I think," said Lord Cairns in *Pellatt's case*, L. R. 2 Ch. 527, "that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract"; and this statement of the law has always been accepted. The communication of the acceptance need not necessarily be formal or in writing, but it must be communicated in some way, whether by writing or verbally, or by conduct. *Gamm's case*, L. R. 8 Ch. 40. *Prima facie*, notice of allotment must be given to the applicant or to his agent duly authorised to receive notice of allotment (*Levitt's case*, 5 Ch. 489; *De Rosaz's case*, 21 L. T. 49; for an agent to apply for shares has no special authority to receive notice of allotment. *Robinson's case*, 10 Ch. 325; *Wallis's case*, L. R. 4 Ch. 325, n).

Notice of allotment.

Thus, if A, in applying, says, "Give notice of allotment to B," and notice is so given, that is sufficient (*De Rosaz's case* (1889), 21 L. T. 49); and so, too, an applicant may waive notice of allotment (*Carbolite, &c. Co.*, (1893) 1 Q. B. 256).

There are other cases also in which notice of allotment is not necessary to complete the contract, e.g., where, by virtue of some arrangement on reconstruction or amalgamation, the company is bound to allot the shares; and a person, entitled to an allotment, responds to a circular calling on him to come in, claim, and take his shares. In such case notice of allotment may not be necessary (*Gamm's case*, L. R. 8 Ch. 40; unless, indeed, the offer is intended to invite application, not to allot. *Wallis's case*, (1900) 2 Ch. 671). However, in any case in which the company, by letter or otherwise, in effect offers a certain number of shares to a person, and he writes back accepting, further notice of allotment is unnecessary.

Allotment with notice after incorporation, in response to an application before incorporation, is sufficient to constitute a complete contract (*Downes v. Ship*, L. R. 3 H. L. 343; *Lorraine's case*, 2 Ch. 412), for in such a case the application operates as a continuing offer and matures, on acceptance by the company after incorporation, into a contract.

By post.

As a general rule, notice of allotment may be given by post (*Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216; *Henthorn v. Fraser*, (1892) 2 Ch. 27), and in such case the contract is complete when the letter is posted, even though it is never received. *Harria's case*, 7 Ch. 587; *Brumer v. Moore*, 20 T. L. R. 125. But the posting must be regular, for handing to a town postman in the street is not enough. *London & Northern Bank*, (1900) 1 Ch. 220.

Proof of notice

If notice of allotment is disputed the onus is on the company to prove the notice (*Reidpath's case*, 11 Eq. 86); but this onus it may discharge by proving acts on the part of the alleged member going to show that he was aware of the allotment and assented to it (*Crawley's case* (1868), 4 Ch. 325), for formal notice is not necessary. *Richards v. Home Assurance Association*, L. R. 4 C. P. 391. Notice of allotment, if brought home to the allottee, not from the company but *aliunde*, will bind him (*Wallis's case*, L. R. 4 Ch. 325, n.), e.g., if the allottee is present at a board meeting at which the allotment is resolved on. *Ex parte Smedley and Fletcher*, W. N. 1467, 259.

In *Crawley's case*, *supra*, C. had applied for shares that were not allotted to him for fourteen months, and accordingly he might have refused the allotment on the ground that it was not made within a reasonable time. No notice of the allotment was given to him, but some months afterwards, he, at the request of B., signed a blank transfer of the shares, and that was held sufficient to show that he must have known of, and assented to, the allotment. "I think after that act," said Selwyn, L. J., p. 325, "he cannot be heard to say that he did not know of the allotment, or that it had not been communicated to him."

A letter of allotment and letter of renunciation or any other document having the effect of a letter of allotment of any company had by the Stamp Act, 1891, to be stamped with a penny stamp under a penalty on any person executing, granting, issuing, or delivering it out, of 20*l.* Sect. 79 and Schedule I. But by sect. 9 of the Finance Act, 1899 (62 & 63 Vict. c. 9), a duty of 6*d.* is substituted for the 1*d.* duty when the nominal amount which is allotted or to which the letter of allotment relates is not less than 5*l.*, and a separate duty is charged in respect of letters of allotment and renunciation although entered in the same document. A letter of allotment, though unstamped, is, if posted or delivered, an effective acceptance of the application. *Whitley Partners*, 33 C. D. 337.

Entry in Register.

Where membership is constituted otherwise than by subscribing the memorandum of association, entry in the register of members is, by sect. 24, made a condition precedent to membership. The complete status of membership in such case is not acquired unless and until it can be predicated of the person that he is, within the words of the section, one "who has agreed to become a member of a company under this Act, and whose name is entered in the register."

Entry in register necessary to complete membership.

In this respect there is an essential difference between the requisites of membership as regards persons who subscribe the memorandum, and those who otherwise agree to become members. The former, as we have seen (p. 46), become *ipso facto*, on the registration of the company, members irrespective of entry in the register of members; the latter do not become members until agreement plus entry in the register. This distinction is clearly recognized in *Nicol's case*, 29 C. D. 421. There A. had agreed to take shares, and shares had been allotted to him; but his name had not been entered in the register. After some years, the agreement for membership not having been acted on, a winding-up order was made, and it was sought to place A. on the list of contributories, on the ground that he was a member. The learned judges were all of opinion that he had never become a member, that he had only agreed to be a member.

Agreement without registration not sufficient.

Cotton, L. J., said that the question was, whether, under the circumstances, A. had become an actual member or had only agreed to become a member, and stated that "there was in this case no actual membership, although it would have been possible, if proper proceedings had been taken, to render the membership complete"; and Bowen, L. J., said: "It appears to me that A. never acquired the status of a member of the company. I think that he remained with contractual obligations to the company, which the company had for a time a right to enforce against him. . . . According to the twenty-third section of the Act" (now the twenty-fourth of the Act) "I think he had not become a corporate member"; and Fry, L. J., said that the section "makes the placing of the name of a shareholder on the register a condition precedent to membership."

No doubt, where there is an agreement to take shares, but no entry in the register, either party may be entitled to claim and resist on specific performance of the agreement (see p. 57); but that circumstance, as the above case clearly shows, is not equivalent to entry on the register.

So, too, if B. takes a transfer of shares from A., and the company rightly or wrongly refuses to register the transfer, B. is not a member although either A. or B. can enforce registration of the transfer under sect. 32 of the Act of 1908.

Not is the rule, that entry in the register is necessary to establish the status of membership, in any way at variance with the rule as to settling the list of contributories in winding-up, namely, that a person who has agreed to become a member, and whose name is not, but *ought* to be, on the register, is to be included in such list, for in a winding-up the Court has full power to rectify the register of members (sects. 32, 163 of the Act); but even in contributory cases the Court will not exercise this power unless the agreement relied on is one which, at the commencement of the winding-up, the company was entitled to have specifically enforced. *Arnol's case*, 36 C. D. 707.

Wrongful
removal from
register.

The above cases must also be distinguished from those in which a person who has acquired the full status of membership is afterwards wrongfully removed from the register, as, for example, in consequence of a forged transfer having been proved. In such a case the person remains a member; he has acquired the full status, and the wrongful removal of his name does not affect his membership. *Barton v. L. & N. W. Rail. Co.*, 21 Q. B. D. 77; *Bahia Co.*, 3 Q. B. D. 595.

Registration
subject to a
condition.

Moreover, it has been held that where shares are allotted subject to a condition, and the name of the allottee is entered in the register with words expressly referring to the condition, he has not obtained the complete status of a member. *Spitzel v. Chinese Corporation* (1900), 80 L. T. 347. Properly, his name ought not to be on the register. The mere entry of a person's name on the register cannot, of course, if there is no contract, make him a member. See *infra* p. 57.

Delay in Allotment.

Delay in
allotment.

It is an implied term in an application for shares that the offer must be accepted within a reasonable time, and, if it is not, the applicant is entitled to repudiate the allotment. See *Crawley's case* 4 Ch. 323; and *Ramsgate Hotel v. Montefiore*, L. R. 1 Ex. 109. What is a reasonable time must depend on circumstances; but an allottee who receives notice of allotment, after a reasonable time has expired, must exercise his right of repudiation promptly. If he does not he will be bound, *a fortiori* if creditors' rights have intervened by a winding-up. *Boyle's case*, 33 W. R. 450; *Crawley's case*, 4 Ch. 323; *Dukes v. Turquand*, L. R. 2 H. L. 325.

Conditional Applications.

Conditional
applications.

Sometimes an application for shares is made subject to a condition precedent, e.g., A. writes to a hotel company saying, "If you will give me an order for furniture, I will take up fifty shares in your capital, which please allot." In such case an allotment disregarding

the condition may be repudiated by the allottee; for where there is a conditional application for shares and an unconditional allotment there is no true consent and therefore no contract constituted. The parties are not *ad idem*. *Rogers' case*, *Harrison's case* (1868), 34 Ch. 633; *Wood's case*, 3 De G. & J. 85; *Shaw's case*, 34 L. T. 715; *Wood's case*, 15 Eq. 236. The condition need not be contained in the letter of application. It is sufficient if the letter containing the condition reach the directors before allotment. *Rogers' case*, *Harrison's case*, *supra*. But in such cases if, after notice of allotment and registration before the condition is complied with, the allottee abstains from repudiating, he will be taken to have waived the condition and be bound (*Wheeleroff's case*, 20 L. T. 324), unless the entry in the register is expressed to be subject to the condition. *Spitzel v. Chinese Corporation*, 80 L. T. 347.

In this connection there is a very material distinction between an application with a condition precedent annexed, and an application with a collateral agreement or a condition subsequent. In the latter case the applicant on allotment becomes a shareholder *in presenti* absolutely, with only a right to enforce (if valid) the collateral agreement or condition subsequent against the company. *Elkington's case* (1867), L. R. 2 Ch. 511; *Fisher's case* and *Sherington's case* (1885), 11 Ch. D. 120; *Bridger's case* (1870), 5 Ch. 305; and *Thompson's case* (1865), 4 D. J. & S. 749, are good illustrations of the distinction.

Typical Examples of Contracts to take Shares.

a. A. applies to the company for an allotment of a specified number of shares, and agrees to accept the same or any less number that may be allotted to him. In response to this application, the directors resolve that a specified number of shares be allotted to him, and notice of such allotment is given to him. This constitutes the agreement, and his name should at once be entered on the register.

Examples of contracts to take shares.

b. The company allots or offers to A. a specified number of shares and A. notifies to the company his acceptance of the shares so offered. The agreement is complete, and A. should be entered in the register.

c. A. authorizes some agent to apply for shares on his behalf, and such agent applies accordingly. The shares are allotted to A., and notice is given to him as above, and he is duly registered. He is a member.

d. B. without authority applies for shares on behalf of A., and the directors allot shares to A., and register him. Subsequently A. ratifies B.'s act, *e.g.*, either expressly, or by doing something (*e.g.*, signing a transfer, or taking a dividend), which shows that he assents to the allotment. A. is a member.

e. A. being the holder of shares, transfers them by an instrument complying with the regulations of the company to B.; B. takes the transfer to the company, and the company passes it and places B. on

the register. In this case, B. becomes a member in respect of the shares comprised in the transfer, and his name should be entered in the register in the place of A.'s.

(f) A. is duly appointed as a director of the company. The articles of the company state that the qualification of a director is so many shares, and that unless he acquires such qualification within (say) a month after the incorporation of the company, he is to be deemed to have agreed to take the shares from the company, and is to be registered accordingly. A. does not take up the shares within the month, and shortly afterwards he is, by the officers of the company, placed on the register as the holder of such shares. He thereby becomes a member in respect of such shares. By accepting the office he is regarded as in effect agreeing to comply with the articles, and by placing him on the register the company accepts his offer; and see pp. 718, 719, *infra*.

(g) A. is duly appointed a director. The articles state that the qualification of a director is the holding of so many shares. A. does not acquire this qualification within a reasonable time, and he is, at the expiration of that time, placed on the register of members in respect of his qualification. He is estopped from denying that he is a member in respect of the shares thus registered in his name, and should, therefore, be treated as a member.

h) A., who has not applied for shares, is informed that he has been registered as a holder of a specified number of shares in a company. He signs a proxy paper in respect of such shares, or otherwise, in effect, acts as the owner of such shares. He is estopped from denying that he is the holder of such shares. *Crawley's case* 4 Ch. 323.

i) A. applies for shares on the footing that he is not to be liable thereon for the full amount, and the company allots shares which involve the full liability. A. nevertheless exercises acts of ownership, e.g., by selling some and obtaining proxies. A. is bound. *Railway Time Tables, &c. Co.*, 42 C. D. 98. "If she assented to have these shares in her name, that is all that is required to make her liable as a member," said Cotton, L. J., and Bowen, L. J., added, "From such assent to be on the register, and from such dealing with the shares which took place after she was on the register, there can be but one inference which the Court ought to draw, namely, that she agreed to be a member of the company, and, her name being on the register, her liability to the company is complete."

The cases under the last two heads come to this: that a person is to be regarded as a member if his name is on the register of members with his consent, or if he is estopped from denying that he is registered without consent. He may not have applied: the shares may have been placed there without his consent and contrary to his wishes, but if he assents to his name being on the register, he is to be considered a member of the company.

Mere entry of a person's name on the company's register, however, without agreement or assent, is not enough. Thus, if a director resigns before the time for taking up his qualification shares has expired, and the company has, notwithstanding, entered his name on the register, without his assent, as the holder of the qualification shares, he may compel the company to take his name off the register. *Salisbury-Jones's case*, (1894) 3 Ch. 356. So, too, if a man's name is put on the register upon the application of some person professing to act as his agent, but without any authority in fact, the company can be compelled to take the name off. *Ormerod's case*, (1894) 2 Ch. 475. Or, again, where a man applies for shares, but withdraws his application before acceptance, and the company allots nevertheless and puts his name on the register, he may have it taken off. *Hebb's case*, 1 Eq. 9; *Truman's case*, (1894) 3 Ch. 272.

A person improperly registered as a transferee of a share is not bound, and may have his name taken off the register. *Heritage's case*, 9 Eq. 5; *Cartmell's case*, 9 Ch. 691.

As to rescinding the agreement, see *infra*, p. 193.

The above are all cases of persons *nisi juris*. In the case of persons not *nisi juris*, such as infants or lunatics, a contract to take shares is voidable. *Lumsden's case*, 4 Ch. 34; *Ebbett's case*, 5 Ch. 302; *Capper's case*, 3 Ch. 458; *Yeoland Consols*, 58 L. T. 922; *Symons' case*, 5 Ch. 298. The infant on coming of age may annul the contract, but he must elect promptly.

Specific Performance.

The Court has jurisdiction to specifically enforce a contract by a person to take, or by a company to allot, shares (*New Brunswick Co. v. Muggeridge*, 1 Dr. & Sm. 363; *Oriental Inland Steam Co. v. Brans* (1861), 31 L. J. Ch. 341; *Odessa Tramways Co. v. Mendel* (1878), 8 Ch. D. 235); but if before action brought all the shares have been allotted to other persons, the only remedy of a plaintiff claiming an allotment is an action for damages for breach of contract. *Ferguson v. Wilson* (1865), 2 Ch. 77. A company may, by delay, disentitle itself to enforce an agreement. *Nicol's case*, 29 Ch. D. 421.

Specific performance of contract to take shares.

Cessure of Membership.

A person may cease to be a member of a company

Cessure of membership.

1. By transferring his shares to another person. In such case, the transferor ceases to be a member so soon as, but not before, the transferee is registered; but the transferor is still liable to be placed on the B list of contributories as a past member, if the company is wound up within a year. *Stanhope's case*, 1 Ch. 161; *Heritage's case*, 9 Eq. 5.

- (2.) By his shares being forfeited. *Daire's case*, 6 Eq. 232.
- (3.) By his shares being sold by the company under some provision in its articles (*e.g.*, for enforcing a lien), and by the purchaser being registered as holder in his place.
- (4.) By death: but in such a case the deceased member's estate remains liable until the registration of some person entitled under a transfer from his executors or administrators. *Heward v. Wheatley*, 3 De G. M. & G. 628; *Baird's case*, 5 Ch. 725.
- (5.) By a surrender in the rare cases where a surrender is valid. *Trecor v. Whitworth*, 12 App. Cas. 409.
- (6.) By the trustee in bankruptcy of an insolvent member disclaiming his shares. See Bankruptcy Act, 1883, s. 55; Bankruptcy Act, 1890, c. 71, s. 13.
- (7.) By rescission of the contract of membership on the ground of misrepresentation (pp. 193, 199) or mistake (p. 200). This, however, does not apply to shares subscribed for in the memorandum of association. *Lord Lurgan's case*, (1902) 1 Ch. 707.
- (8.) By avoiding within the statutory period an allotment as made in contravention of sect. 85 of the Act. See sect. 5, *supra*, p. 18.

Liability to Pay for Shares.

Liability on shares.

The terms of the Act of 1908 replacing those of the Act of 1862 in the case of a company limited by shares, and in particular the provisions of sects. 2 and 123, leave no doubt about the obligation of shareholders to pay to the company the full amount of their shares. The words of sect. 2, limiting the liability of members to "the amount unpaid on their shares," can only mean, as Lord Macnaghten pointed out in the *Oregum case*, (1892) A. C. 145, that the liability of the member continues so long as anything remains unpaid on his shares. Nothing but payment, and payment in full, can put an end to the liability. "All the legislation," said his Lordship, "proceeds on the footing of recognizing and maintaining the liability of the individual member to the company until the prescribed limits are reached." The liability under the Act of 1862 was to pay in money or (with the company's consent) in money's worth.

Thus, in an early case, Romilly, M. R., said:

"A person cannot sign the memorandum of association for shares generally, and afterwards say that some or all of them are paid-up shares, unless money or money's worth was actually paid by him or on his behalf for those particular shares." *Baron de Bessille's case* (1868), 7 Eq. 11. And in *Baglan Hall Colliery Co.*, 5 Ch. 346, where the owners of a colliery subscribed the memorandum for 600 shares,

and by the articles it was provided that these shares should be deemed to be fully paid up, it being obviously intended that they should be paid up by making over the colliery to the company, and the colliery was in fact subsequently made over to the company, it is held that the shares were paid-up shares. In that case, Giffard, L. J., after referring to the provisions of the Act, said that: "Taking these sections together, a person who subscribes the memorandum of association is to be held to have agreed to be a shareholder for the number of shares in respect of which he subscribes it to take them, and to pay a proper consideration for them. . . . There is not any inconsistency between a memorandum which is general in its terms, and articles which state that the payment for shares is to be made in a particular way according to the terms of a contract referred to in the articles—nor do I see that payment in kind according to a subsequent contract with the company is inconsistent with such a memorandum. If there be a contract of such a nature that on bill filed by the company it could not be set aside, a payment of shares in kind according to that contract is legal. . . . The test to be applied is this: Could the company by any proceeding have set aside the transaction by which it was arranged that the owners of the colliery were to have paid-up shares as the price of their interest in the colliery? And I say, on the evidence, that the company clearly could not. It was urged that the parties only agreed with themselves, and that heretofore there was no contract. But every company is started by parties agreeing among themselves, and it is idle to say that they have nobody to agree with." See also *Drummond's case*, 4 Ch. 772, and *Pell's case* (1869), 5 Ch. 11. In *Leckie's case* (1871), 11 Eq. 100, Stuart, V.-C., questioned these decisions, and expressed the opinion that there was nothing in the statute of 1862 to countenance the notion of anything but money being a satisfaction of the limited liability. "Indeed," said the learned judge, "the money due in respect of calls upon shares is by the statute made a specialty debt. Great as the alteration of the law of contract is which the statute has made, the facility for fraud would be intolerable if by any agreement amongst themselves the creditor could be deprived even of his limited right, and of the absolute right to the limited amount of money capital. An agreement amongst the shareholders to contribute their capital not in money but in any commodity, with no criterion of value but the agreement of the shareholders, would make the subscribed capital a mere delusion." But although the decision of the V.-C. was affirmed on appeal (6 Ch. 469), his opinion on this point was extra-judicial, and it is in opposition to a long series of subsequent decisions, including decisions of the House of Lords; and on the appeal from the V.-C. (6 Ch. 469), James, L. J., said he did not wish to be considered as concurring in all that the V.-C. had said. See further, *infra*, p. 60.

The operation, however, of the Act of 1862 was modified by sect. 25 of the Companies Act, 1867. By that enactment the Legislature



restricted the power to pay otherwise than in cash by providing that every share should be deemed to have been issued and to be held subject to the payment of the whole amount thereof in *cash* unless the same should have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such share. And whilst this section was in force it followed that once a share was issued it had to be paid up in full in cash unless a sufficient contract providing for some other mode of payment was duly filed before such issue. See further, *infra*, p. 68. However, as from 31st December, 1900, this section has been repealed by the Companies Act, 1900, and accordingly the law as it stood under the Act of 1862 is restored. Hence shares, whether subscribed in the memorandum or otherwise taken, may now be paid up in money or (with the consent of the company) in money's worth, *e.g.*, by making over to the company property or rendering to it services. *Baglan Hall Co.*, 5 Ch. 346.

The shareholders' liability is limited even as regards debts incurred in a foreign country. *Ridlon v. Iron and Locomotive Works*, (1905) 1 K. B. 304.

Amount or Value of Consideration.

Value of consideration for paid-up shares and set-off.

It is well settled that under the Act of 1908, as under the earlier Acts, shares cannot be issued at a discount, that is to say, the liability in respect of a share can only be satisfied by payment or satisfaction of the full amount, and that an agreement by the company to accept in satisfaction a cash payment of less than the full amount is *ultra vires*. *Ooregum Co. v. Roper*, (1892) A. C. 125. That case was decided whilst sect. 25 of the Companies Act, 1867, was in force, but it was decided on the principle that the liability to pay the full amount is imposed by the Act of 1862 (now 1908); accordingly it is still a governing decision. Hence, to issue shares at a discount is *ultra vires* (see the case last mentioned, and *Almada & Tinto Co.*, 38 C. D. 423; *Addlestone Linoleum Co.*, 37 C. D. 191; *Wellton v. Saffery*, (1897) A. C. 299; *Moseley v. Koffyfontein*, (1904) 2 Ch. 108); and *à fortiori* to issue bonus shares is *ultra vires*. *Eddystone Marine Insurance Co.*, (1892) 2 Ch. 423; *Alkaline Syndicate*, 45 W. R. 10.

Nevertheless, shares may be paid up in money's worth, and there need not be evidence of an exact equivalent in value in the consideration.

As to consideration in kind.

It was held, many years since, that where shares have been issued as paid up, upon the footing that certain specified property shall be accepted by the company as the consideration for such issue, the Court will not, whilst the contract stands, inquire as to the value of the consideration, even at the instance of a liquidator. *Pell's case* (1869), 5 Ch. 11; *Baglan Hall Co.*, 5 Ch. 346. And see *Ooregum Co. v. Roper*, *ubi supra*; *Theatrical Trust*, (1895) 1 Ch. 771.

Pell's case was decided in 1869. Pell had agreed to sell to a company the goodwill and stock-in-trade of his business, in consideration of 1,500 20l. shares in the company fully paid up. In a winding-up, Lord Romilly, M. R., directed an inquiry as to the value of the property handed over by Pell to the company under his agreement aforesaid, and declared that Pell was entitled to be allowed only the amount of that value. This decision was reversed on appeal; Giffard, L. J., holding that, as the agreement was not impeached, the Court had no ground for going behind it, and that the shares must be treated as fully paid up. In the next year (1870) Lord Hatherley, L. C., in *Forbes and Judd's case*, 5 Ch. 273, clearly approved of *Pell's case*; and in *Baglan Hall Colliery Co.*, Giffard, L. J., soon afterwards again laid down what he had stated in *Pell's case*.

In *Ooregum Gold Mining Co. v. Roper*, (1892) A. C. 125, Lord Watson said: "A company is free to contract with the applicant for its shares; and when he pays in cash the nominal amount of the shares allotted to him, the company may at once return the money in satisfaction of its legal indebtedness for goods supplied or services rendered by him. That circuitous process is not essential. It has been decided that under the Act of 1862 shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature, where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may over-estimate the value of the consideration, and therefore receive less than the nominal value of its shares. The Court would doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that *so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash*, its estimate ought not to be critically examined." In the same case Lord Herschell said that "not only may a share be allotted as fully paid up in respect of property, goods, or services received by the company, but the Courts will not inquire into the adequacy of the consideration, and certainly have not required it to be proved that the consideration given was equivalent in cash value to the nominal amount of the shares"; and Lord Macnaghten said: "It seems to me that all that has been determined so far is that the Court will decline to rip up a transaction not impeached as dishonest, and not proved to be such, merely because the company may have paid an extravagant price for their property."

The principles laid down and recognized in the case last mentioned were treated for nearly thirty years as sound law, and acted on in thousands of cases; nevertheless they were challenged again in the

case of *Re Wragg, Ltd.*, (1897) 1 Ch. 796, and a strenuous attempt made to impugn their authority—an attempt which, if successful, would have introduced endless confusion. In that case the agreement for sale had apportioned the consideration between the various items of property comprised in it, and in a winding-up it was alleged by the liquidator that the consideration apportioned to one item was excessive, and that on this ground the paid-up shares issued to the vendor ought to be treated as unpaid; but the Court considered itself bound by the decision in *Pell's case*, *supra*, and declined to intervene.

"It has," said Lindley, L. J., in that case, "never yet been decided that a limited company cannot buy property or pay for services at any price it thinks proper and pay for them in fully paid-up shares. Provided a limited company does so honestly and not colourably, and provided that it has not been so imposed upon as to be entitled to be relieved from its bargain, it appears to be settled by *Pell's case*, 5 Ch. 11, and the others to which I have referred, of which *Anderson's case*, 7 C. D. 75, is the most striking, that agreements by limited companies to pay for property or services in paid-up shares are valid and binding on the companies and their creditors. . . . Value paid to the company is measured by the price at which the company agrees to buy what it thinks it worth its while to acquire. Whilst the transaction is unimpeached this is the only value to be considered."

"If," said A. L. Smith, L. J., in the same case, "the consideration which the company has agreed to accept as representing in money's worth the nominal value of the shares be a consideration not clearly colourable nor illusory, then, in my judgment, the adequacy of the consideration cannot be impeached by a liquidator unless the contract can also be impeached, and I take it to be the law that it is not open to a liquidator, unless he is able to impeach the agreement, to go into the adequacy of the consideration to show that the company have agreed to give an excessive value for what they have purchased."

In other words, the Court does not revise the discretion of directors on a business transaction unless they are shown not to have acted in good faith.

See also *Felix Hadley & Co. v. Hadley* (1897), 77 L. T. 131, in which case the company, being still a going concern, sought to make the defendant, from whom it had bought property, responsible in damages for having sold, as it was alleged, at an excessive price; but Byrne, J., not being satisfied that the price was excessive, dismissed the action. And see *Theatrical Trust*, (1895) 1 Ch. 771; *Innes & Co.*, (1903) 2 Ch. 251. See also, as to the law as laid down in Scotland, *Brownlie, Petitioner (Scottish Heritage Co.)* (1898), 6 S. L. T. 326.

Then as to the nature of the consideration. It is well settled that the consideration may consist of property or services, or any other

benefits or advantages which the company deems of value and has power to expend its funds on.

But bonus certificates issued with debentures and made payable out of profits only cannot be made the consideration for the issue of paid-up shares. *Burg v. Farnatona Co.*, (1910) A. C. 439. See also *Moseley v. Koffyfontein Mines, Ltd.*, (1904) 2 Ch. 108.

The failure of the consideration given for the issue of paid-up shares will not entitle the company to treat the shares as unpaid (see *Mege & Angier's case*, W. N. (1875) 208). In that case the shares were issued in consideration of the assignment of a patent: the patent never was in fact assigned, but the shares were nevertheless held to be and to remain paid-up shares. So in *Schroder's case*, 11 Eq. 131, a company, the business of which was to run the blockade during the Confederate rebellion, accepted Confederate bonds in satisfaction of certain shares, and it was held that this was a valid payment, though the bonds subsequently became worthless owing to the issue of the war.

It has even been held that where paid-up shares are issued under an *ultra vires* contract, such shares cannot be treated by the company or by its liquidator as unpaid. *De Rurigne's case*, 5 C. Div. 306. The company must, it is said, either approve or reprobate the contract (see *Anderson's case*, per Jessel, M. R., 7 C. D. 75); but this seems open to question, for no estoppel can arise under an *ultra vires* contract.

If the contract is *ultra vires*, it may be that the allottee can within a reasonable time repudiate it, as in *Almada & Tirito Co.*, 38 C. D. 123; but once it is shown that he is on the register with his consent, that imports an obligation to pay (*Welton v. Saffery*, (1897) A. C. 299; *Railway Time Table Co.*, 42 C. D. 98; *Oregon Co. v. Roper*, (1892

C. 125); for persons trust the company on the faith of the names appearing on the register.

Shares, again, though not in fact paid for, may be impressed with estoppel, the character of fully paid-up shares by reason of the company being estopped from saying that they have not been paid for, *supra*, p. 42.

Who is liable.

The registered holder of a share is the person liable in respect of the amount unpaid thereon, and such registered holder is liable whether he is the beneficial owner or a mere trustee. It makes no difference, when the registered holder is a trustee or whether the company is or is not cognisant of the trust. *Chapman and Barber's case*, 3 Eq. 301. The *cestui que trust* cannot be made liable as shareholder or as a contributory (*Buggs' case*, 2 Dr. & Sm. 459; *Cree v. Somervail*, 4 App. Cas. 618), but he is liable to indemnify his trustee. *Hemming v. Maddick*, 7 Ch. 395; *Hardoon v. Belilos*, (1901) A. C. 118.

The holder's liability to pay in most cases arises from the operation of sect. 14 (2) of the Act of 1908, replacing sect. 16 of the Companies Act, 1862, which expressly provides that "all money payable by any member to the company under the memorandum and articles shall be a debt due from him to the company, and in England or Ireland be of the nature of a specialty debt"; and the articles generally go on to define how and when calls and instalments made payable by the terms of issue shall be paid when due by the holder to the company. Sometimes, however, the articles are defective in this respect, and in such cases it is necessary to resort to the contract under which the shares were issued, and to rely on the promise therein to pay the whole or part by specified instalments. In a winding-up the liability to pay whatever may be called for arises under sect. 123 of the new Act, reproducing sect. 38 of the Act, replacing sect. 38 of the Companies Act, 1862. Where the holder dies, his estate remains liable in respect of his share until some other person is registered as the holder thereof. See *supra*, p. 58. When the holder transfers and the transferee is registered, the transferee becomes liable to pay all moneys subsequently becoming payable in respect of the share. See *supra*, p. 58. But a person who has, by transfer, forfeiture, or surrender, ceased to be a member, still remains secondarily liable as a past member (B. contributory) in the event of a winding-up commencing within one year after he ceases to be a member, as by sect. 123 (reproducing sect. 38 of the Companies Act, 1862) provided.

Returns as to Allotments and Filing Contracts with Registrar.

By sect. 88 of the Act, replacing sect. 7 of the Companies Act, 1900, special provision has been made for prompt filing with the Registrar of particulars of all allotments from time to time made. The section runs as follows:

Return as to
allotments.

88.—(1) Whenever a company limited by shares makes any allotment of its shares, the company shall within one month thereafter file with the registrar of companies—

- (a) a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses, and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; and
- (b) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment, together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(2) Where such a contract as above mentioned is not reduced to writing, the company shall within one month after the allotment file with the registrar of companies the prescribed particulars of the contract stamped with the same

stamp duty as would have been payable if the contract had been reduced to writing, and those particulars shall be deemed to be an instrument within the meaning of the Stamp Act, 1891, and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section twelve of that Act.

(3) If default is made in complying with the requirements of this section, every director, manager, secretary, or other officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding fifty pounds for every day during which the default continues:

Provided that, in case of default in filing with the registrar of companies within one month after the allotment any document required to be filed by this section, the company, or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such period as the Court may think proper.

The object of this section is to afford those who deal or propose to deal with a company the means of ascertaining approximately the position of the company as regards its issued shares. Under the law as it stood before this Act (sect. 26 of the Act of 1862) a company was only bound once a year to make a return showing its capital issue, and, accordingly, a search at the Registrar's office in many cases afforded very little information, for the filed return very commonly showed only the position six or eight months before the search. This was supplemented by the now repealed sect. 25 of the Companies Act, 1867, which provided for the filing of contracts as to shares issued for a consideration other than cash; but even after compliance with both sections the information disclosed was not up to date. The section now under consideration brings matters up very nearly to the date of search.

The first sub-section is divided into two parts, (a) and (b)

Part (a) requires "a return of the allotments," stating certain particulars, including "the amount (if any) paid, or due and payable on each share"; and a question at once arises whether this return must include shares subscribed for in the memorandum of association, for shares so subscribed do not require allotment (*supra*, p. 46), the subscriber obtaining a complete title immediately on the incorporation of the company. Upon the whole the answer seems to be that where there is no allotment of shares so subscribed there is no obligation to include such shares in the return; but, though not necessary, it is not uncommon to pass a resolution for allotment of the shares so subscribed for, and where this is done the shares should be included in the return.

Another question which arises on part (a) is whether the return thereby required is to include *all* shares allotted, including those which are allotted in whole or part for a consideration other than cash, or only those which are to be paid for in cash. Probably the latter construction is the correct one; for otherwise, in the case of

shares allotted in whole or part for a consideration other than cash, they must be mentioned in two returns, viz., that under (a) and that under (b), which might lead to confusion.

(b) This paragraph is in substitution for sect. 25 of the Companies Act, 1867, which was repealed by sect. 33 of the Act of 1900. It is peculiarly framed, for in the case specified it requires the filing—

- (1) of a contract in writing constituting the title of the allottee to such allotment, and
- (2) of any contract of sale or for services, or for other consideration in respect of which such allotment was made, and
- (3) of a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

It is clear that in every case the contract (1) and the report (3) must be filed; but as to (2) it is apprehended that, the word being "any" as distinguished from "a," it means any contract which may have been entered into, supposing there is such a contract—there is no need to file such a contract when there is none—or, in other words, "any contract" must be read "the contract, if any."

The object, presumably, is to meet the case of a principal contract for sale followed by a sub-contract conferring title on the allottee, as in *Kharaskhoma, &c. Syndicate*, (1897) 2 Ch. 451, 456, and to compel the filing of both in order to furnish the fullest information.

Very commonly, however, the allottee's title is constituted by the sale contract, and where this is the case it would seem sufficient to file the sale contract: in filing that, everything required by the section is in fact filed.

It seems clear that, in order to comply with this section, if the contract "constituting the title to the allotment" has not been reduced to writing before the allotment, the company must file particulars as required by sub-sect. (2). See *infra*, p. 67.

Allotted.

"Allotted." Sub-section (b), it is to be noted, applies only "in the case of shares allotted as fully or partly paid up otherwise than in cash." These words are peculiar. They are obviously elliptical, and should, looking to the context, be read as referring to the case of shares allotted upon the footing that the whole or some part of the amount thereof shall be credited as paid up for a consideration other than cash; for the context shows that the Act is here dealing with shares which are to be treated as paid up to some extent, and are allotted in consideration of property or services or other equivalent.

"A Contract in Writing." The section says nothing about the contract being signed by the parties. The words used in sect. 25 of the Companies Act, 1867, for which sect. 7 of the Companies Act, 1900, and now sect. 88 of the Act of 1908, is substituted, were "a contract duly made in writing," and it was held that these words meant signed by both parties. See *New Eberhardt Co.*, 43 C. D. 130. So, in *Pooley v. Driver*, 5 C. D. 458, it was held that the words "contract in writing" in sect. 1 of 28 & 29 Vict. c. 6, meant contract in writing signed by the parties. And in *Ex parte Munro*, 1 Q. B. D. 724, it was held that an "agreement in writing" between a solicitor and clients as to costs, under sect. 4 of 33 & 34 Vict. c. 28, must be signed by both parties. Hence it is apprehended that a contract, to satisfy sect. 88, must be signed or executed by both parties.

Contract in writing.

"Constituting the Title of the Allottee to such Allotment." These words *primâ facie* lead to the conclusion that the contract which is to be filed must be signed before the allotment; for, once the allotment has been made, it would seem that no subsequent contract can constitute the title of the allottee to "such allotment."

Thus, if by oral contract the shares are allotted in consideration of property which is duly conveyed, it is difficult to see how any subsequent contract in writing can "constitute" the allottee's title to the allotment: the title was validly and effectually "constituted" by oral contract. In such case particulars of the oral contract must be filed under sub-sect. (2) of sect. 88.

This is a matter of some importance, for cases very commonly occur in which, by oversight or otherwise, allotments for a consideration other than cash are made without the signature of a sufficient contract to file.

As to the parties to the contract, it would seem that the company or some duly authorized agent of the company must be one of the parties, and *primâ facie* that the allottee or a trustee for the allottee must also be a party; for, strictly speaking, a contract by the company with A. for an allotment to B. gives B. no title to the allotment, and no right to enforce it (*Empress Engineering Co.*, 16 C. D. 125), unless A. is agent or trustee for B. (*Ibid.*) Hence it is doubtful whether a contract which provides for the allotment of paid-up shares "to A. or his nominees" can, so far as regards the nominees, be said to constitute the title of the nominees to an allotment. And even if the contract *plus* the nomination be filed, it is not clear that they "constitute the title."

In such cases any question can be precluded by allotting direct to A. and then transferring to the nominees, or by making a supplemental contract between him and the nominee or a trustee before allotment, and therein providing for the allotment to the nominee.

Under sect. 25 of the Companies Act, 1867, it was held that a

nominee was effectually protected by the filing of a contract providing for allotment of paid-up shares to A. or his nominees (*Carling's case*, 1 C. D. 115), or even without those words (*Kirby's case*, 46 L. T. 682; *Common Petroleum Engine Co.*, (1895) 2 Ch. 759); but the words of sect. 88 of the Act of 1908 are very different.

When contract to be filed.

The contract is to be filed within one month after the allotment, and the question sometimes arises whether a contract filed before allotment will suffice. Considering that the obvious object is to secure the disclosure, it may be that a contract so filed is sufficient; but it is safer to adhere to the express directions of the section, the policy of which is to ensure disclosure of the actual allotment, not of that which is in contemplation merely.

What is "Cash"?

Cash.

Sub-sect. 1 (b) of sect. 88 deals with shares allotted as fully or partly paid up otherwise than in cash, and the question thereupon arises as to what is cash. There is, of course, no question that if the share is issued expressly on the footing that it is to be paid up by instalments, or with reference to calls, or without any stipulation as to how the amount is to be paid, it is issued on a cash footing.

So, also, if the share is issued credited as fully or partly paid up in consideration of the payment to the company of a sum in cash equal to or exceeding the credit, the share is issued for cash.

But it has been held that where a share is issued as a fully paid-up share in consideration of the release of a debt presently payable by the allottee, it is not issued for cash. *Johannesburg Hotel Co.* (1891) 1 Ch. 119, 129.

Where a transaction results in this, that there is on the one side a *bonâ fide* debt payable in money *at once* for the purchase of property, and on the other side a *bonâ fide* liability to pay money *at once* on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property; then if the two demands are set off against each other, the shares have been paid for in cash. *Spargo's case*, L. R. 8 Ch. 412; *North Sydney Investment Co.*, (1899) A. C. 353; *Larocque v. Beauchemin*, (1897) A. C. 358. But there must be "cross money payments presently enforceable." *Re Barrow-in-Furness Investment Co.*, 14 Ch. D. 403, *supra*.

What not cash.

If shares are issued as fully or partly paid up, in consideration of property to be made over to the company or services rendered to the company, or in consideration of the release of a debt or claim, or by way of compromise, the share is issued for a consideration other than cash.

So, also, where shares are issued without any sum credited, but upon the footing that the whole or some part of the amount may be paid up by making over to the company property, or rendering it

services, the share is issued, at any rate in part, for a consideration other than cash.

Sub-sect. 1 (b) of sect. 88 only deals with shares allotted for a consideration other than cash; it does not cover the case of shares allowed on a cash basis and afterwards paid up wholly or in part by making over to the company property or rendering to it services which it is willing to accept in satisfaction of the amount of the shares or some part thereof.

Sect. 25 of the Act of 1867 having been repealed (see *infra*), the law now stands as it stood under the Act of 1862; and accordingly shares, whether subscribed in the memorandum or otherwise taken up, may be paid up in cash or otherwise. "If a man contracts to take shares, he must pay either in money or money's worth, and payment in either will be a satisfaction." Per Giffard, L. J., in *Baglan Hall Colliery Co.*, 5 Ch. 346, 353. And in the same case he says (p. 354) that he does not see that "payment in kind according to a subsequent contract with the company is inconsistent with such a memorandum. If there be a contract of such a nature that on a bill filed by the company it could not be set aside, a payment for shares in kind according to that contract is legal."

Hence, if shares are issued to A. on a cash basis, there is nothing to prevent a subsequent contract that the amount or part thereof shall be satisfied by making over to the company property or rendering it services which the company is willing to accept in satisfaction; but in such a case the company must file a return under sect. 88.

Moreover, the section in no way interferes with *Spargo's case*, 8 Ch. 407, and accordingly any *bonâ fide* transaction which in an action for calls would support a plea of payment is, *à fortiori*, sufficient. *Larocque v. Beauchemin*, (1897) A. C. 358; *North Sydney Investment, &c. Co.*, (1899) A. C. 263.

As to applications for relief where there has been an omission to comply with the section, see the decisions on the Companies Act, 1898, *infra*, towards the conclusion of Chap. XX.

Penalty.

The penalty is very onerous, namely, 50*l.* per day; but it is only to be enforced against a director, manager, secretary, or other officer who is knowingly a party to the default. "Knowingly" means "knowing the facts" (*Burton v. Bevan*, (1908) 2 Ch. 240), and a man commits the offence if he knows of the allotment or knows of the contract and does not procure compliance with the section; the mere fact that he erroneously believed that he had complied with the section would not, *semble*, afford a defence. *Twycross v. Grant*, 2 C. P. D. 469.

Result of Non-filing.

Result of non-filing.

The non-filing of the requisite contract will not, as under sect. 25 of the Act of 1867, below referred to, render the shares liable to payment in cash, but will expose the directors and other officials of the company to heavy penalties. See sect. 88, sub-sect. 3, of the Act of 1908.

Register of Members.

Register of members.

Every company under the Act is to cause to be kept in one or more books a register of its members. See sect. 25 of the Act of 1908 (replacing sect. 25 of the Act of 1862). This register, as will be seen, is one of the cardinal points of our company system.

Contents.

Contents.

This register must contain:

- (a) Names and addresses and the occupations (if any) of the members of the company.
- (b) A statement of the number of shares held by each shareholder, distinguishing each share by its number (sect. 22) and the amount paid or agreed to be considered as paid on each share.
- (c) The date at which the name of any person was entered in the register as a member.
- (d) The date at which any person ceased to be a member.

In default the company and every director or manager are liable to heavy penalties.

Notice of any change of address is to be entered on the register. As to share warrants, see sect. 37 of the Act of 1908 (replacing sect. 31 of the Companies Act, 1867).

Primâ facie a company is not entitled to enter a memorandum of lien on the register. *Re Key & Son*, (1902) 1 Ch. 467.

As to registering a firm, *supra*, p. 45.

Inspection.

Inspection.

The register of members commencing from the date of the registration of the company is, by sect. 30, to be kept at the registered office of the company (sect. 62, *infra*); and by sect. 30 such register is to be open for inspection by members gratis, and for inspection by any other person on payment of one shilling or such less sum as the company may prescribe for each inspection.

A right is also given to receive a copy of such register or any part thereof, and a penalty is imposed for refusal of inspection, and in addition to this penalty, a judge sitting in chambers may by order

compel an immediate inspection of the register; and disobedience of that order being a contempt of Court may be punished by imprisonment.

The right of inspection does not carry with it the right to make free extracts. The sum of 6d. per folio of 100 words must be paid. *Balaghât Gold Mining Co.*, (1901) 2 T. B. 665, overruling *Boord v. African, &c. Co.*, (1898) 1 Ch. 596.

The "register" includes the entries of the names of persons who have been, but have ceased to be, members of the company by reason of the forfeiture of their shares or otherwise. *Boord v. African Consolidated, &c. Co.*, *supra*.

The right terminates on a winding-up. *Kent Coalfields Syndicate*, (1898) 1 Q. B. 754.

Refusal in this section means a distinct and definite refusal. *Rex v. Wilts and Berks Canal Co.*, 3 Ad. & El. 477. See, too, 8 Ad. & El. 901.

A creditor or member may inspect by his solicitor or agent. *Bevan v. Webb*, (1901) 2 Ch. 59.

The motive for inspection is immaterial. *Davies v. Gas Light and Coal Co.*, (1909) 1 Ch. 248.

Closing of Register.

The company is empowered to close the register by advertisement, but not for more than thirty days in each year. See sect. 31 of 1908. Closing of register.

Register *Primâ facie* Evidence.

The register of members is to be *primâ facie* evidence of any matters by the Act directed or authorized to be inserted therein. Sect. 33 of the Act of 1908. Hence it is not conclusive. *Reese River, &c. Co. v. Smith*, L. R. 4 H. L. 80.

Publicity of Register.

It is important to note the fact that the register of members is, by the Act, open to the public until winding-up. In this respect the Act of 1862 differs from the Act of 1844. By sect. 50 of the Act of 1844 every shareholder was to have liberty to search the register at all reasonable times, but nobody was to be at liberty to search it who was not a shareholder. Publicity of register.

There was a similar obligation as to keeping a register in the Act of 1862, but that Act introduced an important change in providing (sect. 30) that the register should be open to the inspection not only of shareholders, but, on payment of one shilling, of *all other persons*. This would, of course, include creditors and persons about to deal

with the company, and the change indicates unmistakeably an intention on the part of the Legislature that the creditors and persons who contemplated dealing in some way with the company were to be entitled to look at this document as showing them to what extent they might safely trust the company.

Object of
publicity.

While the liability of shareholders remained unlimited "such a power of inspection was not necessary, or, certainly, not at all so necessary. . . . But when the Legislature enabled shareholders to limit their liability not merely to the amount of their shares, but to so much of that amount as remained unpaid, it is obvious that no creditor could safely trust the company without ascertaining first who the shareholders might be, and, secondly, to what extent they would be liable. This is obviously the reason why the new statute opened the register to the inspection of all the world. . . . The Legislature took care to provide the register as the means of enabling persons dealing with the company to know to whom and to what they might trust. It intended to put the persons whose names are on it in the same position towards creditors (subject, of course, to the statutable restrictions) as persons engaged in an ordinary partnership, or persons trading formerly under the Act of 1844." Per Lord Cranworth, *Oakes v. Turquand*, L. R. 2 H. L. 366. In the same case his Lordship also said: "It is a fallacy to hold that the liability of the partners in these companies must rest entirely on the same principle of contract which was the foundation of the liability of the partners of any unincorporated companies prior to the institution of this class of associations. The question is not whether there was any privity of contract between the appellant and creditors of the company; but it is whether, under the constitution of these newly-created societies, there is a statutory liability imposed on persons in the position of the appellant. Secondly, it is an error to hold that creditors are not supposed to trust to the responsibility of the shareholders. The careful regulations as to the register of shareholders and the publicity to be given to them form a sufficient answer to that argument. Indeed it is plain, from the reason of the thing, that no credit would otherwise be given to the abstraction of a company."

Doctrine of
holding out.

On the same principle, in *Sewell's case*, 3 Ch. 138, where a registered shareholder wished to disclaim the ownership of certain shares, Lord Cairns, while assuming in the shareholder's favour that he might have had a right to disclaim, was of opinion that "not having done so, and being aware that he was held out to the public as the holder of the shares, it is too late for him, months or even years afterwards, to enter into that question." "It is impossible," the same learned judge remarked on another occasion, "to disembarass these cases of the effect which a man's name being on the register has in inducing other persons to alter their position." *Lawrence's case* (1867), 2 Ch. 417.

The result of this doctrine of holding out is that if a person's name is on the register with his consent, and he claims a right to have it removed on some ground or other, he must exercise the right promptly, otherwise he forfeits it. See *Scottish Petroleum Co.*, 23 C. D. 434, in which Baggallay, L. J., said: "The delay of a fortnight in repudiating the shares makes it in my mind doubtful whether the repudiation in the case of a going concern would have been in time. No doubt where investigation is necessary some time must be allowed, as in the *Central Railway Company of Venezuela*, L. R. 2 H. L. 99; but where, as in the present case, the shareholder is at once fully informed of the circumstances, he ought to lose no time in repudiating." Even where a name is, pursuant to a void contract, placed on the register, delay may be fatal. *Railway Time Tables Co.*, 42 C. D. 107; *supra*, p. 54. Delay.

Nevertheless the reliance to be placed on the register is qualified to this extent, that anyone dealing with the company must be taken to know— Register not conclusive.

- (1) That shares may be transferred in accordance with the regulations, and thus an insolvent shareholder may be substituted for a solvent one.
 - (2) That a member who has been induced to take shares by misrepresentations or mistake, even though on the register for years, may, while the company is a going concern, repudiate his shares and get off the register. See p. 197, *infra*.
 - (3) That there may be persons on the register placed there without their consent who may subsequently enforce the removal of their names. See further, *Reese River Co. v. Smith*, L. R. 4 H. L. 803; and *Baillie's case*, (1898) 1 Ch. 110, in which a person on the register escaped on the ground that he had made a mistake as to the company.
 - (4) That persons on the register may escape under sect. 86 of the Companies Act, 1908, on the ground of the allotment being irregular.
 - (5) Where the entry on the register is there stated to be subject to some condition membership is not complete. *Spitzel v. Chinese Corporation*, 80 L. T. 347. See p. 49, *supra*.
- As to rectification of the register, see *infra*, Chap. XX.

Powers of Majority.

It is a cardinal rule of the law, as applied to corporations, that *primâ facie* the majority of its members are entitled to exercise its powers and control its operations generally. Powers of majority.

"Where no special provision is made by the constitution of a corporation, the whole are bound by the acts not only of the major part, but of the major part of those who are present at a regular

corporate meeting, whether the number present be a majority of the whole or not." Bacon, Abr. II. 269, citing 10 Mod. 75; 12 Mod. 232; Cowp. 249. "It cannot be disputed that wherever a certain number of persons are incorporated, a major part of them may do any corporate act; so, if all be summoned, and part appear, a major part of those that appear may do a corporate act, though nothing be mentioned in the charter of the major part." Per Lord Hardwicke, C., *Att.-Gen. v. Davy*, 2 Atk. 212.

This rule is applicable to a company under the Act of 1908, save so far as its constitution, or regulations, or the Act, exclude or modify the rule; and accordingly all the powers of the company are exercisable by resolution of a general meeting, *e.g.*, if there are no directors capable of acting in a particular transaction, and some of the directors do, or propose to do, something beyond their powers, but within the powers of the company, a general meeting can ratify what has been done, or authorize what is proposed to be done. *Grant v. United Kingdom Switchback Rail. Co.*, 40 C. D. 135. And if some person is acting as a director who has not been duly appointed, or is not duly qualified, it is for the majority to object, and if some shareholder brings an action in the name of the company, *e.g.*, to impeach the conduct of the directors in regard to a matter within the powers of the company, it is for a general meeting to decide whether the action shall proceed. *Duckett v. Gover*, 6 C. D. 82. As to further proceedings, see 25 W. R. 554; *Exeter and Crediton Rail. Co. v. Buller*, 5 Ry. Cas. 211.

The cases following illustrate the importance which the Courts, and especially Courts of equity, attach to the will of the majority:—

In *Foss v. Harbottle*, 2 Ha. 461, two members of an incorporated company filed a bill against the directors and others, praying that the defendants might be compelled to make good the losses sustained by the company by reason of the fraudulent acts of such directors; but the Court, being of opinion that the acts of the defendant complained of were capable of confirmation by a majority of the members of the company, declined to interfere. See also *Mozley v. Alston*, 1 P. H. 790.

So, in *Macdougall v. Gardiner*, 1 C. Div. 13, where the plaintiff, a shareholder in a company under the Act of 1862, sued in respect of alleged misconduct of a director at a meeting of the company, it was held that he had no *locus standi* to complain; that the wrong, if any, was a wrong to the company, and that the company in its corporate capacity could alone sue in respect thereof; that if the majority sided with the plaintiff, there was no difficulty in suing in the name of the company; and that if the majority were against the plaintiff, there was no use in litigating the matter, for the will of the majority was entitled to prevail.

"In my opinion," said Mellish, L. J., in that case, "if the thing complained of is a thing which in substance the majority of the com-

pany are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes." See also *Ex parte Fox*, 6 Ch. 176; *Harben v. Phillips*, 23 C. Div. 14; *Whitman v. Walkins*, 78 L. T. 188; *Exeter and Crediton Rail. Co. v. Buller*, 5 Ry. Cas. 211; and *Normandy v. Ind, Coope & Co.*, (1908) 1 Ch. 84.

But the rule of the majority is, as above stated, subject to the provisions of the Acts and of the company's memorandum, and in some cases the articles of association. Thus, if the articles provide for the continuance in office of the directors, and do not contain any power to remove a director, the company cannot remove a director without in the first place procuring the insertion in the articles of a power of removal. *Hampton v. Price's Patent Candle Co.*, 24 W. R. 754.

So, also, where the articles provide that the directors shall have all the powers of the company, subject to any regulations made by the company in general meeting "not inconsistent with the articles," a general meeting cannot override the directors, *e.g.*, by directing them to make a particular contract or to disregard a veto given them by the articles. A special resolution is required. *Quin & Ardens v. Salmon*, (1909) A. C. 443; *Automatic Self-Cleaning Co. v. Cunningham*, (1906) 2 Ch. 34; *Gramophone Typewriter*, (1908) 2 K. B. 89; *Marshall Valve Gear Co. v. Manning*, (1909) 1 Ch. 267.

And, lastly, the majority have no power to sanction that which is *ultra vires* the company (*Ashbury, &c. Co. v. Riche*, L. R. 7 H. L. 653, 694; *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. C. 712; *Hoole v. G. W. Rail. Co.*, 3 Ch. 262; *Welton v. Saffery*, (1897) A. C. 299); or which is a fraud on the minority (*Menier v. Hooper's Telegraph Works*, 9 Ch. 350; *Burland v. Earle*, (1902) A. C. 82); or a breach of duty of the directors towards some of the shareholders (*Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56, 69). See further notes in Chap. XVIII. on the rule in *Foss v. Harbottle*.

Partnership Law.

Incorporated joint stock companies differ essentially in many respects from partnerships. It is true that there is a close analogy between the two, and the Courts, in determining the law applicable to such companies, frequently—in the early days of companies resorted for guidance and suggestion to the principles of partnership law.

Analogy to
partnerships.

Thus, in *Simpson v. Denison*, 10 Ha. 54, an agreement between two

incorporated joint stock companies was impeached, and Wood, V.-C., said: "The first question to be considered upon this motion is, what are the general principles which ought to be applied to cases of this nature? and I take it to be well settled that the principles which are to govern such cases between the members of large companies are the same as those which regulate the rights in ordinary partnerships."

So, too, in *Oakes v. Turquand*, L. R. 2 H. L. 325, Lord Colonsay said that it was "a mistake to hold that these companies must, to all legal effects and consequences, be regarded as unqualified corporations and in no respect as partnerships. . . . I think it would be contrary to the tendency and scope of all the statutes to hold that these corporations are stripped of all the characteristics of mercantile partnerships, and clothed with all the attributes of perfect corporations, without qualification."

And, again, in *Griffith v. Paget*, 6 C. D. 515, Jessel, M. R., said that he would "first of all consider the case on general principles, as applicable to other partnerships; for, after all, these companies are commercial partnerships, and are, in the absence of express provisions, statutory or otherwise, subject to the same considerations."

See also *Weston's case*, 4 Ch. 20; *Maude's case*, 6 Ch. 51; *Guinness v. Land Corp.*, 22 C. Div. 377; *Houldsworth v. Glasgow Bank*, 5 App. Cas. 317; *Wilkinson v. Cummins*, 11 Ha. 337.

These judicial *dicta* notwithstanding, an incorporated company is *not* a partnership, as appears elsewhere (p. 27), and partnership rules are for the most part inapplicable to it. For instance, in the case of a partnership, the unanimous consent of the partners can extend the objects of the partnership, whereas the majority of the members of a company have no such power (*Ashbury, &c. Co. v. Riche*, L. R. 7 H. L. 694; *Hutton v. West Cork Rail. Co.*, 23 C. D. 654, 671; *Stroud v. Royal Aquarium Co.*, W. N. (1903) 146) save as otherwise provided by sect. 9 of the Act of 1908 incorporating the provisions of the Companies (Memorandum of Association) Act, 1890. So also the practice of the members of a partnership may override the provisions of the partnership deed: whereas practice, in the case of a company, cannot alter or override the provisions of the memorandum, or, as a rule, the regulations of the company. *Frank Mills Mining Co.*, 23 C. D. 52, 56; *Ashbury v. Watson*, 30 C. Div. 376; *Oakbank Oil Co. v. Crum*, 8 App. Cas. 65. Though long acquiescence may prove the informal adoption by the company of new articles. See *Ho Tung v. Man On Insurance Co.*, (1902) A. C. (P. C.) 232. The agency of directors is circumscribed by the company's articles; the agency of partners only by the scope of the partnership business. The remedies of a creditor of a company are solely against the company, not the shareholders personally, whereas in a partnership the creditors of the firm are creditors of the individual partners. Other illustrations in plenty might be given. And as company law

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grows more complex this differentiation between the company and the partnership becomes more and more marked.

"These companies," says Lord Macnaghten in *Welton v. Saffery*, (1897) A. C. 324, "are the creation of statute, and by the statute to which they owe their being they must be bound in regard to shareholders as well as in regard to creditors in all matters coming within the conditions of the memorandum of association. . . . A limited company cannot, in matters coming within the conditions of its memorandum, go on leading two lives, one strict, and precise and regular, and the other a life of greater freedom and laxity, substituting the easier yoke of '*social contract*' for the rigour of statutory directions. The confusion would be hopeless."

Notice of Memorandum and Articles.

A company's memorandum and articles of association being public documents registered at Somerset House, not only the shareholders of a company, but all strangers who have any dealings with the company, are fixed with notice of their contents, as well as of the Act or Acts under which the company is constituted.

Notice of
memorandum
and articles.

Speaking of this constructive notice, with reference to members of the company, Lord Cairns says, in *Puel's case*, 2 Ch. 674: "If the memorandum and articles of association are in existence when he [the member] applies for shares, and if he agrees to take his shares on the footing of the memorandum and articles of association (which would seem to be the case here), then I think that he ought to be held bound to look to the memorandum and articles of association before he applies for shares. But where the memorandum and articles of association are not in existence at the time of application, I think that, at the very latest, when he receives his allotment of shares, he ought to satisfy himself that there is nothing in the memorandum or articles of association to which he desires to make any objection." And the same learned judge, in *Sewell's case*, 3 Ch. 140, observes: "The company was a company consisting of shareholders. It is impossible not to impute to every shareholder of the company the knowledge of what has been called the charter, of documents under which the company was trading. The company was trading under the memorandum of association as its principal document. I think every shareholder must be taken to have known the contents of the memorandum of association."

Other eminent judges have fully recognized the same principle.

All the shareholders of the company must have imputed to them knowledge of the Act of Parliament and also of their own memorandum and articles of association, and of the fact that the articles *did not* (as they stood before this resolution was passed) authorize the proposed increase of capital; and from the resolutions which convened the two extraordinary meetings it must have been clearly understood

that without the sanction of those meetings the proposed increase of capital could not be made." *Campbell's case*, 9 Ch. 1, per Lord Selborne.

"People who enter into these partnerships under articles of association—that is, articles of partnership—must be taken to have read them, and must be taken to have understood them; and if they are to be taken to have read them, and to have understood them, which they ought to do before entering into these contracts, they cannot complain if the contract is afterwards carried out. That appears to me a conclusive answer to any notion of hardship. Whether it is conclusive in fact or not is a matter upon which men who have experience in the world may have different opinions, but I must hold it to be conclusive in law." Per Jessel, M. R., *Griffith v. Paget*, 6 C. D. 517.

"Each party must be taken to have made himself acquainted with the terms of the written contract contained in the articles of association, and the Acts of Parliament, so far as they are important. He must also in law be taken (though that is sometimes different from what the fact may be) to have understood the terms of the contract according to their proper meaning; and, that being so, he must take the consequences, whatever they may be, of the contract which he has made." Per Lord Selborne. *L. C., Oakbank Oil Co. v. Crum*, 8 App. Cas. at p. 70.

Creditors, &c.

The principle was stated thus by Lord Hatherley in *Mahoney v. East Holyford Co.*, L. R. 7 H. L. 869, 893. "It is settled by a series of decisions, of which *Ernest v. Nicholls*, 6 H. L. C. 401, is one, and *Royal British Bank v. Turquand*, 6 El. & Bl. 327, a later one, that those who deal with joint stock companies are bound to take notice of that which I call the external position of the company. Every joint stock company has its memorandum and articles of association; every joint stock company, or nearly every one, I imagine (unless it adopts the form provided by the statute, and that comes to the same thing), has its partnership deed, under which it acts. Those articles of association and that partnership deed are open to all who are minded to have any dealings whatsoever with the company, and those who so deal with them must be affected with notice of all that is contained in those two documents."

And see *Argus Life Assurance Co.*, 39 C. D. 571.

In *County Life Assurance Co.*, 5 Ch. 288, 293, Giffard, L. J., said: "In the first place, a stranger must be taken to have read the General Act under which the company is incorporated, and also to have read the articles of association, but he is not to be taken to have read anything more; and if he knows nothing to the contrary, he has a right to assume, as against the company, that all matters of internal management have been duly complied with. The company is bound by what takes place in the usual course of business with a third party where that third party deals *bonâ fide* with persons who

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may be termed *de facto* directors, and who might, so far as he could tell, have been directors *de jure*."

In *County of Gloucester Bank v. Rudry Co.*, (1895) 1 Ch. 629, Lord Halsbury, L. C., further said: "Persons dealing with joint stock companies are bound to look at what one may call the outside position of the company—that is to say, they must see that all the acts which the company is purporting to do, are acts within the general authority of the company; and, if these public documents, which everyone has a right to refer to, disclose an infirmity in their action, they take the consequences of dealing with a joint stock company which has apparently exceeded its authority." See also *Biggerstaff v. Rowatt's Wharf*, (1896) 2 Ch. 93; *Owen, Ashworth's and Whitworth's Claims*, (1901) 1 Ch. 115; *Oakbank Oil Co. v. Crum*, 8 App. Cas. 71; *Marshall v. Glamorgan Iron and Coal Co.*, 7 Eq. 137; *Barrow Hematite Co.*, 39 Ch. D. 582; *County of Gloucester Bank v. Rudry & Co.*, (1895) 1 Ch. 629.

This rule of constructive notice entails important consequences, for inasmuch as everyone dealing with a company is to be deemed to have notice of its memorandum and articles, it follows that he is fixed with notice of the extent not only of the company's powers, but of the directors' powers and of any limitations and restrictions imposed thereon by the articles or other regulations. Consequences.

Thus, if the articles provide that a bill of exchange to be binding on the company must be signed by two directors, an outsider or anyone dealing with the company must see that it is so signed, otherwise he cannot claim under it. So, too, if the articles provide that the seal of the company is to be fixed in the presence of two directors, who are to sign their names, a person dealing with the company cannot safely rely on an instrument not so signed. See *Eagle Co.*, 4 K. & J. 549; *Agar v. Atheneum Soc.*, 3 C. B. N. S. 725. This is a sufficiently onerous obligation to impose on those who deal with a registered company, but the incidence of the obligation is to some extent lightened by what is known as the

Rule in Royal British Bank v. Turquand (6 E. & B. 327).

This rule is that where a company is regulated by an Act of Parliament, general or special, or by a deed of settlement or memorandum and articles registered in some public office, persons dealing with the company are bound to read the Act and registered documents, and to see that the proposed dealing is not inconsistent therewith; but they are not bound to do more; they need not inquire into the regularity of the internal proceedings—what Lord Hatherley called "the indoor management." They are entitled to assume that all is being done regularly. See also *Mahoney v. East Holyford Mining Co.*, L. R. 7 H. L. 869; *Land Credit Co. of Ireland*, L. R. 4 Ch. 469; *County Life Assurance Co.*, L. R. 5 Ch. 288; Presumption of regularity.

Hambro v. Burnand, (1904) 2 K. B. 10. But see *Premier Industrial Bank v. Carlton Co.*, (1909) 1 Ch. 107.

This rule is based on the principle of convenience, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus where the articles give power to borrow with the sanction of a general meeting, a lender need not inquire whether such sanction has in fact been obtained. *Royal British Bank v. Turquand*, *ubi supra*. He may assume that it has, and if he is acting *bonâ fide* he will, even though the sanction has not been obtained, stand in as good a position as if it had been obtained.

In another case the directors of a company had, under the articles, power to borrow and power to fix their own quorum, and they fixed three as the quorum. At a meeting of the directors at which two only were present, the secretary was authorized to fix the company's seal to a mortgage. This was accordingly done by the secretary in the presence of the same two directors, and the mortgage was handed over to the mortgagee. It was contended that the seal had not been duly affixed, since the two directors, not being a quorum, had no power to act, but it was held that this was only an internal irregularity, and that the execution of the deed was therefore valid. "All the public documents," said Lord Halsbury, "with which an outside person would be acquainted in dealing with the company would only show this, that by some regulation of their own—what Lord Hatherley described as their indoor management—they were capable, if they had thought right, of making any quorum they pleased; and an outside person knowing that, and not knowing the internal regulations, when he found a document, sealed with the common seal of the company, and attested and signed by two of the directors and the secretary, was entitled to assume that that was the mode in which the company was authorized to execute an instrument of that description. It turns out that their own internal regulation was that the number of directors should exceed two. But that is a matter which was known to them and to them alone. The only external fact with respect to the management of the company of which an outside person would be cognizant, would be that they had power to make any quorum they pleased, and I think he would be entitled to assume that the proper quorum had been properly summoned and had attended to effect the completion of that instrument." And in the same case, Lindley, L. J., said: "What is there to give them notice of anything irregular, if there was anything irregular? If a person looked at the deed and looked at the articles, he would not see anything irregular at all. He would be at liberty to infer, and anyone in the ordinary course of business would infer, that, if the directors had appointed a quorum, they appointed the two who signed that deed. But supposing that three were wanted,

he is not bound to go and look at the directors' minutes. He has no right to look at them, except as a matter of bargain. The directors' minutes, unless he knows what they are, do not affect him at all. There is nothing irregular on the face of the deed, even taken with the articles—there is nothing illegal in it. As to a plea of *non est factum*, that could not be sustained for a moment; and I have not the slightest doubt myself that that deed is as good as any deed that ever was sealed." *County of Gloucester Bank v. Rudry, &c. Co.*, (1895) 1 Ch. 629, 633, 636.

So, if there be a managing director, and authority in the regulations for the directors to delegate to him, a person dealing with him is entitled to assume that he has power to do what he purports to do, provided that it is within the company's objects and apparently regular. All he has to do is to see that the managing director *might* have power to do what he purports to do. That is enough for a person dealing with him *bonâ fide*. *Biggerstaff v. Rowatt's Wharf*, (1896) 2 Ch. 93; *Hambro v. Burnand*, (1904) 2 K. B. 10.

So, also, a person dealing with a company is entitled to assume that the directors who carry on its business are directors *de jure*. It matters not to him that they have not been duly appointed—that is part of the indoor management. *Mahoney v. East Holyford Co.*, L. R. 7 H. L. 869; *County Life Assurance Co.*, 5 Ch. 288; *Duck v. Tower Galvanizing Co.*, (1901) 2 K. B. 314; *Davies v. Bolton & Co.*, (1891) 3 Ch. 678; see *supra*, p. 78.

In *Duck v. Tower Galvanizing Co.*, *supra*, Lord Alverstone, C. J., said that those cases afforded ample authority to show that no informality will alter the rights possessed by a *bonâ fide* holder for value upon a document that purports to be in order.

But a person dealing with a company if he has notice of the irregularity cannot claim the benefit of this rule. Thus where directors had only power to borrow in excess of 1,000*l.* with the assent of a general meeting, and without such assent had issued debentures for 2,500*l.* to themselves in respect of money lent, it was held, that as they must be taken to have known that the internal regulations had not been complied with, the debentures could only stand good for 1,000*l.* *Howard v. Patent Ivory Co.*, 38 Ch. D. 156; *Tyne Mutual v. Brown*, 74 L. T. 283.

Notice of irregularity

Nor does the rule apply, it would seem, where the requisite signatures are forged. *Ruben v. Fingall Consolidated*, (1906) A. C. 130.

A person dealing with a company must take the articles to be such as appear at the office of the Registrar of Companies to be in force. If the directors propose to do something in excess of their powers thereunder, he is not entitled to assume that their powers have been extended by a special resolution, for such a resolution, if passed

would be registered (Chap. XII.). *Irvine v. Union Bank of Australia*, 2 App. Cas. 366.

The Common Seal.

- The right to a common seal.** To have a common seal is incidental to a corporation (*Sutton's Hospital case*, 10 Rep. 30 b); but sect. 16 (2) of the Act of 1908, reproducing sect. 18 of the Act of 1862, makes an express provision on the subject, and, by sect. 63 of the Act of 1908, the company is required to have its name "engraven in legible characters on its seal."
- Who can use.** The right to use the seal of the company for the purposes of its business is usually vested in the directors. Occasionally the power is vested in them by express words, but, more usually, their power arises from the terms of a general clause enabling them to exercise all the powers of the company (see for example, Clause 71 of Table A); it has been laid down that the executive of the company is, *prima facie*, entitled to use the common seal. *Barned's Banking Co.*, 3 Ch. 105.
- Contracts not under seal.** As to contracts under seal, sect. 76 of the Act, reproducing sect. 37 of the Companies Act, 1867, enables a company, as a general rule, to contract without seal; it need only contract under seal where a private person would have to do so, *e.g.*, in the case of a covenant or of a bond.
- Conveyances, &c.** As to conveyances, demises, surrenders, certificates, &c., the section above referred to does not touch these instruments, and the ordinary rule prevails, namely, that where in the case of an individual a seal is requisite, it is requisite in the case of a company.
- Thus, to convey freehold property, and to assign or surrender leasehold property, or to give a power of attorney, a seal is requisite. And a seal is requisite for some instruments in order to obtain certain statutory advantages, *e.g.*, in the case of a certificate of title to shares (sect. 23 of the Act, reproducing sect. 31 of the Act of 1862); in the case of a share warrant (sect. 37 of the Act, reproducing sect. 27 of the Act of 1867); and see the Conveyancing Acts, 1881 and 1882, for various cases in which statutory incidents are annexed to *deeds*.
- Where no particular formalities are required for affixing the seal of a trading company, entitled by its memorandum or articles or by the general law, it will be sufficient to bind the company if it is affixed by the company's executive for carrying on its business. Per Cairns, L. J., *Re Barned's Banking Co.*, L. R. 3 Ch. 105.
- Regulations as to use of seal.** Where the articles superadd special provisions as to the affixing of the seal, *e.g.*, that the instrument must also be signed by two directors, those who deal with the company are bound to see that the deed on the face of it accords with the regulations. See *supra*, p. 79.
- Presumption of validity.** But if the instrument is on the face of it regular, they have a right to presume that the seal so affixed has been duly affixed, that the

directors were duly appointed and their signatures duly made (*County Life Assurance Co.*, L. R. 5 Ch. 288; *Mahoney v. East Holyford Mining Co.*, L. R. 7 H. L. 869; *Davies v. Bolton*, (1891) 3 Ch. 678); and the burden of proving the contrary rests with those who allege it. *Clark v. Imperial Gas, &c. Co.*, 4 B. & Ad. 313; *Hill v. Manchester, &c. Co.*, 5 B. & Ad. 866.

This is a corollary from the rule in *Royal British Bank v. Turquand*, *supra*, p. 79. See *County of Gloucester Bank v. Rudry, &c. Co.*, (1895) 1 Ch. 629. In this case the seal had been irregularly affixed to an instrument, but the company was held bound by it, for the instrument appeared to be in accord with the regulations, and the irregularity was only in regard to the "indoor" management, with which an outsider, acting in good faith, is not concerned. But this principle, it seems, does not apply if the seal is affixed fraudulently by the secretary for his own private ends, for such a fraud outside any authority raises no estoppel against the company. *Ruben v. Great Fingall Co.*, (1906) A. C. 430. Where the presumption does not apply, as in the case of a non-trading corporation, an instrument to which the seal has been irregularly affixed is inoperative. *Bank of Ireland v. Evans' Trustees*, 5 B. & C. 389; *Mayor of the Staple v. Bank of England*, 21 Q. B. D. 160; and see *Freehold Land Co. v. Suffield*, (1897) 2 Ch. 608.

A deed, to be effectual, must be sealed and *delivered*; but, in the case of a corporation, the affixing of the seal imports delivery. "Le fait d'un corporation ne besoin aucun delivery mes l'apposition del common seale done perfection al ces sans aucun delivrie." Rol. Abr. 23 (1), 50; and see Comyns' Digest, Fact A (3), that "a common seal fixed to the deed of a corporation is tantamount to a delivery." Accordingly, whilst in the case of a private individual it is usual to add an attestation clause to the effect that the instrument was "signed, sealed and *delivered*" in the presence of the witness, in the case of a company the clause merely states that "the common seal was affixed hereto in the presence of — and —."

Delivery of deed: not required from a corporation

Primâ facie, therefore, if the common seal is duly affixed to a deed it becomes operative. *London Freehold, &c. Co. v. Suffield*, (1897) 2 Ch. 608.

Nevertheless a corporation can execute a deed in escrow, *i.e.*, can seal it subject to a condition suspending its efficacy.

As Lord Cranworth said in *Xenos v. Wickham*, L. R. 2 H. L. 310.

The efficacy of a deed depends on its being sealed and delivered by the maker of it, not on his ceasing to retain possession. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or until some condition has been performed; but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the maker of the deed

is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow. I know of nothing intermediate between a deed and an escrow.'

Whether a document sealed by a company was or was not intended to operate as a complete and operative instrument, or as an escrow, depends on the intention of the parties as expressed or implied. See *Derby Canal Co. v. Wilmot*, 9 East, 359, 360, where the company's seal was affixed to a conveyance; but the clerk was directed to retain it until certain accounts were adjusted. Lord Ellenborough, C. J. and the rest of the Court held that, "in order to give the instrument effect, the affixing of the seal must be done with intent to pass the estate. Otherwise it operates no more than a feoffment would do without livery of seisin; whereas here, though the seal was directed to be and was affixed to the instrument for form, yet it was with a reservation of any present effect to pass the title out of the company, as they did not choose to deliver over the possession of the conveyance till the accounts were settled between them and the purchaser." See, too, *Mowatt v. Castle Steel, &c. Co.*, 34 C. D. 58, in which the Court found as a fact that debentures to bearer sealed by the company had not in fact been delivered. But it is quite consistent with this that where an instrument under the seal is taken in good faith the company would, as a general rule, be estopped from setting up non-delivery. *County of Gloucester Bank v. Rudry*, (1895) 1 Ch. 629. And see *Roberts v. Security Co.*, (1897) 1 Q. B. 111, and *London Freehold, &c. Co. v. Suffield*, *supra*, that the onus of proving that a deed duly sealed was only executed in escrow rests with those who so assert.

Whether sealed document a deed.

A document to which the seal is affixed is not necessarily a deed; thus a certificate of title to shares is not a deed (*Reg. v. Morton* L. R. 2 C. C. R. 22); nor is a company's memorandum of association a deed, though it operates as a deed (*Whitley Partners*, 32 C. D. 338); but it would seem that every contract under the seal of a company is a deed, save only that, by the Bills of Exchange Act, 1882 s. 91, a corporation is empowered to seal, instead of signing, acceptances, indorsements, and the like.

Foreign Seals-Act, 1864.

Besides its common seal, a company may, under the Foreign Seals Act, 1864 (now reproduced in sect. 79 of the Act), obtain power to have an official seal for use abroad; and, under sect. 78 of the Act of 1908, it can authorize any person, as the attorney of the company, to execute, under his seal, deeds outside the United Kingdom.

Residence and Domicile.

Registered office in the United Kingdom.

Every company formed or registered under the Act of 1908 is obliged to have a registered office (sect. 62), which must be in England, or Scotland, or Ireland (sects. 3, 4, 5 of 1908). The situa-

tion of the registered office is one of the conditions required to be stated in the memorandum of association (sects. 3, 4, 5 of 1908). But it is a sufficient compliance with the Act to state in the memorandum that the registered office will be situate in England, or Scotland, or Ireland, as the case may be. Notice of the precise situation in the country named in the memorandum must be given to the Registrar of Companies. Having regard to sect. 7 of 1908, a company registered under the Act cannot now change the situation of its registered office from one country forming part of the United Kingdom to another, as to change is *ultra vires*, and by no professed change can the company escape from the jurisdiction of the Courts having jurisdiction in that country forming the part of the United Kingdom in which, by its constitution, it is required to have its registered office, or from the provisions of sect. 116 of the Companies Act, 1908, which provides for the service of writs and notices at the registered office. But within that country, the company may from time to time change the situation of its registered office, though it must give notice of each change to the Registrar (sects. 62, 131 (8)).

A company registered in Scotland or Ireland may nevertheless in certain cases be sued in England and served with a process of the English Courts, under the service-out-of-the-jurisdiction order R. S. C. Ord. XI. r. 1. This rule is as follows:

Scottish or
Irish com-
panies, when
suable in
England.

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever—

- a) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or
- b) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or
- c) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or
- (d) The action is for . . . the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England; or
- (e) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or
- (f) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or
- (g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

In the above rule "person" includes "corporation." (R. S. C. Ord. LXVI. r. 1.)

The discretion to grant leave is regulated by rule 2 of the Order, which provides that "Where leave is asked from the Court or a judge to serve a writ, under the last preceding rule, in Scotland or in Ireland, if it shall appear to the Court or judge that there may be a concurrent remedy in Scotland or Ireland (as the case may be), the Court or judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant, or person sought to be served, and particularly in cases of small demands to the powers and jurisdiction, under the statutes establishing or regulating them, of the Sheriff's Courts, or Small Debts Courts in Scotland, and of the Civil Bill Courts in Ireland, respectively." See Annual Practice, p. 85.

Scotch company with agencies and chief office in England.

On the construction of Ord. XI. r. 1, it has been held, that a company which had its registered office in Scotland, but had agencies and a chief office in England, was not "domiciled or ordinarily resident" within the jurisdiction, and that leave to issue a writ for service out of the jurisdiction could not be granted. *Jones v. Scottish Accident Insurance Co.* (1886), 17 Q. B. D. 421. See also *Watkins v. Scottish Imperial Insurance Co.* (1889), 23 Q. B. D. 285; *Williams v. Cartwright*, (1895) 1 Q. B. 142; *Lopez v. Chavarri*, W. N. (1901) 115; and the Ann. Pr. 1912.

As to domicile of foreign companies generally, see Chap. XVIII.

A foreign company may reside abroad and also here, and it will be taken to reside here if it has an agency here for transacting business, or if the company carries on business at a fixed abode in this country. *Saccharin Corp. v. Chemische Fabrik von Heyden Actiengesellschaft*, (1911) 2 K. B. 516; *Actiesselskabet Dampskib Hercules v. Grand Trunk Pacific Rail. Co.*, 105 L. T. 695.

County Court jurisdiction

As to County Court process, as a general rule the district in which actions and matters must be commenced is to be ascertained from sect. 74 of the County Courts Act, 1888 (51 & 52 Vict. c. 42), that is to say, except where otherwise in the Act provided (see sect. 59), in the Court "within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of commencing the action or matter." This is a re-enactment of old County Court legislation. The words "dwell or carry on business" occurred in 9 & 10 Vict. c. 93, s. 60, under which it was held, in the cases of railways and other carrying companies, that a corporation dwells where it carries on its principal—that is, its administrative—as distinct from the manufacturing or trading—business (*Taylor v. Crowland Gas Co.*, 11 Ex. 6); and that ordinarily it carries on its business where its chief office is (*Corbett v. General Steam Navigation Co.*, 4 H. & N. 482), or where its general as opposed to a part, or even a material part, of its business is carried on. *Adams v. G. W. Rail. Co.*, 6 H. & N. 404; *Brown v. L. & N. W. Rail. Co.*, 4 B. & S. 326. This is generally, but not in all cases, its registered office in the case of a company registered under the Companies Acts.

Keynsham Blue Lias Co. v. Barker, 2 H. & C. 729, 733. And see Dicey, *Conflict of Laws*, 2nd ed. 160; and cases cited in the notes to sect. 74 of the Act of 1888 in the *Yearly County Court Practice*.

As regards the right of a company registered here to sue and be sued abroad, it is an established rule of private international law that a corporation duly created according to the laws of one State may sue and be sued in its corporate name in the Courts of other States, and accordingly, as a general but not universal rule, a company incorporated here can sue and be sued in foreign Courts. Moreover, in a considerable number of cases, conventions have been concluded between this country and other countries expressly recognizing the right of companies to sue and be sued.

English company suing or sued abroad.

Income Tax.

Without attempting to deal fully with the subject of income tax it may be useful to refer to some of the principal provisions of the Income Tax Acts and to some of the leading cases which have been decided thereunder.

The income tax is levied year by year under an Act annually passed which fixes the rate for the current year (commencing on the 6th April in that year and ending on the 5th of April following) and makes the provision of the principal Income Tax Acts applicable with more or less modification to the tax as regards the particular year, for, strange to say, there is no general Act which makes the requisite provisions operate automatically as and when each year's income tax is granted. Two Acts constantly referred to are

- (1) The Income Tax Act of 1842 (5 & 6 Vict. c. 35).
- (2) The Income Tax Act of 1853 (16 & 17 Vict. c. 34).

As a specimen of the Annual Act, attention is called to the Finance Act, 1911 (1 & 2 Geo. 5, c. 48), enacting in sect. 14—

(1) Income tax for the year beginning on the 6th day of April, 1911, shall be charged at the rate of one shilling and twopence, and the same super-tax shall be charged, levied and paid for that year as was charged for the year beginning 6th April, 1910.

(2) All such enactments relating to income tax (including super-tax) as were in force with respect to duties of income tax granted for the year beginning the 6th day of April, 1910, shall have full force and effect with respect to any duties of income tax hereby granted.

In the result the Income Tax Act, 1842, and the Income Tax Act, 1853, as modified by subsequent legislation, are revived and brought into operation again.

By the former Act the year's tax was to be charged according to certain schedules, A, B, C, D and E, and by the latter Act fresh schedules were adopted.

Schedule A relates to duties charged for and in respect of income. The schedules.

from lands, tenements, hereditaments and heritages, commonly called the Landlord Property Tax.

Schedule B relates to duties in respect of the occupation of lands, tenements and hereditaments.

Schedule C relates to duties in respect of interest, annuities and dividends payable out of the public revenue.

Schedule D. As to this, see *infra*, where the schedule is in part set out.

Schedule E relates to duties in respect of public offices and annuities, pensions and stipends payable by the Crown out of the public revenue.

It may be convenient here to call attention to the fact that the income tax imposed by Schedule D is not an essentially different kind of tax to that imposed by the several other schedules. The matter was discussed in *London County Council v. Att.-Gen.*, (1901) A. C. 26. In that case Lord Macnaghten in his speech dealt with the matter as follows:—

“Income-tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Schedule D to those assessed under Schedule A, or any of the other schedules of charge. One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which the taxable income is derived. That is all. Schedule A contains the duties chargeable for and in respect of property in all lands, tenements and hereditaments capable of actual occupation. There the standard is annual value. It is difficult to see what other standard could have been adopted as a general rule. But there again, if the subject of charge be lands let at rack-rent, the annual value is understood to be the rent by the year at which the same are let. In every case the tax is a tax on income whatever may be the standard by which the income is measured. It is a tax on profits or gains in the case of duties chargeable under Schedule A, and everything coming under that schedule—the annual value of lands capable of actual occupation as well as the earnings of railway companies and other concerns connected with lands—just as much as in the case of the other schedules of charge. . . . Unfortunately the learned judges of the Courts below took a very different view in regard to this point. That, I think, was the initial mistake. In the Divisional Court the argument on behalf of the Crown as reported was this: ‘The tax under Schedule A is a tax on property, and is totally distinct from the income tax under Schedule D.’ It appears from the shorthand notes that that argument was adopted by the Court without any qualification.”

SCHEDULE D.

Schedule D. By Schedule D (sect. 2) of the Income Tax Act, 1853, duties were granted to the Crown—

For and in respect of the annual profits or gains arising or accruing to any person resident in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the

United Kingdom from any profession, trade, employment or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains.

And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom or any profession, trade, employment or vocation exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains.

And for and in respect of all interest on money annuities and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act, and to be charged for every twenty shillings of the annual amount thereof.

And the following Rules are, by sect. 100 of the Income Tax Act 1842, applicable:

Rules of Assessment (Schedule D).

FIRST CASE.—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other Schedule of this Act.

RULES.

First. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure or concern upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure or concern shall have been usually made up, or on the 5th day of April preceding the year of assessment, and shall be assessed, charged, and paid without other deduction than is hereinafter allowed: Provided always, that in cases where the trade, manufacture, adventure or concern shall have been set up and commenced within the said period of three years, the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same: Provided also, that in cases where the trade, manufacture, adventure or concern shall have been set up and commenced within the year of assessment, the computation shall be made according to the rule in the Sixth Case of this Schedule.

Second. The said duty shall extend to every person, body politic or corporate, fraternity, fellowship, company, or society, and to every art, mystery, adventure or concern carried on by them respectively in Great Britain [the United Kingdom] or elsewhere as aforesaid, except always such adventures or concerns on or about lands, tenements, hereditaments, or heritages as are mentioned in Schedule A, and directed to be therein charged.

Third. In estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure or concern, nor for any sum expended for the supply of repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure or concern beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such

assessment shall be made; nor on account of loss not connected with, or arising out of, such trade, manufacture, adventure or concern, nor on account of any capital withdrawn therefrom, nor for any sum employed, or intended to be employed, as capital in such trade, manufacture, adventure or concern, nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure or concern, nor on account, nor under pretence of any interest which might have been made on such sums, if laid out at interest, nor for any debts except bad debts, proved to be such to the satisfaction of the commissioners respectively, nor for any average loss beyond the actual amount of loss after adjustment, nor for any sum recoverable under an insurance or contract of indemnity. (And see sect. 159.)

Fourth. In estimating the amount of the profits and gains arising as aforesaid, no deduction shall be made on account of any annual interest, or any annuity or other annual payment payable out of such profits or gains. *Alexandria Water Co. v. Musgrove*, 11 Q. B. D. 174.

SECOND CASE.—The duty to be charged in respect of professions, employments, or vocations not contained in any other Schedules of this Act [with special rules].

THIRD CASE.—The duty to be charged in respect of profits of an uncertain annual value not charged in Schedule A [with special rules].

FOURTH CASE.—The duty to be charged in respect of interest arising from securities in Ireland, or in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain and foreign securities—except such annuities, dividends, and shares as are directed to be charged under Schedule C of this Act.

The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year—without any deduction or abatement.

FIFTH CASE.—The duty to be charged in respect of possessions in Ireland or in the British plantations in America or in any other of Her Majesty's dominions out of Great Britain and foreign possessions.

The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain, either for remittances from thence payable in Great Britain or from property imported from thence into Great Britain or from money or value received in Great Britain and arising from property which shall not have been imported into Great Britain or from money or value so received on credit or on account in respect of such remittances, property, money, or value brought or to be brought into Great Britain, computing the same on an average of the three preceding years as directed in the First Case, without other deduction or abatement than is hereinbefore allowed in such case.

SIXTH CASE.—The duty to be charged in respect of any annual profits or gains not falling under any of the foregoing rules and not charged by virtue of any of the other Schedules contained in this Act [with special rules].

Supplementary Provisions.

The following Rules which appear in the same section may also be mentioned:—

"First. In estimating the balance of the profits or gains to be charged according to either of the First or Second Cases, no sum shall be set against or deducted from or allowed to be set against or deducted from such profits or gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure or concern, or of such profession, employment, or vocation, nor for any disbursements or expenses of maintenance of the parties, their families, or establishments, nor for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern not exceeding the proportion of the said rent or value hereinafter mentioned, nor for any sum expended in any other domestic or private purposes distinct from the purposes of such trade, manufacture, adventure, or concern, or of such profession, employment, or vocation.

"Second. The computation of the duty to be charged in respect of any trade, manufacture, adventure, or concern, or any profession, whether carried on by any person singly, or by one or more persons jointly, or by any corporation, company, fraternity, or society, shall be made exclusive of the profits or gains arising from lands, tenements, or hereditaments occupied for the purpose of such profession, trade, manufacture, adventure or concern."

Fifth. Every statement of profits to be charged under this Schedule shall include every source so chargeable on the person delivering the same on his own account or on account of any other person, and every person shall be chargeable in respect of the whole of such duties in one and the same division and by the same commissioners (except in cases where the same persons shall be engaged in different partnerships or the same person shall be engaged in different concerns relating to trade or manufacture in divers places, in each of which cases a separate assessment shall be made in respect of each concern at the place where such concern if singly carried on ought to be charged as herein directed); and every such statement on the behalf of any other person for which such person shall be chargeable as acting in any of the characters before described or on the behalf of any corporation, fellowship, fraternity, company, or society shall include every source chargeable as last aforesaid, and shall be delivered in that division where such person, corporation, fellowship, fraternity, company, or society would be chargeable if acting on his or their own behalf.

By sect. 40 of the Income Tax Act, 1842, it is enacted that, "all . . . companies . . . whether corporate or not corporate, shall be chargeable with such and the like duties as any person," and certain officers thereof are required (sect. 54) to make the requisite return.

By sect. 41 of the same Act any person lent in [the United Kingdom], whether a subject of Her Majesty or not, shall be chargeable in the name of any trustee . . . , or of any factor, agent, or receiver having the receipt of any profits or gains arising as herein mentioned and belonging to such person . . .

Foreign Investments.

By the Income Tax (Foreign Dividends) Act, 1842 (5 & 6 Vict. c. 80), it is enacted that, "All persons intrusted with the payment of annuities or any dividends or shares of annuities payable out of the revenue of any foreign state to any persons, corporations, companies or societies in Great Britain, or acting therein as agents, or in any other character," are to make a return of the same as therein mentioned, and are to pay the duty on such annuities, &c. out of the moneys in their hands on behalf of the persons entitled to the same, and

by 16 & 17 Vict. c. 34, s. 10, these provisions are extended to "all interest, dividends, or other annual payments payable out of or in respect of the stocks, funds, or shares of any foreign company, society, adventure or concern," and intrusted to persons in the United Kingdom for payment.

By 24 & 25 Vict. c. 91, s. 36, these provisions are extended to interest, dividends, and annual payments payable out of or in respect of stocks, funds, shares, and securities of any colonial company, society, adventure, or concern, intrusted to any person in the United Kingdom for payment.

And by sect. 9 of 29 Vict. c. 36, the above provisions are extended to dividends and interest when the title of the person to whom the same may be payable is shown by registration or entry of the name of such person in any book or list ordinarily kept in the United Kingdom.

And by 31 Vict. c. 28, s. 5, the provisions as to interest payable in the United Kingdom arising out of a foreign company or concern are extended to annuities, pensions, and other annual sums payable out of the funds of any institution in India, and intrusted to any person in the United Kingdom for payment.

By 48 & 49 Vict. c. 51, s. 26, the persons "intrusted with payment" are to include (a) any banker; (b) any person who obtains payment of dividends for another elsewhere than in the United Kingdom; (c) any dealer in coupons payable out of the United Kingdom.

And by sect. 24 of the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), it is, amongst other things, provided that upon payment of any interest of money or annuities charged with income tax under Schedule D, and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, and of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge as the case may be; and such amount shall be a debt from such person to Her Majesty and recoverable as such accordingly; and the provision contained in sect. 8 of 13 & 14 Vict. c. 97, now in force in relation to money in the hands of any person for legacy duty, shall apply to money deducted by any person in respect of income tax.

This section supplements in effect and modifies sect. 104 of the Income Tax Act, 1842, and sect. 40 of the Income Tax Act, 1853.

As to its operation, see *London County Council v. Att.-Gen.*, (1901) A. C. 34.

"Residence"
of a company.

Referring again to Schedule D, set out in part *supra*, p. 88 *et seq.*, one would have thought that a company formed under the Companies (Consolidation) Act, 1908, or under any of the preceding Acts for which that Act is substituted and having its registered office within the United Kingdom, and being a subject of His Majesty, and capable of obtaining from the proper Court in the United Kingdom an order confirming an alteration of objects or a reduction or reorganization of capital, or an arrangement with its creditors, and liable at the instance of the Attorney-General or of any member to an injunction to restrain the company from doing anything *ultra vires*, was emphatically a resident in the United Kingdom. But strange to say, at an early stage in the application of income tax law, it was held that situation of the registered office of the company was not

at all conclusive as to its residence, and that in reality a company resides at its head office, that is where the control of its administrative business rests and is exercised—though its manufacturing or trading business is carried on elsewhere—and that the place of its registration and the situation of its registered office is only a circumstance in determining such residence. See *Cesena Sulphur Co. v. Nicholson* and *Calcutta Jute Mills Co. v. Nicholson* (1876), 1 Ex. Div. 428.

The question was first raised in the leading case of *Cesena Sulphur Co. v. Nicholson* and *Calcutta Jute Mills Co. v. Nicholson* (1876), 1 Ex. D. 428. Each of the companies in those two cases was formed under the Companies Act, 1862 (now replaced by the Act of 1908), with a registered office in England. The business was carried on abroad, where the profits were made, but was controlled and directed by meetings of members and directors held in England. Only part of the profits was remitted to the United Kingdom. On these facts, both companies contended that they were liable to income tax only on the proportion of the profits actually received in the United Kingdom, but this contention was overruled and it was held that both companies were "residing in the United Kingdom" within Schedule D, and were liable to pay income tax upon the whole of their profits wherever earned: that the test of residence was not the situation of the registered office nor where the company's trading or manufacturing was carried on: that a company resides where its real business is carried on—where the board of directors and shareholders meet and the real control is exercised. And in the cases in question this was England. This was the *ratio decidendi*, and it must now, therefore, be taken that a company resides where it has its head office, where the meetings of the whole company or those who represent it are held, and where its governing body meets in bodily presence for the purposes of the company and exercises the powers conferred upon it by statute or by its articles of association. The place of registration is not conclusive as to residence: it is a circumstance, but only a circumstance. See also *Imperial Continental Gas Association v. Nicholson*, 37 L. T. N. S. 717, in which case it was held that an English company governed and constituted here but owning gas works abroad is chargeable for the whole profits under the first clause of Schedule D, and not merely for the sum remitted to the United Kingdom under the Fifth Case (*supra*, p. 90) as in respect of foreign possessions, and *San Paulo Brazilian Rail. Co. v. Carter*, (1896) A. C. 31; and *Alexandria Water Co. v. Musgrave* (1881), 11 Q. B. D. 174; *Bank of Mexico v. Aphorpe*, 64 L. T. 416.

A finding by the Inland Revenue Commissioners that a company registered abroad is resident in the United Kingdom on the ground that the control of the company is in England is conclusive if there is evidence to support it. *American Thread Co. v. Joyce*, 28 T. L. R.

The onus of proving residence in the United Kingdom is on the Crown. *Att.-Gen. v. Alexandria*, L. R. 10 Eq. 20.

Having regard to the leading case above referred to, it would seem by parity of reasoning that a company, though registered in the United Kingdom, if it has no board of directors or executive here, and does not hold any general meetings of shareholders here, or carry on business here, does not "reside" in the United Kingdom for the purposes of Schedule D.

Exercises a Trade. See paragraph (2) of Schedule D. *supra*, p. 89.

The meaning of the expression "exercise its trade" in Schedule D is also material, for whether a company resides or does not reside within the United Kingdom, yet if it exercises its trade wholly or in part therein it is chargeable under Schedule D.

Wherever profitable contracts are habitually made in the United Kingdom, even by or on behalf of a foreign company, there is an exercising of trade there. See *supra*. *Erichsen v. Last*, 8 Q. B. D. 414.

Where, however, a foreign company through an agent canvasses in England for orders, but makes all contracts and takes delivery of all goods abroad, it does not carry on trade here. *Grainger v. Gough*, (1896) A. C. 325. And see *Crookston v. Inland Revenue*, (1911), S. C. 217, Ct. of Sess.

In connection with this there are a whole series of important decisions both as regards companies constituted in the United Kingdom and foreign companies. Of these, one of the most important is *San Paulo Brazilian Rail. Co. v. Carter*, (1896) A. C. 31. In that case the company was registered in England but its railway was in Brazil, and was worked there. The directors purchased and sent out to Brazil materials for the purposes of the railway, but the general control of the company was in England. "It seems to me," said Lord Halsbury, L. C. (at p. 38), "that, as was said by Cockburn, C. J., in the case of *Sulley v. Attorney-General*, 5 H. & N. 711, 'it is probably a question of fact where the trade is carried on.' . . . In Brazil the payments are received, and in Brazil the passengers and goods are carried, but the form of trading can make no difference. . . . The person who governs the whole commercial adventure. . . . The person who decides what shall be done in respect of the adventure; what capital shall be invested in the adventure; on what terms the adventure shall be carried on: in short, the person who, in the strictest sense, makes the profits by his skill or industry, however distant may be the field of his adventure, is the person who is trading. That person appears to me, in this case, to be the appellant company. . . . It appears to me that this appellant company is carrying on the trade in London, from which it issues its orders, and so governs and directs the whole commercial adventure that is under its superintendence." See also *London Bank*

of *Mexico v. Aphthorpe*, (1891) 2 Q. B. 378; *Watson v. Sandie and Hall*, (1898) 1 Q. B. 326; *Tischler & Co. v. Aphthorpe* (1885), 52 L. T. 814; and *Pommery and Greno v. Aphthorpe* (1886), 56 L. T. 24.

A company registered abroad, but having its head office in London, where the meetings of the directors are held and where the directing and controlling power is exercised, is assessable to income tax on the whole of its profits as "a person residing in the United Kingdom" within the meaning of Schedule D. *Goetz & Co. v. Bell*, (1904) 2 K. B. 136; *De Beers Consolidated Mines v. Howe*, (1906) A. C. 155; *New Zealand Shipping Co. v. Stephens* (1906), 24 T. L. R. 172; *Ogilvie v. Inland Revenue* (1908), S. C. 1003, Ct. of Sess.; *American Thread Co. v. Joyce*, 28 T. L. R. 233, Feb. 1912.

It has, however, been held in the Queen's Bench Division, applying the principle of *Colquhoun v. Brooks*, 14 App. Cas. 493, that where a company, resident here, is a partner or a shareholder in a concern wholly carried on outside the United Kingdom, the profits of the company are chargeable under the Fifth Case, and accordingly that the company is only liable in respect of what it actually receives in the United Kingdom. And it is not at all uncommon, where the undertaking of a company registered here is situate abroad, to vest the same in a local company in exchange for shares therein, with a view to bringing the case within the Fifth Case. Where this is done, profits made and retained abroad for reserve, or for improvement and capital expenditure, or for distribution among shareholders or creditors abroad, escape the tax (unless it is shown that the control of the company is in the United Kingdom).

Case of local company formed abroad whose shares held by registered company in England.

The following decisions supported this view. Where an English company, which carried on no business of its own, owned all the shares but seven in a foreign company carrying on business in a foreign country, and the foreign company, on a dividend being declared by the English company, remitted to England the amount required for distribution among the shareholders, less the amount required for distribution among shareholders in the English company resident in the foreign country, it was held that the profits of the English company arose from foreign possessions, and came within Schedule D, Fifth Case; that the money retained for distribution among the shareholders resident abroad was not received by the English company in England within the meaning of the Fifth Case; and that that company was not liable to pay income tax on the amount retained abroad. *Bartholomay Brewery Co. (of Rochester) v. Wyatt*, (1893) 2 Q. B. 499.

And where an English company, which carried on no business of its own, owned shares in various English and foreign companies, and the dividends due to that company from the foreign companies were insufficient to pay the dividends due from it to such of its shareholders as were resident abroad, and the English company directed the dividends accruing to it from the foreign companies to be paid

to bankers abroad for distribution among its foreign shareholders: it was held that the profits of the English company came within Schedule D, Fifth Case, that the moneys retained abroad for distribution among shareholders resident abroad were not received by the English company in England within the meaning of the Fifth Case, and that that company was not liable to pay income tax on the amount retained abroad. *Nobel Dynamite Trust Co. v. Wyatt*. (1893) 2 Q. B. 499, 508, 517.

But it was subsequently held that where an English company owns nearly all the shares in a foreign company, and has complete control and directing power over the affairs of such foreign company, it (the English company) is liable to pay income tax upon the whole profits, and not merely upon that part of the profits which is transmitted to England. *Apthorpe v. Peter Schoenhofen Brewery Co.* 80 L. T. 395; *St. Louis Breweries v. Apthorpe*, 79 L. T. 552. These two decisions appear to ignore the fundamental distinction between a company and its shareholders (*supra*, p. 27), and to treat the principal shareholders as carrying on the business of the company, repeating the fallacy into which the Court of Appeal fell in *Broderip v. Salomon & Co.*, (1895) 2 Ch. 323. The authority of the cases is much shaken by the decision of the Court of Appeal in *Kodak Ltd. v. Clark*, (1903) 1 K. B. 505.

In that case *Kodak, Ltd.*, carrying on business in the United Kingdom, owned 98 per cent. of the shares in a foreign company, which gave it a preponderating influence in the control of the foreign company, the remaining shares being held by independent persons, and there was no evidence that the English company had ever attempted or had power to control or interfere with the management of the foreign company otherwise than by voting as shareholder. The Court of Appeal held that the foreign company was not carried on by the English company, and was not the agent of the English company, and that the English company was not, therefore, assessable to income tax under the First Case of Schedule D upon the full amount of the profits of the foreign company.

This case was followed in *Gramophone and Typewriter v. Stanley* (1908) 2 K. B. 89. The company (registered and resident in England) owned all the shares in a German company. The German company out of its profits in one year set aside the sum of 15,000*l.* to meet deterioration in patents. The commissioners found that the English company controlled the German company, that the head and seat and directing power of the English company were at its registered office in London, and that the entire business of the German company was carried on by and was the business and property of the appellant company, and that the profits of the German company were the profits of the appellant company, and that this sum of 15,000*l.* was profits within the meaning of the Income Tax Acts, and that all the profits of the German company should be assessed

without regard to the mode of application of such profits. Walton, J., considered that the commissioners were wrong, and on appeal the Court of Appeal took the same view, and considered that the English company was only liable to pay tax on such portions of the profits of the German company as had been received in this country, that is to say, the Court considered the assessment ought to be under the Fifth Case. The Court considered that the mere fact that the English company had acquired all the shares in the German company did not make it the owner of the property of the German company, and that the German company was not a mere sham, and that agency was not established, and that the profits of the German company were not profits of a business carried on by the English company in a foreign country, because the individual corporation does not carry on the business of the corporation. He is only entitled to the profits of that business to a certain extent, fixed and ascertained in a certain way, depending on the constitution of the corporation and his holding in it. *Apthorpe v. Peter Schoenhofen Brewing Co.*, *supra*, was distinguished on the ground that there the company was a mere form kept up to satisfy the American law, and that in that case the relation of principal and agent was proved to exist. *Kodak, Ltd. v. Clark*, *supra*, was approved.

See also *Nobel Dynamite Co. v. Wyatt*, (1893) 2 Q. B. 499, in which it was held that the term "foreign possession" in the Fifth Case includes the income of an English company derived from investing abroad in shares of various companies, English and foreign. So, too, the term includes income derived by an English company from a partnership constituted and carried on abroad by persons residing abroad. *Colquhoun v. Brooks* (1889), 14 App. Cas. 493.

Schedule D.—Profits and Gains—how Estimated.

For the purposes of Schedule D, "profits and gains of a concern must be ascertained on ordinary principles of commercial trading." Per Lord Halsbury, L. C., *Gresham Life Soc. v. Styles*, (1892) A. C. at p. 316. Subject, however, to the special provisions of the Acts which expressly disallow certain deductions.

The Act plainly contemplates the preparation of a balance sheet in which proper trading disbursements and liabilities are to be set against trade assets, so that the surplus (if any) of the latter will represent the assessable profits or gains of the concern. . . . Rule 3 of the last case (above) specifies certain items which a trader might naturally enough for his own private purposes insert in the debit side of the sheet; and enacts that these shall *not* be allowed as deductions in estimating net profits for the purposes of income tax." Per Lord Watson, *Ibid.*, p. 317.

"Whether there be such a thing as profit or gain can only be ascertained by setting against the receipts the expenditure or obli-

Estimation of
profits and
gains.

gations to which they have given rise." Per Lord Herschell, *Ibid.*, p. 323.

"That which has to be assessed is the balance of the profits or gains of a trade, that is to say, the sum left after subtracting the proper deductions from the profits or gains. The Act does not affirmatively state what losses may be deducted. It furnishes merely negative information." Per Lord Loreburn, L. C., *Strong & Co. v. Woodfield*, (1906) A. C. 448.

Insurance
company.

Accordingly, it was held, in the *Gresham* case, above referred to, that an insurance company which carried on the business of selling annuities, although bound to credit the account with its receipts in respect of the purchase-money of annuities sold during the three years, was entitled to debit the account with its payments in respect of annuities during the same period. It was urged that the payments in respect of the annuities were within the words of the Fourth Rule to the First Case above, which provides that no deduction shall be made on account of any annual interest, or any annuity or other annual payment payable out of such profits or gains. But it was considered that the rule in question was designed to meet such a case as that in which a trader had contracted to make an annual payment out of his profits, as, for example, where he had agreed to make such a payment to a former partner, or to a person who had made a loan on the terms of receiving such payment, and other cases which it was not necessary to define (per Lord Watson), and was not introduced to disallow a deduction in respect of the cost of obtaining the income. "You can no more refuse to take that cost into your consideration, when ascertaining the balance of profits and gains, than you could the cost of the coals or the corn of the coal merchant and corn merchant in ascertaining what are the profits from his trade." Per Lord Halsbury, *Ibid.*, p. 316.

The decision in this case was in accord with the principle established in *Mersey Docks v. Lucas*, 8 App. Cas. 891, that the taxpayer is entitled to deduct from the gross profits of his trade or business the expenses necessary to earn them, subject to the negative provisions of the Act.

So, too, interest on temporary and fluctuating loans may properly be deducted just as much as rent of offices or hire of machinery. *Farmer v. Scottish American Co.*, (1912) A. C. p. 118. But interest on debentures for a term of years cannot be deducted. *Alexandria Water Co. v. Muxgrove*, 11 Q. B. D. 174. See the Fourth Rule of the First Case, p. 90, *supra*.

In the case of an insurance company the gain for any particular year must be ascertained by estimate in accordance with some reasonable system, and a proper allowance should be made in respect of unexpired risks. *Sun Insurance Office v. Clark*, House of Lords, 7 March, 1912, W. N. (1912) 79. In that case the company treated 40 per cent. of the premium received each year as a fair allowance

in respect of the unexpired risks, and there was evidence that this was a fair allowance. *Bray, J.*, held that the amount ought to be allowed in ascertaining the company's gains, and the House of Lords upheld this decision and reversed that of the Court of Appeal.

Again, a brewery company which carries on the business of lending money to publicans and others is entitled to debit the account with bad debts made during the three years. *Reid's Brewery Co. v. Mule*, (1891) 2 Q. B. 1. And with compensation levy imposed under sect. 3 of the Licensing Act, 1904. *Smith v. Lion Brewery Co.*, (1909) 2 K. B. 912; (1911) A. C. 150.

An annuity which represents partly income and partly capital is not taxable as regards the latter portion. *Secretary for India v. Scoble*, (1903) A. C. 299.

By sect. 23 of the Customs and Inland Revenue Act, 1890 (53 Vict. c. 8), "Where any person shall sustain a loss in any trade, manufacture or concern or profession, employment or vocation . . . it shall be lawful for him . . . to apply to the commissioners . . . for an adjustment of his liability by reference to the loss and to the aggregate amount of his income." On these words it was held that the section does not apply to a particular loss in ascertaining the profits of the particular transaction which has occurred in the course of the business, but to a general loss resulting from the business, that is, a loss as to the total result of the business operations. *Rer v. Commissioners*, 91 L. T. 94.

Where the business of a company consists in part of buying and selling investments, it has been held that profit on sale of investments is to be brought into account. *Northern Assurance Co. v. Inland Revenue*, 26 Sc. L. R. 330; *Scottish Investment Trust v. Surveyor*, 21 Scot. Sess. Cases, 4th series, 262. Compare these cases with *Sterens v. Hudson's Bay Co.*, 101 L. T. 96.

But a company formed for rubber production is not chargeable on a sum of money representing profit on a re-sale of its estates to a new company. *Tebnan (Johore) Rubber Syndicate v. Farmer* (1910), S. C. 906, Ct. of Sess.

So, too, where a person buys up the undertaking of a company and re-sells at a profit to another company, and the transaction is one of several like transactions in the ordinary course of his business, the profit is chargeable to income tax, but not where the buying-up and re-selling of the business is an isolated transaction, and not one of a series of like transactions. Where, too, a company reconstructs and so parts with its business for a consideration exceeding the amount of its paid-up capital, debts and liabilities, the excess is not chargeable as profit.

As to the tax being payable where there is income under one head but a loss on the business as a whole, see *Armistage v. Moore*, (1900) 2 Q. B. 363.

Deductions.

The Acts do not, except in a few cases, state affirmatively what deductions may be allowed. It furnishes for the most part merely negative information, *supra*, pp. 89, 90.

Under 41 & 42 Vict. c. 15, s. 12, deductions are to be allowed for wear and tear during the year of any machinery and plant. And see *Canard Steamship Co. v. Coulson*, (1899) 1 Q. B. 865.

The value of all doubtful debts may be estimated. Sect. 80 of the Income Tax Act, 1853.

And as to abatements for loss by flood or tempest, see sect. 83 of the Income Tax Act, 1842.

As to allowing for interest on the amount of the deductions allowed, and considering what is the life of the plant, see *Leith, Hull, &c. Co. v. Musgrave*, 1 Fraser (Court of Session, 5th series), 1117; W. N. (1900) 210; *British India Steam Navigation Co. v. Leslie*, 17 T. L. R. 104; and *Peninsular and Oriental Co. v. Leslie*, 82 L. T. 137; below, 79 L. T. 118. What the commissioners have to do is to *estimate* according to what is just and reasonable; they are not bound to take an average of the depreciations during the three preceding years. *Canard Steamship Co. v. Coulson*, (1899) 1 Q. B. 865.

Cases where deductions disallowed.

The negative information, as to deductions, above referred to, is for the most part contained in the Third and Fourth Rules to First Case, *supra*, pp. 89, 90. None can be allowed for money carried to reserve for contingencies (*Forder v. Handyside*, 1 Ex. D. 233); or for depreciation of leases (*Watney v. Musgrave*, 5 Ex. D. 241); or for interest on borrowed money, which in substance is part of the company's working capital, *e.g.*, debentures or debenture stock (*Alexandria Co. v. Musgrove*, 11 Q. B. D. 174), and does not represent mere temporary loans; or for bonus on borrowed capital (*Arizona Copper Co. v. Smiles*, 29 L. R. Sc. 134); or for past losses or dead rent and royalties (*Broughton, &c. Co. v. Kirkpatrick*, 14 Q. B. D. 491; or, as a general rule, for sinking new pits (*Coltness Iron Co. v. Black*, 6 App. Cas. 315); or for recoupment of capital value of extracted mineral (*Alianza Co. v. Bell*, (1906) A. C. 18); or for balance of annuity paid to a sinking fund (*Nizam Rail. Co. v. Wyatt*, 24 Q. B. D. 548); or for costs of embankments to improve the condition of land, and not merely to protect it from sea or tidal river (*Hesketh v. Bray*, 21 Q. B. Div. 444); or in respect of unearned premium (*Imperial Fire Insurance Co.* (1876), 35 L. T. 271); or for premium paid for a lease (*Gillats and Watts v. Colquhoun*, 33 W. R. 258); or, as a rule, for loss on loans at interest (*English Crown Speller Co. v. Baker*, 99 L. T. 353; or for a sum payable to a manager in commutation (*Royal Insurance Co. v. Watson*, (1897) A. C. 1); or for repairs of tied houses (*Brickwood v. Reynolds*, (1898) 1 Q. B. 95 (C. A.)); otherwise as to compensation paid to tenants of tied houses under sect. 3 of the Licensing Act, 1904 (*Smith v. Lion Brewery Co.*, (1909) 2 K. B. 912; (1911) A. C. 150); or for

annual sums paid for the right to call for the surrender of public-house licences, or for expenses incidental to applications for new licences (*Southwell v. Savill Bros.*, (1901) 2 K. B. 349); or for royalties (*Lanston Monotype v. Anderson*, (1911) 2 K. B. 15); or for damages paid for injury caused to a guest in an inn through non-repair of the building (*Strong & Co. v. Woodifield*, (1906) A. C. 418); or for exhaustion of raw material (*Alianza Co. v. Bell*, (1906) A. C. 18); or for expenses of removal to new premises. *Granite Supply Assoc. v. Inland Revenue*, 8 F. 55, Ct. of Sess. On the other hand, where an annuity consists in part of capital, income tax is not payable on that part. *Secretary of State v. Scoble*, (1903) A. C. 299.

In *Vallombrosa Rubber Co. v. Inland Revenue* (1910), S. C. 519, Ct. of Sess., expenses of weeding and watching part of the company's rubber estate, where the trees had not yet reached the rubber bearing stage, were allowed.

In *Guest, Keen & Nettlefolds v. Fowler*, (1910) 1 K. B. 713, contributions by manufacturers to an association for keeping up prices were allowed to be deducted.

Moneys repaid by a life assurance company under old contracts by way of bonus to participating policy-holders, are assessable to income tax as "annual profits or gains." H. L. (Lord Bramwell dissenting). *Last v. London Assurance Corp.* (1885), 10 App. Cas. 438; *New York v. Styles*, 14 App. Cas. 381; *Equitable Life Assurance Society of the United States v. Bishop*, (1900) 1 Q. B. 177. As to mutual societies, see *New York Life Insurance Co. v. Styles*, 14 App. Cas. 381, and *Nizam State Rail. Co. v. Wyatt*, 24 Q. B. D. 548. No deduction is permissible in respect of unexpired risks when the facts do not justify the same. *General Accident Assurance Corp. v. McGowan*, (1908) A. C. 207, explained in *Sun Insurance Office v. Clark*, *supra*, p. 98.

Schedule D, Case 4, is dealt with in the recent cases, as to the income tax on dividends and interests derived from securities abroad. *Universal Life Assurance Society v. Bishop*, 68 L. J. Q. B. 962; 81 L. T. 122; and *Gresham Life Assurance Co. v. Bishop*, (1902) A. C. 287.

As to a company's right to deduct and retain income tax out of dividends paid out of income of the company which has already been charged with income tax (*e.g.*, dividends from other companies), see sect. 24 of Act of 1888, *supra*, p. 92; and *London County Council v. Attorney-General*, (1901) A. C. 26; see also *infra*, note to cl. 117 of Form 251.

"All interest of money, annuities and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act." These words will be found in the concluding paragraph of sect. 2 of Schedule D (*supra*, p. 89) and must be borne in mind. Thus, it has been held that a life assurance company must pay

Interest, &c.

income tax on the interest derived from its business investments, for the language of the Act makes no distinction between the class of investments necessary to carry on the business and other investments. *Clerical, Medical and General Life Assurance Society v. Carter*, 22 Q. B. D. 444; *Liverpool, London and Globe Insurance Co. v. Bennett*, (1911) 2 K. B. 577; affirmed on appeal, C. A., 28 T. L. R. No. 17; W. N. (1912) 73.

The case last mentioned affirmed the view expressed in the Court of Session by Lord Dunedin in *Revelt v. Edinburgh Life Insurance Co.*, 5 Tax Cases, 221, 226, and by the Lord President in *Scottish Mortgage Co. of Mexico v. McKelvie*, 26 Sc. L. R. 87; 2 Tax Cases, 165, and by Wright, J., in *Norwich Union Fire v. Magjee* (1896), 44 W. R. 384; 3 Tax Cas. 457.

In arriving at the profits and gains, the profits should be estimated as inclusive and not exclusive of the amount payable for the year's income tax. *Ashton Gas Co. v. Att.-Gen.*, (1906) A. C. 10.

Deduction
in paying
dividends,
interest, &c.

Prior to sect. 24 of the Customs and Inland Revenue Act, 1888, a company had power (sect. 104 of the Income Tax Act, 1842, and sect. 40 of the Income Tax Act, 1853) but was not bound to deduct the income tax from dividends and interest payable by it. The Act of 1888 altered this. "Now what," said Lord Macnaghten in a recent case, "has the Act of 1888 really done? It is no longer optional for a person who has to make an annual payment to deduct income tax; he is bound to make the deduction and pay over to the Crown the amount deducted unless payment comes out of income which has already paid the duty." See *London County Council v. Attorney-General*, (1901) A. C. 26.

A person receiving interest from which income tax has not been deducted is liable to pay income tax thereon notwithstanding the duty being imposed by sect. 24 of the Inland Revenue Act, 1888, on the person paying the interest. *Glamorgan v. Quarter Sessions v. Wilson*, (1910) 1 K. B. 725.

Where a partnership business was converted into a company, the partners receiving shares in exchange for their interests, it was held that the company had "succeeded" to the business, and was chargeable on that footing. *Ryhope Co. v. Foye*, 7 Q. B. D. 185.

A company trading with one ship does not start a new business because it loses its single ship and buys another. *Merchiston Steamship Co. v. Turner*, (1910) 2 K. B. 923.

As to sect. 41 of the Income Tax Act, 1842, *supra*, p. 91, the agent within the United Kingdom of a foreign company carrying on business within the United Kingdom is properly chargeable in his own name in respect of the profits derived from trade in this country, see *James Wingate & Co. v. Commissioners*, W. N. (1898) 129; 24 Rettie, 939.

Where foreign principals consign goods from abroad for sale by agents in this country, the mere fact that the agents sell in their own

names does not relieve the principals from liability to pay income tax under Schedule D. See *Watson v. Sandie and Hull*, (1898) 1 Q. B. 326; *Lorell and Christmas v. Commissioners*, (1908) A. C. 46; see also *supra*, p. 94, and *infra*, p. 103.

Where an allowance ought to be granted but is refused, a mandamus lies to the commissioners commanding them to grant and certify the allowance. *Commissioners of Income Tax v. Pemsel* (1891) A. C. 531.

As to sect. 55 of the Income Tax Act, 1842, it was held that a person who had delivered without fraud, an incorrect statement of his profits or gain chargeable with income tax under Schedule D, which, through negligence or carelessness but without fraud, was incorrect, was not liable for the penalty of 50*l.* imposed by that section, and that the section applied only to non-delivery or to the delivery of a merely illusory statement as distinct from the delivery of a statement which purports and is intended to be a true and correct statement as required by sect. 52, but which is erroneous in some particular. *Attorney-General v. Till*, (1909) 1 K. B. 694. This decision was reversed by the House of Lords, (1910) A. C. 50.

As to the duties on mines, quarries, docks, waterworks, canals, &c., see 5 & 6 Vict. c. 35, s. 60, and *Mersey Docks v. Lucas*, 8 App. Cas. 891; *Ryhope Colliery Co. v. Foyer*, 7 Q. B. D. 485; *Coltress Iron Co. v. Black*, 6 App. Cas. 315; *Broughton Coal Co. v. Kirkpatrick*, 14 Q. B. D. 491; *Jones v. Cwmorthen Slate Co.*, 5 Ex. Div. 93; *Harris v. Irvine Corp.*, W. N. (1901) 182.

As to additional assessments on a succession to business, see *Bell v. National Provincial Bank of England*, (1904) 1 K. B. 149.

Overpaid Income Tax.

Overpaid income tax is recoverable under sect. 133 of the Income Tax Act, 1842, when the profits and gains have been over-estimated, provided that application is made in as short a time after the end of the year as with diligence is practicable, having regard to the particular circumstances of the case; and if the commissioners will not grant the requisite certificate, a mandamus will be granted. *Rey v. Commissioners*, 21 Q. B. D. 313.

Overpaid
income tax

Taxes Management Act, 1880.

As to assessment, see sect. 4 of Taxes Management Act, 1880 (43 & 44 Vict. c. 19); as to assessor's certificates, sect. 49 of same Act; as to estimates in default of return, sect. 50; as to examination of assessments, sect. 51; as to amendment of assessments, sect. 52; as to place of assessment, sect. 53; as to errors, sect. 55; as to allowances of assessments, sect. 56; as to appeals by person aggrieved

Assessments,
appeals.

(under sect. 80 of Income Tax Act, 1842), sect. 57; as to cases for opinion of High Court, sect. 59.

Production of Returns.

As to ordering production of income tax returns on a misfeasance summons, see *Joseph Hargreaves, Ltd.*, (1900) 2 Ch. 347.

Super Tax.

A corporation is not liable to super tax.

Calling for Returns before Act passed.

Returns may be called for in any year before the Act in passing granting income tax for that year, see sect. 30 of the Customs and Inland Revenue Act, 1890, and *Bowles v. Attorney-General*, Times, Dec. 1911, Parker, J.

Non-exemption when Income below 160*l.* per annum.

A company under the Companies (Consolidation) Act, 1908, is not exempt from duty by reason of its yearly income being under 160*l.* *Myllam v. Market Harborough Advertiser Co.*, (1905) 1 K. B. 708.

Corporation Duty.

Corporation
duty under
Customs, &c.
Act, 1885.

By the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), ss. 11 to 20, certain duties were imposed in respect of property vested in bodies corporate or unincorporate. But among the exceptions is property belonging to a body corporate established for any trade or business, and accordingly trading companies under the Act of 1908 are exempt, even when registered without the word "limited" and on the footing that no dividends are to be paid. *Council of Law Reporting*, 22 Q. B. D. 279.

There is also an exception in respect of property which, or the income of which, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science or the fine arts. See *Inland Revenue v. Forrest*, 15 A. C. 334, in which the Institution of Civil Engineers was held exempt. The holding of examinations and granting diplomas in surgery are not a "promotion of science" within sect. 11 (3), of the Customs and Inland Revenue Act, 1885. *Royal College of Surgeons*, (1899) 1 Q. B. 871; *C. v. J. Q. B.* 705; 79 L. T. 89. As to a club, see *New University Club*, 18 Q. B. D. 720.

As to property not entirely appropriated to be applied to the promotion of science, see *Royal College of Surgeons, supra*.

As to the proper mode of attesting "annual value, income, or profits," see *Surrey County Cricket Club, (1901) 2 K. B. 400*.

Inhabited House Duty.

Partly residential, *London and Westminster Bank v. Smith*, 87 L. T. 244; 67 J. P. 229; *Union Bank of Scotland v. Foster*, 65 J. P. 824; *Maple & Co. v. Wilson*, 49 W. R. 670; 85 L. T. 229; *Walker v. Brisley, (1900) 2 Q. B. 735*; *Grant v. Langton, (1900) A. C. 383*; *Styles v. Middle Temple (Treasurer)*, 81 L. T. 426; *Foster v. Liverpool Athenæum*, 97 L. T. 692; *Browne v. Furlado, (1903) 1 K. B. 723*; *Swain v. Fleming*, 81 L. T. 202.

Poor Rates.

By the Act of 43 Eliz. c. 2, s. 1, competent sums are to be levied in each parish for the relief of the poor, by taxation of every inhabitant, parson, vicar, and "others," and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines or saleable underwoods in the parish, to be gathered out of the parish according to its ability.

The Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1, further provides

"That no rate for the relief of the poor in England and Wales shall be allowed by any justices or be of any force which shall not be made upon an estimate of the net annual value of the several hereditaments related thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes and tithe commutation rentcharge (if any), and deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses (if any) necessary to maintain them in a state to command such rent; provided always, that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities (if any) according to which different kinds of hereditaments are now by law rateable."

As to evidence to alter gross estimated rental on appeal, see *Horton & Son v. Walsall Assessment Committee, (1898) 2 Q. B. 239*.

The Act of 3 & 4 Vict. c. 89, s. 1 (continued by divers Expiring Laws Continuance Acts), is as follows:

"That it shall not be lawful for the overseers of any parish, township, or village, to tax any inhabitant thereof as such inhabitant in respect of his ability derived from the profits of stock-in-trade, or any other property for or towards the relief of the poor; provided always, that nothing in this Act contained shall in anywise affect the liability of any parson or vicar, or of any occupier of lands, houses, tithes impropriate, propriation of tithes, coal mines, or saleable underwoods to be taxed, under the provisions of the said Acts, for and towards the relief of the poor."

Poor rates
under 13 Eliz.
c. 2, s. 1.

3 & 4 Vict.
c. 89, s. 1.

Cases of Rating.

ADVERTISING STATIONS. 52 & 53 Vict. c. 27, and *Burton v. St Giles, &c. Ass. Com.* (1900) 1 Q. B. 389.

AGRICULTURAL LAND. *Smith v. Richmond*, (1899) A. C. 448; *Alton Urban Council v. Spicer*, (1904) 1 K. B. 678.

BREAKWATER AND LANDING STAGE. — *Cattewater Harbour v. Plympton Union*, 63 J. P. 297.

CANAL. — *Glamorganshire Canal Co. v. Merthyr Tydfil Union*, 89 L. T. 85.

CEMETERY. *Queen v. Abney Park Cemetery Co.*, 8 Q. B. 515. The company purchased lands and laid them out for a cemetery, and received fees for interments, and conveyed plots for graves subject to regulations: Held, that the company was rateable in respect of the plots sold.

COAL MINES. *Brown v. Rotherham Assessment Committee*, 83 L. T. 193.

DOCK. *Swansea Harbour Trustees v. Swansea Union*, 97 L. T. 585.

WAREHOUSES. — See *London and India Docks v. Poplar Union*, 83 L. T. 371.

DRILL HALL. — *Ragner v. Drewitt*, 82 L. T. 718.

GRAVEL PITS. *Farnham Flint, &c. Co. v. Farnham Union*, (1901) 1 Q. B. 272; and see cases there cited as to other wasting properties.

HOARDING FOR ADVERTISEMENTS. *Burton v. St. Giles' Committee*, (1900) 1 Q. B. 389.

LAIRAGES. — See *Mersey Docks Board v. Birkenhead Assessment Committee*, (1901) A. C. 175.

MACHINERY. — Machinery or other fixtures which are part of the stock-in-trade, though they belong to the tenant, must be taken into account in assessing the rateable value of the premises. The principle established in *Reg. v. Guest*, 7 L. J. M. C. 38; 7 Ad. & E. 951, and followed ever since, cannot now be disturbed; *Kirby v. Hunslet*, (1906) A. C. 43; H. L. (E.); and see *Crockett v. Northampton Assessment Committee*, 72 L. J. K. B. 320; *Laing v. Overseers of Bishop Wearmouth*, 3 Q. B. D. 299; — In this case it was held, that in assessing shipbuilding premises to the poor rate

the value of machinery attached to the premises was to be taken into consideration in ascertaining their rateable value where such machinery, though some of it might be capable of being removed without injury to itself or the freehold, was essentially necessary to the shipbuilding business to which the premises were devoted, and intended to remain permanently attached to them so long as they were applied to their present purpose. An elaborate descriptive list of various classes of the machinery is set out in the report.

In *Tyne Boiler Co. v. Overseers of Longbenton*, 18 Q. B. D. 81; *Crockett v. Northampton Union*, 18 T. L. R. 451, the decision there was, that in estimating the rateable value of premises used as a manufactory, machinery and plant placed thereon for the purpose of making them fit as premises for such a manufactory are to be taken into account as enhancing the value of the hereditament, although such machinery and plant remain personal property, and are not physically attached to the premises, and this notwithstanding the Act 3 & 4 Vict. c. 83, s. 1 (*supra*), which exempts personal chattels from rating, which up to that Act had been rateable. Esher, M. R., said: "Nobody says that these machines are to be rated as personal chattels. The question is, whether they are to be taken into account in estimating the rateable value of the premises:

... the statute (3 & 4 Vict. c. 89) makes no difference, and all the cases with regard to estimating the value of real property remain untouched by it." After citing with approval the cases cited in *Laing v. Overseers of Bishop Wearmouth* (*supra*), and others, including *Reg. v. Haslam*, 17 Q. B. 220 (per Patteson, J.), the Master of the Rolls continued: "Does the Court there mean by the word 'attached' that the thing must be bolted or screwed to the premises? ... I do not think so. I think that they could not have meant to differ from Patteson, J., when he said that it was necessary to inquire whether the machinery was or was not annexed to the freehold."

The above decision, as to plant and machinery not attached to the rated premises being taken into account in estimating the rating value of the premises, was followed in *Boden & Co. v. Overseers of Chard*, and *Gifford, Fox & Co. v. Same*, 7 T. L. R. 431 (July, 1890), where the Court of Appeal (Esher, M. R., and Lindley and Bowen, L. J.J.) affirmed (as to the second case) the decision of a Divisional Court (63 L. T. 249).

It is not easy to reconcile these two decisions with the Act 3 & 4 Vict. c. 89, and in 1895 a bill was introduced into Parliament to exempt machinery as in Scotland and Ireland.

PUBLIC-HOUSES. Gross rateable value in case of tied houses (*Bradford Assessment Committee v. White*, (1898) 2 Q. B. 630): evidence of trade and profits in ascertaining rateable value (*Dodds v. South Shields Union*, (1895) 2 Q. B. 133; *Cartwright v. Scul-*

coates Union, (1900) A. C. 150; increase of value by premium paid for lease (*Camberwell Assessment Committee v. Ellis*, (1900) 1 Q. B. 68; affirmed in H. L., 16 T. L. R. 504).

TELEPHONE WIRES (overhead).—*Lancashire Telephone Co. v. Overseers*, 14 Q. B. D. 267; Company held rateable.

TRAMWAYS.—*Pimlico, &c. Tramway Co. v. Assessment Committee of Greenwich Union*, 9 Q. B. 9. The company was formed under the Tramways Act, 1870 (33 & 34 Vict. c. 78), and laid down a tramway in a highway, the soil of which was vested in the district board: Held, that the company was rateable in respect of its occupation of the road by its tramway. Other cases are *Milbourne Tramway Co. v. Fitzroy Corp.*, (1901) A. C. 153; *Metropolitan Electric Tramways v. Tottenham Urban District*, 28 T. L. R. 292 (C. A.); overruling *Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary Authority*, (1892) 1 Q. B. 357. Light railways exempt. *Wakefield Corp. v. Wakefield Light Ry.*, (1908) A. C. 293.

UNDERGROUND SEWERS.—*Ystradfydwg, &c. Board v. Newport Assessment Committee*, (1901) 1 Q. B. 406.

WAREHOUSE.—See *Rex v. Henderson*, 92 L. T. 662; *Booth Overseers v. Liverpool Warehousing Co.*, 85 L. T. 45; and *London and India Docks v. Poplar Union*, 83 L. T. 371.

WATERWORKS AND GASWORKS.—See *Rex v. Brighton Gaslight Co.*, 5 B. & C. 466; *Rex v. Rochdale Waterworks*, 1 M. & S. 634; *Rex v. Miller, Corp.*, 619; *Reg. v. West Middlesex Waterworks*, 1 E. & E. 716; *Reg. v. Lee Overseers*, L. R. 1 Q. B. 241; *Liverpool Corporation v. Llanfyllin Assess. Com.*, (1899) 2 Q. B. 14; *New River Co. v. Hertford Union*, (1902) 2 K. B. 597; *Hampton Urban Council v. Southwark and Vauxhall Water Co.*, 16 T. L. R. 60; *Liverpool Corporation v. Birkenhead Union*, 94 L. T. 509.

The true test of beneficial occupation is not whether a profit can be made, but whether the occupation is of value. *London County Council v. Churchwardens of Erith*, (1893) A. C. 562. In that case the Council were held rateable in respect of sewage pumping station and works which they occupied and used to enable them to perform their statutory duties, and to be properly taken into account as the hypothetical tenant, although they had no power to take the premises. See also *Imperial Institute v. St. Mary Abbott's*, Times, 7 March, 1895.

But if a person is a mere caretaker of a house, put in to preserve the house from depredation, the master who put in such caretaker is not liable to be rated in respect of the house, because he has no beneficial occupation. The question in each case is whether there

is a beneficial occupation. *Bertie v. Walthamstow Overseers*, 68 J. P. 545.

The stoppage of works during a particular strike should not be taken into consideration in the assessment of rates, especially where no evidence is produced that the Assessment Committee had disregarded the general contingency of strikes. This was so held in *Hoyle and Jackson v. Oldham Union*, (1894) 2 Q. B. 372, by the Court of Appeal.

Stoppage of work not to be taken in account in estimating rating value

As to closing of shops during winter months, see *Southend-on-Sea Corporation v. While*, 83 L. T. 408, distinguished in *Booth Overseers v. Liverpool Warehousing Co.*, 85 L. T. 45; 65 J. P. 740.

As to deductions for repairs of mines, see *John Brown & Co. v. Rotherham Union*, 83 L. T. 193; *Wear & Tees, Leith Hill, &c. Co v. I. R.*, 1 F. 1117; W. N. (1900) 210.

By 6 & 7 Vict. c. 36, s. 1, exemption from rates is allowed to premises occupied by "any society instituted for purposes of science, literature, or the fine arts exclusively; provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its bye-laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members." See *Savoy Overseers v. Art Union of London*, (1896) A. C. 296; *Royal College of Music v. St. Margaret's Overseers*, (1898) 1 Q. B. 809; *Jenner Institute of Preventive Medicine v. St. George's Assessment Committee*, 16 T. L. R. 444; 69 L. J. Q. B. 814; 83 L. T. 344; *Hornsey School of Art v. Edmonton Union*, 94 L. T. 203; *Jones v. St. Dunstan Overseers*, 95 L. T. 787.

What scientific, literary, and fine arts societies are exempted.

As to the limitation of time for recovery of rates, see *Keeton v. Sheffield Coal Co.*, (1901) 2 Q. B. 26.

As to the recovery of rates pending appeal, see *Burton v. St Giles-in-the-Fields*, (1901) 1 K. B. 650.

Illegal Associations.

The Act of 1908, like the Act of 1832, affords great facilities for forming companies, but before it introduces the machinery of formation, the Act, in sect. 1, first proceeds to clear the ground by declaring illegal all large unregistered companies or associations subsequently formed, and thus indirectly compelling associations to avail themselves of the provisions of the Act. Section 1, the section in question, provides, in effect, as follows:

Illegal associations.

- (1) That after the commencement of the Act no company, association, or partnership consisting of more than ten members is to be formed for carrying on the business of banking unless registered under the Act or formed in pursuance of some other Act of Parliament or of letters patent: and
- (2) That no company, association, or partnership consisting of

more than twenty persons shall be formed after the commencement of the Act for the purpose of carrying on any other business (*i.e.*, other than banking) that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered under the Act, or is formed in pursuance of some other Act, or of letters patent, or is a company engaged in working mines within the Stannaries, Devon and Cornwall.

Decided
meaning
of above
provisions.

The meaning of these provisions is, as interpreted by the Courts, is that any company or association formed in violation of the section is an illegal association, and the policy of the enactment is well expounded by James, L. J., in *Smith v. Anderson* (1889), 15 C. D. at p. 273. "The object of the Act," says the Lord Justice, "was to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons so dealing with them did not know with whom they were contracting, and so might be put to great expense, which was a public mischief to be repressed."

And this object the Act may be said effectually to have accomplished. It has destroyed the status of such associations. Thus an association which is illegal cannot be wound up, under the Act of 1862, at the instance either of the association, of a creditor, or of a shareholder. *South Wales Atlantic, &c. Co.* (1875), 2 C. D. 763; *Padstow Association* (1882), 20 C. D. 137; *Ex parte Hargroves* (1875), L. R. 6 Ch. 542; *Ilfracombe Building Soc.*, (1901) 1 Ch. 102. So, too, an action by an illegal association, whether against a member or any other person, must fail if the illegality of the association is disclosed. *Re Day* (1876), 1 C. D. 690. If the association has lent money, for instance, and obtained as security a promissory note, it cannot sue thereon. *Shaw v. Benson*, 11 Q. B. D. 563. And, conversely, neither a member nor an outsider can sue such an association, for it can contract no debts (*London Marine Association* (1869), 8 Eq. 176; *Hume v. Record Reign Jubilee Syndicate*, 80 L. T. 104), and can enter into no contracts. *Jennings v. Hammond* (1882), 9 Q. B. D. 229. In a word, the association is a phantom. It has no legal existence.

Many attempts have been made to escape from the provisions of the section, but seldom successfully; the words are too wide. It was at one time thought, for example, that mutual assurance associations were not within the section—not "associations for gain"; but these doubts—or hopes—were dispelled by the decision in *Padstow Association* (1882), 20 C. D. 137.

In *Re Thomas* (1884), 14 Q. B. D. 379, again, it was contended that an unregistered loan society consisting of more than twenty members was not illegal, because in its inception it comprised less than twenty

members, but this flimsy contention was promptly overruled. "I cannot," said Cave, J., "assent to the doctrine that, because a society is projected by less than twenty people originally, and subsequently grows to more than twenty, it is outside the Act and does not require registration. This would be making a laughing-stock of the Act."

These cases must, however, be read with *Smith v. Anderson* (1880), 15 C. D. 247, a decision of the Court of Appeal, in which it was held that an investment trust was not an illegal association although there were more than twenty beneficiaries entitled to the benefit of it, the *ratio decidendi* being that the business, if business it was, was carried on by the trustees, who were less in number than twenty.

So in *One and All Sickness Assoc.*, 25 T. L. R. 674, a slate club was held not to be an illegal association within the section, the only association being to share in a relief fund formed by subscriptions.

Wigfield v. Potter (1881), 45 L. T. 612; *Crowther v. Thorley*, 50 L. T. 43; *Re Siddall* (1885), 29 C. D. 1, are other cases in which unregistered land companies of more than twenty members have been held to be legal on the ground that they were formed merely for acquiring and dividing land between the members, and not for carrying on any business of land jobbing or trafficking in land.

Marrs v. Thompson, 86 L. T. 759, in which the trustees of an unregistered society for mutual insurance consisting of more than twenty persons were held entitled to sue the society's treasurer for recovery of money of the society in his hands, seems to have been one of those hard cases which make bad law; at least, it is difficult to reconcile with *Re Padstow Assoc.* (*supra*).

Dissolution.

A common law corporation was dissolved by loss of all its members. *Dissolution.* Grant on Corporations, p. 303. But it is apprehended that a company, under the Act of 1862 (now 1908), being a statutory corporation, and an independent legal *persona*, is not so dissolved (*Newhaven Local Board v. Newhaven School Board*, 30 C. D. 373), and that it subsists as a corporation until it is dissolved in the manner expressly provided for by the Act, viz., (a) by a compulsory winding-up, followed by an order of the Court for dissolution under sect. 172 of the Act; (b) by a voluntary winding-up, followed by a general meeting and return to the Registrar (sect. 195); (c) by striking the name of a company off the register under sect. 242 of the Act.

The dissolution of a company under sects. 172, 195 of the Act precludes a subsequent winding-up order, or proceedings for recovery of any outstanding assets. *Coxon v. Gorst*, (1891) 2 Ch. 73; *Pinto Silver Mining Co.*, 8 C. Div. 273; *London and Caledonian Co.*, 11 C. Div. 140; *Knowles v. Scott*, (1891) 1 Ch. 717; *Whiteley Exerciser*

v. Gamage, (1898) 2 Ch. 405; *Salton v. New Beeston Cycle Co.* (2), (1900) 1 Ch. 43; *Westbourne Grove Drapery Co.*, 27 W. R. 37.

But where the dissolution has taken place under sect. 212, the company may be revived by order of the Court as therein mentioned (sub-sect. (6)). See Part II. Chap. LI.

Cases have sometimes occurred in which, after an effective and irrevocable dissolution, assets of the company have been discovered, or assets supposed to be valueless have been found to be of value.

Such assets, so far as they are real assets, revert to the donors or their heirs (Co. Litt. 13 b; *Grant on Corporations*, 303), and so far as they are personal property vest in the Crown as *bona vacantia* (1 Bla Com. 299; *Grant*, 304). *Re Higginson and Dean*, (1899) 1 Q. B. 325; but any trust affecting the property is not displaced should such a case occur.

And see as to *bona vacantia*, *Cannock v. Edwards*, (1896) 2 Ch. 679; *Printers' Soc.*, (1899) 2 Ch. 184; *Brown v. Dale*, 9 Ch. 78; *Re Bond*, *Panes v. Att.-Gen.*, (1901) 1 Ch. 15; *Pryce Jones v. Williams*, (1902) 2 Ch. 517.

Creditors and others might, it is apprehended, apply to the Crown by petition for a grant of assets so vested in the Crown, and probably with success, having regard to the fact that where the goods of a bastard vest in the Crown, it is usual to grant the same or part thereof to the natural next of kin of the deceased. See *Evans v. Brown* (1843), 5 Beav. 114.

Singular results sometimes ensue; thus, where Company A, holding freeholds in trust to secure debentures of Company B, was dissolved, it was found that the legal title had passed to Company B as donor. Where assets subject to a trust vest in the Crown, the Crown takes subject to the trust, but apparently it will not act as a trustee. See *Re Taylor's Agreement Trusts*, (1904) 2 Ch. 737. In that case Buckley, J., refused to act on the view that a dissolved vendor company which had neglected to assign patents to a purchaser was a trustee who "could not be found" within the meaning of sect. 35 of the Trustee Act, 1893; but Farwell, J., has in two cases come to the opposite conclusion. *General Accident Assurance Corp.*, (1904) 1 Ch. 147; *Richard Mills & Co. (Brierly Hill)*, W. N. (1905) 36; and his view has been followed by Warrington, J., in *Re No. 9, Bomori Road*, (1906) 1 Ch. 359. See, too, *Ruddington Land*, 100 L. T. 648.

As to destruction of books on a dissolution, see sect. 222 of the Act of 1908, and as to the Court's power to declare this resolution void, see sect. 223, and *Spottisroode, Dixon & Hunting*, W. N. (1912) 48.

Mortmain.

Mortmain

By the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), and the Mortmain and Charitable Uses Act, 1891 (54 & 55

Act of 1733), land (including tenements and hereditaments corporeal or incorporeal, of any tenure, but not moneys secured on land or other personal estate arising from or connected with land) is not to be assured to or for the benefit of or acquired by or on behalf of any corporation in mortmain otherwise than under the authority of a licence of the Crown or of a statute for the time being in force; and if any land is so assured otherwise than as aforesaid, the land is to be forfeited to the Crown from the date of the assurance, and the King may enter upon and hold the land accordingly; but the Act of 1888 contains a proviso enabling the mesne lords to enter within a specified period.

A licence is not necessary in the case of a company registered for profit or to be taken to be registered under the Companies (Consolidation) Act, 1908, for by sect. 16 (2) of the Act it is expressly provided that the company shall be a body corporate, "with power to hold land." But an association *not for profit* cannot hold more than two acres without a licence. Companies Act, 1908, s. 19. Forty such licences were granted in 1910.

How far can a foreign corporation hold land here without licence? It is clear that under the Mortmain Act, 1888, it cannot hold land at all without Royal licence, but of course it can form a company here, and that company can hold land, and a foreign company can hold nearly all the shares in such company (*supra*, p. 45). This course has been adopted in some cases. As to foreign companies establishing a place of business in the United Kingdom, see, now, Companies Act, 1908, s. 274, and p. 118.

Trade Unions and Combines.

At common law trade unions were illegal, in the sense that the courts would not enforce the contracts of the members *inter se*, for such combinations were regarded as in restraint of trade, and contrary to public policy. The common law rule, as enunciated in *Hilton v. Eckersley*, 6 E. & B. 47, is that, *prima facie*, it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying on it (his trade) in accordance with his own discretion and choice. And see *Cullen v. Elvin*, 90 L. T. 840; *Russell v. Amalgamated Society of Carpenters*, (1910) 1 K. B. 506; affirmed by House of Lords (1912), W. N. 79; *Nidd v. General Union of Operative Carpenters*, 103 L. T. 45; *Osborne v. Amalgamated Society of Railway Servants*, (1911) 1 Ch. 540.

In *Hilton v. Eckersley*, *supra*, several manufacturers, with a view to protecting themselves against the combination of workmen, entered into an agreement as to regulating wages and hours of work, as to suspending work partially or altogether, and as to the management of their business by the decision of a majority of their number, and it

Trade unions
at common
law.

was held that the agreement was in restraint of trade, and was therefore not enforceable; and Crompton, J., was of opinion that it was a criminal conspiracy. That opinion was no doubt erroneous (*Mogul Steamship Co. v. McGregor, Gow & Co.*, (1892) A. C. 25, 39); but it required the Trade Union Acts, 1871 and 1876 (34 & 35 Vict. c. 31. and 39 & 40 Vict. c. 22), to remove the doubt. "Parliament," said Lord Macnaghten in *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants*, (1901) A. C. 426, "has legalised trade unions, whether registered or not. If registered, they enjoy certain advantages." And the case went on to decide that if a trade union committed a wrong by its agents, it could be sued for such wrong. This doctrine has recently been abolished by the Trade Disputes Act, 1906, c. 47—one of the most remarkable feats of modern democratic legislation—which provides that "an action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union, in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court."

For the purposes of these Acts the term "trade union" is defined by sect. 16 of the Act of 1876), as follows:—

"'Trade union' means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between master and master, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act [i.e., the Act of 1871] had not been passed, have been deemed to have been an unlawful combination by reason of some or one or more of its purposes being in restraint of trade"; but the Acts are not to affect

- (1.) Any agreement between partners as to their own business;
- (2.) Any agreement between an employer and those employed by him as to such employment;
- (3.) Any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade, or handicraft.

By sect. 2 of the Act of 1871, it is provided that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise; and, by sect. 3, that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. Sect. 4 provides that nothing in this Act shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing or

recovering damages for the breach of any of the following agreements, namely:-

1. Any agreement between members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ or be employed.
2. Any agreement for the payment by any person of any subscription or penalty to a trade union.
3. Any agreement for the application of the funds of a trade union
 - (a) to provide benefits to members, or
 - (b) to furnish contributions to any employer or workman not a member of such trade union in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union, or
 - (c) to discharge any fines imposed upon any person by sentence of a Court of Justice.
4. Any agreement made between one trade union and another, or
5. Any bond to secure the performance of any of the above-mentioned agreements.

But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful.

With reference to the above section it has been held that a trade union registered under the Act may be sued in its registered name *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants*, (1901) A. C. 426; *South Wales Miners' Federation v. Glamorgan Coal Co.*, (1905) A. C. 239. And that, notwithstanding the section, a member of a trade union may sue to restrain a misapplication of the funds of the union. *Yorkshire Miners' Assoc. v. Howden*, (1905) A. C. 256. A member cannot, however, sue to restrain the executive from imposing fines. *Mullett v. United French Polishers Society*, 91 L. T. 133; 20 T. L. R. 395. Nor can a widow of a deceased member enforce by action the benefits given her by the rules. *Russell v. Amalgamated Society of Carpenters*, House of Lords (1912), W. N. 79. 28 T. L. R. 276. As to alteration of rules, see *Burke v. Amalgamated Society of Dyers*, (1906) 2 K. B. 583.

The Acts provide for the registration of trade unions (see sects. 6 and 13 of the Act of 1871, and sects. 6 and 8 of the Act of 1876, and *infra*), and by sect. 5 of the Act of 1871, it is amongst other things provided that the Companies Acts, 1862 and 1867, now replaced by the Act of 1908 (see that Act, sect. 291), shall not apply to any trade union, and the registration of any trade union under any of the said Acts shall be void. See *Edinburgh and District Gravel Water, &c. Assoc. v. Jenkinson*, 5 F. 1159, Ct. of Sess., for use in point.

It follows, then, that it is not allowable to register, under the Act

Trade union
cannot be
registered as
a company.

of 1908, which expressly preserves (see sect. 294) the provisions of the Trade Unions Act, 1871, a company which is formed for trade union purposes, whether exclusively or in conjunction with other objects.

Thus, if it be desired to register a company for the purpose of regulating the prices at which the members of the company are to sell the goods manufactured or supplied by them respectively, or to regulate the wages to be paid by them respectively, or the output of their respective works, or the cases in which they shall concur in a lock-out or suspension of operations, difficulties at once arise; for, if the association appears to be a trade union, the Registrar will refuse to register it, and if he should, by oversight or error of judgment, register the association, the registration will, by virtue of the Act of 1871, be void, and sect. 17 of the Companies Act, 1908, does not, in such a case, make the Registrar's certificate of incorporation conclusive that the company is validly registered. *British Assoc. of Glass Bottle Manufacturers v. Nettlefold*, 27 T. L. R. 527. See p. 24, *supra*.

Presence of
some trade
union rule.

Sometimes an association, with general objects quite free from objection, is registered, notwithstanding the presence in the articles of a clause savouring of trades unionism or restraint of trade. In such case it would seem that the registration should hold good, but that the clause, as being in restraint of trade, will be invalid and cannot be enforced. See *Mineral Water Bottle Exchange and Trade Protection Society v. Booth*, 36 C. D. 465, C. A., where an article prohibiting each member from employing any employee of any other member without his assent was held invalid; *Urmston v. Whitelegg* (1875), 63 L. T. 455; on appeal, 55 J. P. 453, in which an article fixing the minimum price to be charged for sale of goods was held invalid; and see *Swaine v. Wilson*, 24 Q. B. D. 252, as to rules in part illegal; and *Cullen v. Elwyn*, 90 L. T. 840; 20 T. L. R. 490, where main object illegal. In *Cade v. Daly*, (1910) Ir. R. 306, it was held that an agreement between the members of an association of traders fixing the minimum prices of goods was legal, and was enforceable by injunction. But the decision appears to be inconsistent with the principles laid down by the House of Lords in *Russell v. Amalgamated Society of Carpenters*, 28 T. L. R. 276.

How to
arrange valid
co-operation.

Where, then, it is desired to limit the output or control the conduct of a number of undertakings, the best plan is to form a new company, which will acquire all the undertakings in question, and thus obtain the requisite control as owner. Sometimes, however, to vest all the undertakings in one company would be prejudicial, in the sense that it might destroy or detrimentally affect the goodwill of some or one of the businesses or invite competition, and, where this is so, it is very common to adopt the expedient of vesting each of the undertakings in a separate company, all the shares in which are taken by the new company or its nominees; and thus the new

company obtains absolute control over the sub-companies, and is in substance the owner of their separate undertakings.

Sometimes what is desired can be secured by a "joint purse" arrangement, in which several concerns join, and it is provided that the profits of each of the concerns shall for a term be pooled, that the pool shall be divided in specified proportions amongst the various companies, and that in the meantime they shall co-operate. The objection to such arrangements very commonly is that any one of the parties can, at any rate by liquidation or reconstruction, escape the restraint of the contract. See as to income tax in such cases, *Guest, Keen, &c. v. Nettlefold*, (1910) 1 K. B. 713. Joint purse.

Lastly, it is very common for a number of companies and persons to concur in an agreement savouring of trades unionism (e.g., to limit output, or fix prices, or resist labour dictation), well knowing that its provisions cannot be enforced, but relying on the disinclination of members to break faith, especially in view of the fact that the other members may be in a position to punish the breach of faith by special competition or otherwise. *Hilton v. Eckersley*, 6 E. & B. 47, 68, *supra*, p. 113. See also *Collins v. Locke*, 4 App. Cas. 674, in which case an agreement by several persons that orders of a particular character should be divided among them in rotation, and that if the party giving the order would not assent thereto none of them would act for him, was held to be invalid. Again, in *Mogul Steamship Co. v. McGregor*, (1892) A. C. 25, a number of shipowners banded together with a view to keeping up freights, and the combination was declared illegal by the House of Lords. "The agreement," said Lord Watson, "of which the appellants complain, left the contracting parties free to recede from it at their pleasure"; and in the same case Lord Bramwell said: "Let it be that each member had tied his hands; let it be that that was in restraint of trade. I think, upon the authority of *Hilton v. Eckersley* and other cases, we should hold that the agreement was illegal, that is, not enforceable by law." Unenforceable contracts.

And in *Chamberlain Wharf v. Smith*, (1900) 2 Ch. 605, a number of persons and companies, including the plaintiffs, having formed themselves into an association (unregistered) for keeping up the price of tea, the committee appointed under the rules expelled the plaintiffs for alleged breach of the rules, and the Court, holding the association to be a trade union and unlawful for want of registration, refused to grant the plaintiffs an injunction, as that would, it considered, be directly to enforce the rules.

On the other hand, an agreement between vendor and purchaser of goods providing that the purchaser shall not sell below a specified price is unobjectionable. *Elliman & Co. v. Carrington & Son*, (1901) 2 Ch. 275. See also pp. 381, 424, *infra*.

Although a company which is a trade union cannot be registered under the Act of 1908, cannot, that is to say, emancipate itself from the statutory restrictions of the Trade Union Acts, it by no means Contribution to trade union.

follows that the objects of a company to be registered under that Act may not include power for the company to join a trade union or to subscribe to a trade union, for, as we have seen, sect. 2 of the Act of 1908 authorizes the registration of a company for any lawful purpose, and the Trade Union Acts, 1871 and 1876, expressly provide that a trade union shall not be unlawful. No doubt, if the funds of a company are expended in subscriptions to a trade union, it may find that it can obtain no legal assistance in enforcing its rights, but it may well be worth the while of the company to run this risk.

Foreign Companies.

It has long been an anomaly that foreign companies should be at liberty to come here and do business without disclosing anything as to their constitution or financial resources. The Companies (Consolidation) Act of 1908 rectifies this.

Foreign
companies

Section 274 of the Act imposes certain requirements on companies incorporated outside the United Kingdom, which, on 1st July, 1908, has a place of business in the United Kingdom or afterwards establishes such a place of business. Such companies are required to file with the Registrar of Companies:—

- (a) a certified copy of the charter, statutes, or memorandum and articles creating the corporation and defining its constitution;
- (b) a list of the directors of the company;
- (c) the names and addresses of some one or more persons resident in the United Kingdom authorized to accept service of process and notices on behalf of the company.

In case of any alterations in any of these, notice of the alteration must be filed with the registrar (1).

Service on the persons made agents for service under (c) is to be sufficient (2).

Every such company must also file with the registrar an annual statement, in the form of a balance sheet, containing the particulars required to be given in its annual summary by a company registered in the United Kingdom with a share capital.

If the foreign company uses the word "Limited" as part of its name the section makes further requirements.

- (a) The company must, in every prospectus it issues inviting subscriptions for its shares or debentures, state the country in which it was incorporated.
- (b) It must conspicuously exhibit in every place in the United Kingdom where it carries on business the name of the company and the country where it was incorporated.
- (c) It must have the name of the company and of the country of its incorporation mentioned in legible characters in all bill-heads and letter paper, and in all notices, advertisements, and other official publications of the company.

These are just and reasonable conditions, to which no honest foreign trading company can fairly take exception; while to investors, or persons having dealings with the foreign company in the United Kingdom, they afford much-desired information and protection.

The section applies to every assurance company constituted outside the United Kingdom which carries on an assurance business within the United Kingdom, whether incorporated or not. See the Assurance Companies Act, 1909, s. 19. The words here are "carries on an assurance business." Having "a place of business," the words used in sect. 274, are not quite synonymous.

By sect. 275 of the Act, a company incorporated in a British possession which has filed with the registrar the documents and particulars specified in paragraphs (a), (b) and (c) of sub-sect. 1 of sect. 275 is to have the same power to hold lands in the United Kingdom as if it were a company incorporated under the Act.

Section 274, above referred to, is of particular importance in regard to income tax payable by foreign companies. In many cases such companies, acting here by agents, have escaped the tax, but now the obligation to register and have a definite place for service seriously affects the position. It has been held in several cases that a foreigner who carries on business in England through an agent is chargeable with income tax accordingly. *Erichsen v. Last*, 8 Q. B. D. 414; *Grainger v. Gough*, (1896) A. C. 325; *Watson v. Sandie*, (1898) 1 Q. B. 326; *Lovell v. Christmas, re Commissioners*, (1908) A. C. 46; *Crockston v. Inland Revenue*, (1911) S. C. 217, Ct. of Sess.; *American Thread Co. v. Joyce*, 28 T. L. R. 233, and *supra*, p. 95. It will be the company's duty, therefore, under the Act to make the requisite return, and it will be no defence to say "There is no one here having the requisite information." In order to escape, a foreign company will have to form a company here, and then deal with it as a principal, selling to it and buying from it. The tax will then be payable only on the profits made by the company so incorporated.

A foreign corporation can sue and be sued here. *Henriques v. General Privileged Dutch Co.*, 2 Raym. 1532; *Saccharin Corporation v. Reitmeyer & Co.*, (1900) 2 Ch. 659; *Badische Anilin und Soda Fabrik v. Basle Chemical Works*, (1898) A. C. 200. See further, Young on Foreign Companies and other Corporations.

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PROMOTERS.

CHAPTER II.

INTRODUCTORY NOTES.

The term "promoter" is familiar to the Courts of Law and to the general public, and has occasionally been used by the Legislature (sect. 38 of the Companies Act, 1867, now repealed, and sect. 3 of the Directors' Liability Act, 1890, replaced by sect. 84 (5) of the Act of 1908, and sect. 10, sub-sect. 1 (j), of the Companies Act, 1900, now sect. 81 (1) (j) of the Act of 1908), but it is not a "term of art," nor has any precise or satisfactory definition of the term been forthcoming; and accordingly such practical questions as these:—A. has done so and so in relation to a company, is he a promoter? B. is about to do so and so, will he be a promoter?—are constantly being raised and discussed amidst more or less doubt and difference of opinion. Yet to obtain a correct answer to such questions may be of the utmost importance—(1) because a promoter stands in a fiduciary position towards the company he promotes; and by virtue of such relationship comes under certain obligations and disabilities; and (2) because sect. 81 of the Companies Act, 1908, requires certain contracts with and facts as to promoters to be specified in prospectuses.

What is a
promoter?

In *Erlanger v. New Sombrero*, 3 App. Cas. 1268, Lord Blackburn said that the term "promoter" was "a short and convenient way of designating those who set in motion the machinery by which the Act of 1862 enables them to create an incorporated company"; and this, so far as it goes, is accurate; but it is not comprehensive enough. What was said by Bowen, L. J., in *Whaley Bridge v. Green*, 5 Q. B. D. 109, is a more adequate description: "The term 'promoter,' he said, "is a term not of law but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence."

*Erlanger v.
New Sombrero.*

But this statement again is open to the objection that it at once raises without answering the further question, what are those business operations? Moreover, it stops short at the incorporation of the company, whereas the floating of the company is clearly within the scope of the promoter's functions. It is not practicable, in fact, to

give a concise definition of the term "promoter" owing to its inherent complexity. Whether a person is or is not a promoter is a question of fact not of law, and must be determined with due regard to all the circumstances. *Whaley Bridge Printing Co. v. Green* 5 Q. B. D. 111; *Bagnall v. Carlton*, 6 Ch. D. 381; *Emma Silver Mining Co. v. Lewis*, 4 C. P. D. 386; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 936; *Baker v. Plaskit*, 5 C. B. 262; *Olympia, Ltd.* (1898) 2 Ch. 181; and *Leeds and Hanley Theatres of Varieties* (1902) 2 Ch. 809. What these circumstances are or may be is illustrated in the following decisions.

Twycross v. Grant.

In *Twycross v. Grant*, 2 C. P. Div. 169, the defendants had framed a scheme for the formation of the company, found the directors, qualified them, paid the preliminary expenses, and arranged the contracts and were to receive large remuneration from the vendors; and it was held beyond doubt that they were promoters. In that case Cockburn C. J., considered that the term "promoter" meant "one who undertakes to form a company with reference to a given project, and to set it going, and who takes the necessary steps to accomplish the purpose."

Bagnall v. Carlton.

So, in *Bagnall v. Carlton*, 6 C. Div. 371, the proprietors of the concern entered into an agreement to sell for 290,370*l.* to Carlton's nominee, acting as trustee for the company, and entered into a separate agreement with Carlton to pay him a commission of 60,000*l.* for forming and floating the company, which he undertook to do. Carlton entered into an agreement with Grant that the latter should carry the matter through and take the commission, less 20,000*l.* The solicitors of the proprietors were to have a commission from them of 1,500*l.* if the sale was effected, and the proprietors' solicitors and the proposed directors, Carlton and his associate Richardson, all took part in the formation of the company and the settlement of the prospectus.

In this case Bacon, V.-C., said: "Without attempting to define the word 'promoter' in any more certain manner than the occasion requires, it will be sufficient to consider whether what was undertaken and done by the several defendants can be referred to in any other character than that of promoter. It is a fact undisputed that, from the very first suggestion of a sale of the business and property the subject of this action, it was the conviction and intention of all the persons engaged or interested in the matter that they should be sold to a company. It may be truly said that the sale and formation of the company formed one complete idea. With this intention all the negotiations between the proprietors' solicitors, Grant, Richardson, and Carlton, were carried on; the prospectus was prepared by the solicitors and submitted to Carlton, and by him to the proprietors, and known to and not disapproved by them, since one of them made pencil alterations in it. In the face of these plain facts I can find no room for doubting that the persons I have named, each

and every one of them, must be taken to have been promoters of the company.'

In *Emma Mining Co. v. Lewis*, 40 L. T. 168; 4 C. P. D. 396, the defendants had assisted the owner of a mine in his endeavour to sell to a company to be formed to purchase it; there was an understanding or arrangement for their remuneration out of the shares to be received from the company; the defendants left the getting-up of the company to the owner; allowed themselves to be referred to in the prospectus for information concerning the mine, and, in pursuance of the understanding, received some paid-up shares. The jury found that they were promoters, and the Court refused to set aside the verdict.

In *New Sombbrero Co. v. Erlanger*, 5 C. Div. 73; 3 App. Cas. 1218, the defendant and nine other persons formed a syndicate or partnership to buy the property with a view to the re-sale thereof at a profit. Erlanger, acting on behalf of the syndicate, formed the company, procured the directors, settled the contracts and prospectus, and advertised and circulated the same. It was held that all the members of the syndicate were promoters.

The Lagunas Nitrate Company was promoted and formed by the directors of another company called the Lagunas Nitrate Syndicate in order to buy property belonging to the syndicate. The directors of the syndicate in promoting and forming the company were acting within their powers as such directors. Lindley, M. R., said: "The syndicate therefore, as a company, may be properly described, and ought to be regarded, as the promoter, by their directors, of the nitrate company. The syndicate is therefore responsible for the acts and omissions of its directors in promoting and forming the nitrate company." *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, 423.

Again, in *Emma Mining Co. v. Grant*, 11 C. D. 918, the defendant Grant obtained from the vendors an agreement that they should sell the mine to a company to be formed by him. He then formed a company, procured the directors, agreed to sell the mine to a nominee of his own, purporting to act as agent for the company, and procured the adoption by the directors of that contract. Upon the trial of an issue whether Grant was a promoter, it was held that he was. Jessel, M. R., before whom the issue was tried, after referring to what the defendant had done, said (p. 936): "Now it has been decided by a very great number of cases that a person in that position" "is a promoter. It is not necessary that he should have done all these things to make him a promoter—even some of them would be sufficient—but he is undoubtedly a promoter."

In *Lydney and Wigpool, &c. Co. v. Bird*, 33 C. Div. 85, the defendant Bird, pursuant to an agreement with the owners of the property, and for a commission of 10,800*l.*, procured the formation of the company, took an active part in the preparation of its prospectus

and memorandum and articles of association, in the appointment of its first directors, and in the appointment of its secretary, fixed the purchase-money of the property at 100,000*l.*, and stipulated for the payment of the 10,800*l.* commission to his own firm. Pearson, J., held that he was not a promoter, and acted merely as agent of the vendors; but, on appeal, the Court held that he was a promoter.

*Nant-y-Glo
and Blaina Co.
v. Grave.*

Again, in *Nant-y-Glo and Blaina Co. v. Grave*, 12 C. D. 738. Richardson, the principal promoter, had written to the defendant a letter, in which "he explained to him the operation which he then desired to effect for the promotion of the company, and suggested the desirability of having for directors persons of weight and consideration—persons whose names would be likely to inspire confidence in the public—and asked Mr. Grave to become a director." Mr. Grave agreed to become a director on the terms of receiving the remuneration which the articles provided, namely, 200*l.* a year, and a further proportionate division of profits, if there should be profits, and also that he should have fifty of the deferred shares which at that time had been parted with by the company, or agreed to be parted with by the company. "I do not think" (said Bacon, V.-C.) "that it would be forcing the law of this case in the slightest degree to say that, from the time the letter was received and adopted and acted on, Mr. Grave became as much a promoter of this company as any other person engaged in it."

*Leeds and
Hanley
Theatres.*

In *Leeds and Hanley Theatres of Varieties*, (1902) 2 Ch. 809, an incorporated syndicate procured a person (acting, in fact, as its trustee or nominee) to enter into an agreement to purchase certain theatres with a view to the resale thereof to a company to be formed. The property was conveyed to the syndicate's trustee or nominee, as the ostensible purchaser, and was afterwards, by the direction of the syndicate, sold to the proposed company at an increased price. The promoters formed the company, nominated the first directors of the company, and provided the qualification of some of them. It was found as a fact that from first to last the syndicate had acted as promoters of the proposed company. "The conclusion" (said Vaughan Williams, L. J.) "at which I arrive, taking all the facts together, is that, from first to last, the syndicate were promoters; that from first to last their intention was to buy the music-halls for the purpose of selling them to a company which they should create. They intended from the first to do that which they ultimately did: to create a board of directors which should be under their control and carry out their desires, which it is abundantly clear, on the evidence, was to sell the music-hall which they had bought for 24,000*l.*—an inflated price."

**Examples of
promotion.**

It is obvious, therefore, that a person who originates the scheme for the formation of the company, has the memorandum and articles prepared, executed and registered, and finds the first directors, settles the terms of the preliminary contracts and prospectus (if any), and makes arrangements for advertising and circulating the prospectus

and placing the capital, is emphatically a promoter in the fullest sense. He controls the formation and future of the company, and it is this control which lies at the root of the fiduciary relation of the promoter to the company.

But a person who has done much less than this—taken a much less prominent part—may bring himself within the meaning of the term and may be held liable as a promoter.

For instance, the following persons, it is submitted, are also promoters:—

- (1) A person who on his own account, or on account of himself and others, prepares or causes to be prepared a memorandum and articles of association of the proposed company, gets them subscribed, and causes them to be registered, even though he acts no further in the matter (e.g., leaves it for the directors to float the company). He has created a company.
- (2) A person who originates the scheme for the formation of the company, and arranges the terms of the preliminary contract (e.g., for the sale to the company, or to a trustee for the company, of the business the company is to be formed to acquire), and is in a position to exercise dominion in the formation of the company.
- (3) One of several persons carrying on together the work of promotion, for in many cases the work of promotion is carried on by several persons in co-operation. Thus, one may provide the requisite funds, another may provide the directors, or himself act as a director, another may arrange a contract with the vendor; and there may be others taking more or less part in the formation and floating of the company. In such a case the term "promoter" extends to each of the several persons so co-operating.

Moreover, the following persons may be promoters:—

- (4) The vendor to a company is frequently a promoter or one of the promoters, and accordingly it is very common in a prospectus to find the words, "the vendor is the promoter of the company, and he has fixed the price at £ . . .", but, of course, there are many cases where the vendor is independent and has nothing to do with promotion.
- (5) A person who floats, or assists in floating, the company although he has taken no part in its formation, may be a promoter. *Emma Mining Co. v. Lewis*, 4 C. P. D. 390, 407; see *supra*, p. 123. As to the meaning of "floatation," see *Gifford v. Willoughby's Mashonaland Expedition Co* 16 T. L. R. 24; *Torco Exploring Syndicate v. Kelly*, (1900) A. C. 612.

- (6) *In some cases a person who takes part in the formation of the company as agent or servant of another (as, for instance, when he is to have the promoter's remuneration) or have some voice or control in the forming of the company: for "very little will make persons promoters of a company if it can be seen that they were merely doing something in the way of speculation for their own interest, and not acting merely as agents or others."* Per Pearson, J., *Lydney and Wigpool Coal v. Bird*, 31 C. L. 328, 339. So, too, a director of a promoting company may be a promoter himself if he acts otherwise than as such director. *In re Darby, Ex parte Brougham*, (1911) 1 K. B. 95.

In fact, the term "promoter" may include any person who, in the words of the Companies Winding-up Act, 1900, now repealed, and by sect. 215 of the Act of 1908, "has taken part in the formation or promotion of the company."

Not promoter
who is merely
agent or
servant

But a person who takes *merely* a subordinate part in the formation of the company as agent or servant of another is not a promoter, e.g., the solicitor, the printer, the advertising agent. The reason is that he has not the moulding of the company in his hands. He cannot, like a person who frames the memorandum and articles or preliminary agreement, fashion it to serve his private end.

Thus, "promoter" as used in sect. 84 of the Companies Act, 1908 (re-enacting the provisions of the Directors' Liability Act, 1890), is not, by the express words of sub-sect. (5), to include "any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company."

No doubt, in a sense, such persons might be said to promote the company, just as a sandwich-man who carries about a board advertising a company in one sense promotes the company. Nevertheless they are not, in common parlance, termed, or in law regarded as, promoters. They are merely the agents or servants of the promoters. See *Great Western Fertilisers*, 49 L. T. 20. And the same may be said of brokers, bankers and solicitors, who, with their associates, are named as such in the prospectus.

In practice there is usually very little difficulty in the question, for those who are interested in the formation of the company rarely confine themselves to equivocal statements, and not always so, and where there are several persons engaged in the promotion of the company who are obviously promoters, and some persons are assisted in the work more or less, by others, the question whether these subordinate allies are or are not promoters may be of great difficulty; and not the less so where, as not uncommonly happens, they are extremely anxious to disclaim the name of promoter.

In determining whether certain acts have constituted or will

Functions of a Promoter.

Functions

The functions of a promoter sufficiently appear from what has already been stated; and it is obvious that the efficient discharge of those functions may be of vital importance to the company and its shareholders; provided, of course, that the undertaking, to prosecute which the company is formed, be one of a *bonâ fide* character, and has in it the elements, at any rate, of success. For instance:—

- (1) The lines on which the company is to come out are of primary importance. Take the case of a going concern: Is the capital to be large or small? What is to be offered to the public for subscription—ordinary shares, preference shares, debentures, or debenture stock, or some or all of these? How is the vendor (if any) to be paid? Is there to be an independent report as to the past profits of the concern, or any valuation of the property sold? How are the directors to be remunerated? How are the preliminary expenses to be satisfied? The determination of these matters is material not only as bearing on the future of the company, but as affecting the terms of the prospectus, and in many cases of the articles of association.
- (2) The prospectus.—The successful preparation of this document is of the highest importance. A scheme may be good, but if launched with an unskillfully prepared prospectus, will often be neglected by investors; while, on the other hand, a scheme which offers no great attraction in itself may, with the assistance of a well-framed prospectus, obtain ample support from the public.
- (3) The directors.—The selection of the directors is another matter of great importance. Are they to be competent businessmen, though unknown to fame; or are they to be ornamental directors with a title or social reputation, and little else to recommend them; or are there to be some of both kinds; or are they to be directors who are both competent businessmen and also well known as persons of position and integrity? Who, again, are to be the solicitors and auditors? There can be no question that the names of the directors, solicitors, and auditors largely influence the public as to subscribing. It is assumed, and in most cases quite rightly, that a man of integrity and position will not lend his name to an undertaking which the public are invited to subscribe to unless he is satisfied as to its *bonâ fides*.
- (4) The terms of the memorandum and articles of association are very material, and must be framed to accord with the prospectus, must give practical effect and free play to the scheme on which the company is to be formed, and must

contain all the requisite provisions for the protection of the parties interested, without anything open to hostile criticism.

- (5) The preliminary contracts—*e.g.*, for the acquisition of the business or property to acquire which the company is started—are also of vital importance. On what basis is the business or property in question to be acquired? Is the price to be high or low? Is it to be paid in cash, shares, debentures, or otherwise? Is the company to take over liabilities? If so, have those liabilities been ascertained, or is the company to be asked to make a leap in the dark? Is the vendor to be at liberty to compete in the business with the company? Is there to be power to rescind the contract if the company does not float? Is the company or the vendor to pay the preliminary expenses?
- (6) Underwriting.—Is the capital, or at least the minimum subscription, to be underwritten before the company is brought out? If so it may materially assist the floating of the company.

Profit or Remuneration of Promoters.

The professional promoter and the occasional promoter always, and the promoter *pro hac vice* sometimes, expects to make or obtain some profit or advantage out of or in relation to the transaction, and no one can object to such profit or advantage where there is good faith and due disclosure, and where the company promoted derives benefit from the promotion; for "the services of a promoter," as Lord Hatherley, L. C., said in *Touche v. Metropolitan, &c. Co.*, 6 Ch. 671, "are very peculiar. Great skill, energy, and ingenuity may be employed in constructing a plan and bringing it out to the best advantage."

Remuneration.

The nature and extent of the profit or remuneration, and the mode of securing it, are usually settled by the promoters themselves. The following are some of the modes commonly adopted:—

Different modes of remuneration.

- (1) The promoters agree with the proprietor of some going business concern or other property that they, the promoters, will form and float a company to acquire the same, and the vendor in consideration of such promotion services agrees to give the promoters a commission, or a portion of the consideration for the sale when received.
- (2) The promoter, having purchased property before he becomes a promoter, subsequently forms a company and re-sells the property to the company at a profit, or sells the benefit of his contract to purchase the property.
- (3) The promoters agree to pay the preliminary expenses or place a certain number of shares, in consideration whereof the company allows them a commission on the shares placed or

on the nominal amount of the capital. See sect. 89 of the Companies Act, 1908, reproducing sect. 8 of the Companies Act, 1900, *infra*, p. 279.

- (4) The capital consists in part of a small number of shares, *e.g.*, 100 at £1. each. These shares are called (a) "deferred" or (b) "founder" shares, and a right to a certain share of the surplus profits is annexed thereto, *e.g.*, one-third after paying a 6 per cent. dividend on the other shares. By agreement between the company and the promoters these shares are sometimes issued as fully paid up, in consideration or part consideration of the promoters paying the preliminary expenses, or making over either a contract or the benefit of pending negotiations. There is no objection to this now a company can accept in payment of shares anything which they honestly think the equivalent of cash. Sometimes the promoters subscribe the memorandum of association for the deferred or founders shares, and pay for them in cash, so as to avoid the necessity for any other contract.
- (5) Sometimes promoters are remunerated by an option to take as a "call" of a certain portion of the company's issued shares at par, or at a low premium within (say) a year or so. As to the effect of a voluntary winding-up on such an option, see *Re South African Trust Co., Ex parte Hirsch* (1896), 74 L. T. 769.
- (6) A contract is made under which the promoters receive from the company a commission, provided a certain number of shares are taken up within a certain period. See sect. 89 of the Companies Act, 1908, reproducing sect. 8 of the Companies Act, 1900.
- (7) The articles of association authorize or direct the directors to pay a specified sum to the promoters in respect of their services in promoting the company.

In estimating whether directors have given a proper price for property acquired by the company it is very material whether the price is a price paid in cash or in shares, the value of the consideration in the latter case depending on an uncertain event, the success or failure of the company. *Re Brazilian Rubber Plantations* (No. 1), (1911) 1 Ch. 422.

Sometimes the promoter is a registered company or syndicate carrying on the business of promoting companies or formed with a view to the promotion of the particular company. As to this situation, see p. 139, *infra*.

As to the obligation on the part of promoters to disclose their profit, see *infra*, p. 133.

Fiduciary Position towards Company.

The promoters of a company, it is now well settled, occupy a fiduciary position towards the company they promote. "They stand," said Lord Cairns, in *Erlanger v. New Sombrero Co.*, 3 App. Cas. 1236, "undoubtedly in a fiduciary position towards the company. They have in their hands the creation and moulding of the company: they have the power of defining how and when, and in what shape and under what supervision, it shall start into existence and begin to act as a trading corporation." And in the same case, Lord Blackburn (at p. 1268) said that the Act of 1862 "gives them an almost unlimited power to make the corporation subject to such regulations as they please, and for such purposes as they please, and to create it with a managing body whom they select, having such powers as they choose to give to those managers. . . . I think," he goes on, that "those who accept and use such extensive powers are not entitled to disregard the interests of that corporation altogether. They must make a reasonable use of the powers which they accept from the Legislature . . . and consequently they do stand, with regard to that corporation, when formed, in what is commonly called a fiduciary relation to some extent."

Fiduciary position.

In other words, the power of a promoter and his controlling influence over the destinies of the company carries with it a correlative responsibility, and this responsibility equity gives effect to under the doctrine of the fiduciary relation of the promoter with its ancillary obligations.

In the case of guardian and ward, parent and child, priest and penitent, solicitor and client, and in divers other cases of confidential relationship in which one person was in a position to exercise influence over another equity had long ago intervened to restrain an abuse of the influence but it was not until *Erlanger v. New Sombrero* (*ubi supra*) that it was decided that an analogous relation existed between the company and the promoter, by reason of the latter's controlling influence.

Commencement of Fiduciary Relationship.

The fiduciary relationship of the promoter commences when he begins to promote or act on behalf of the proposed company. See *Gluckstein v. Barnes*, (1900) A. C. 240; *Tyrell v. Bank of London*, 10 H. L. C. 26; *Hitcham v. Congreve*, 1 Russ. & My. 150; *Emma Silver Mining Co. v. Grant*, 11 C. D. 918, 936; *Leeds and Hanley Theatres of Varieties*, (1902) 2 Ch. 809. Thus, if he enters into negotiations for the acquisition of property or rights on behalf of an intended company which is subsequently formed, he is to be taken to have been a promoter *ab initio*. So, too, if he gets other persons

When relationship commences.

to agree to subscribe to a proposed company, or to become directors thereof, he is thenceforth in a fiduciary position to the company.

If he arranges for underwriting the capital of the intended company, or for placing it, he is from the moment he does so a promoter.

If he procure the preparation of the memorandum and articles of the proposed company, and keeps them in his own desk without communication to outsiders, no doubt he does not thereby make himself a promoter, but it is apprehended that so soon as he submits them to proposed directors or subscribers he becomes a promoter from that time, supposing the company to be subsequently formed.

When several persons agree to form a company, they are thereafter in a fiduciary position to the subsequently formed company. *Gluckstein v. Barnes*, (1900) A. C. 240. But the mere fact that a person, or persons, buys property with the notion that it may be desirable to form a company, does not make him a promoter. A projector is not, as such, a promoter.

Thus, in *Erlanger v. New Sombrero Co.*, 3 App. Cas. 1218, a syndicate of promoters entered into a contract to buy an island rich in phosphates, and within a month they agreed to sell it to a trustee for the intended company, which they subsequently formed. Nevertheless, Lord Cairns said that it was "clear that the syndicate, in entering into this contract, acted on behalf of themselves alone, and did not at that time act in, or occupy, any fiduciary position whatever. It may be that the prevailing idea was, not to retain or work the island, but to sell it again at an increase of price, and very possibly to promote or get up a company to purchase the island from them; but they were, as it seems to me, after their purchase was made, perfectly free to do with the island whatever they liked." *Ibid.* 1235

Again, in *Ladywell Co. v. Brookes*, 35 C. Div. 400, A., B. and C. entered into an agreement to purchase certain mines, and the correspondence prior to the agreement showed that they contemplated the formation of a company to acquire and work the mines; nothing, however, had been done in the matter of the formation of any particular company before the agreement was made. Shortly afterwards the company was formed by A., B. and C., and they re-sold the mines to the company. It was held that at the date of the first agreement, A., B. and C. were not in a fiduciary relation to the company. In *Gover's case*, 1 C. Div. 182, again, A. entered into an agreement with B. to sell to him patents for 65,000*l.*, payable partly in cash and partly in shares, in a company which B. agreed to form, and if he failed the agreement was to be void. Afterwards B. entered into an agreement with a trustee for an intended company for re-sale. It was considered by James, Mellish, Bramwell, and Brett, L. J.J., that at the time the first agreement was made B. was *not* a promoter.

The question when the status of a promoter was first acquired is occasionally one of great moment, especially where the promoter

resells to the company at a profit property recently acquired by him; for if he bought before he became a promoter he may resell to the company at a profit, subject only to making due disclosure (see *Erlanger v. New Sombbrero Co.*, *supra*). Whereas, if he bought after beginning to promote, the position is infinitely more onerous. The company in such case is entitled to treat the promoter as having acted on its behalf in acquiring the property, and to insist on taking it at the price the promoter gave for it. *Hitcham v. Congreve*, 1 Russ. & My. 150; *Tyrell v. Bank of London*, 10 H. L. C. 26; *Ambrose Tea Co.*, 14 C. D. 39; *Cape Breton Co.*, 29 C. D. 795; *Ladywell Mining Co. v. Brookes*, 35 C. D. 409. And no disclosure on the part of the promoter will enable him to retain the profit, for the property is in equity not his but the company's; that is to say, it is impressed in the promoter's hands with a trust for the company.

The status of a promoter is not necessarily terminated by the formation of the company. "Of course, if a governing body, in the shape of directors, has once been formed, and they take, as I need not say they may, what remains to be done in forming the company into their own hands, the functions of the promoter are at an end. But so long as the promoters are permitted by the directors to carry on the work of formation, the latter remaining passive, so long, I think, would a jury be warranted in finding that what was done by them was done as promoters." Per Cockburn, C. J., *Twyeross v. Grant*, 2 C. P. Div. 469, 541; and see *Emma Mining Co. v. Lewis*, 4 C. P. D. 396.

Termination
of promoter-
ship.

The existence of a fiduciary relationship has important consequences, of which the following are the most notable:—

Consequence
of fiduciary
relationship.

- (1) A promoter may not obtain any *secret* profit at the expense of the company he promotes (*e.g.*, any share or part of the purchase-money payable by the company), and, if he does so, the company, on discovering the fact, can compel him to surrender any such profit so made in violation of his duty to the company.

The moment a man is in a fiduciary position, however that fiduciary position may arise, he must, before he can retain a profit for him-self, deal with his principal on the footing of making a full and fair disclosure of everything material to the dealing or transaction in which he acts in a fiduciary capacity." Per Jessel, M. R., *Emma Mining Co. v. Grant*, 11 C. D. 937; and see *Bagnall v. Carlton*, 6 C. Div. 371; *Lydney and Wigpool Co. v. Bird*, 33 C. D. 85; *Whaley Bridge Co. v. Green*, 5 Q. B. D. 109; *Emma Mining Co. v. Lewis*, 4 C. P. D. 396. In all these cases promoters, by secret arrangement with the vendors to the company, obtained a substantial share of the proceeds of sale or commission for their services in the promotion, and were held accountable to the com-

pany for the same. Other cases are *Mann v. Edinburgh Northern Trams Co.*, (1893) A. C. 69, in which promoters were held accountable for promotion money secretly obtained through contractors for the company; *Gluckstein v. Barnes*, (1900) A. C. 240, in which promoters, whilst pretending to disclose their profits, kept undisclosed some extra profits. See also *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, 409; and *Mayor of Salford v. Lever*, (1891) 1 Q. B. 168; *Grant v. Gold Exploration &c. Syndicate*, (1900) 1 Q. B. 232; *Re Lady Forrest (Murchison) Gold Mine*, (1900) 1 Ch. 582; *Re Leeds and Hanley Theatres of Varieties*, (1902) 2 Ch. 809.

- (2) *Primâ facie* a promoter who proposes to make a contract, whether by way of sale or otherwise, with the company he promotes, or to rely on disclosure to the directors as a justification for obtaining a profit for which he as a promoter would otherwise be accountable, must provide the company with an independent executive able to protect the company and exercise on its behalf an independent and intelligent judgment. See per Lord Cairns, *Erlanger v. New Sombrero Co.*, 3 App. Cas. 1236, and *Gluckstein v. Barnes*, (1900) A. C. 240.

What constitutes an independent executive has not been decided, but it is obvious that a director who is himself one of the promoters, or is under obligations to the promoters, or is to be remunerated by them, cannot be regarded as independent. *Gluckstein v. Barnes*, *supra*.

Independence is a question of fact, and all the circumstances will be regarded. The mere fact that a person is requested by the promoters to become a director does not deprive him of the character of independence. He may still do his duty. The fact that a director puts his own money into the concern affords some indication of independence, but this may go for little if the remuneration attached to the office is relatively large. The conduct of the directors may throw light on the question. In acting on behalf of the company, have they taken any of the reasonable precautions which a prudent man takes with regard to his own affairs? If not, it may not require much to prove their want of independence.

A director is not relieved from the duty of exercising an independent judgment on a contract proposed for adoption by the company though the company was formed for the express purpose of carrying out the particular contract. *Brazilian Rubber Plantations* (No. 1), (1911) 1 Ch. 425.

"Apparently," said Lord O'Hagan, in *Erlanger v. New Sombrero Co.*, 3 App. Cas. 1256, "there was no inquiry as to the enormous advance in the price . . . no consideration of the state of the property, and no intelligent estimate of its capabilities and prospects. If the directors had been nominated merely to ratify any terms the

promoters might dictate, they discharged their function; if it was their duty, as it certainly was, to protect the shareholders, they never seem to have thought of doing it. Their conduct was precisely that which might have been anticipated from the character of their selection, and taking that conduct and character together, I concur in, I believe, the unanimous opinion of your lordships that such a transaction ought not to be allowed to stand." And see *Gluckstein v. Barnes*, (1900) A. C. 240.

But it appears to be now settled that the rule (2) does not apply in the case of a private company, where all the members are cognizant of the facts and where it is not intended to appeal to the public. *Salomon v. Salomon & Co.*, (1897) A. C. 22; *British Seamless Paper Box Co.*, 17 C. D. 467; *Postage Stamp & Co.*, (1892) 3 Ch. 566; *Felix Hadley, Ltd. v. Hadley*, 77 L. T. 131; *Re Sale Botanical Gardens*, 78 L. T. 368; *Innes & Co.*, (1903) 2 Ch. 254. Nor, it would seem, is it applicable to the case of a public company, in which, by the articles and prospectus, full disclosure of the facts is made to all the members. *Volenti non fit injuria*. The shareholders in such a case must be taken tacitly to assent to the promoters making a profit at their expense. This is the theory of the law.

In private companies

"If every member of the company, every shareholder, knows exactly what is the true state of the facts, which, for this purpose, must be assumed to be the case here, Vaughan Williams, J., conclusion seems to me to be inevitable: that no case of fraud upon the company could be established." Per Lord Halsbury, *Salomon v. Salomon & Co.*, (1897) A. C. 33; and see per Lord Watson to the same effect, p. 37.

The following extracts bear on this point:

"It was urged that the price of the property was not fixed or considered by an independent board of directors; and that, in this respect, the transaction was improper and fraudulent. This argument seems to be based on a misconception of the decision in *Erlanger v. New Sombrero, &c. Co.* (1878), 3 App. Cas. 1218: where the facts were very different. In the present case, it was not disputed that every single shareholder was perfectly aware of all the circumstances attending the formation of the company, and that nobody was or could have been deceived." Per Lord Macnaghten, *Laroque v. Beauchemin*, (1897) A. C. 364.

"Of course, one can easily conceive that the thing might have been a mere sham, or evasion, or trick, to get rid of the effect of the Act of Parliament; but any suggestion of sham, or fraud, or deceit, seems to be entirely out of the question in this case. Everybody in the company knew of the transaction; every shareholder of the company was present and was a party to the resolution. There was no deceit practised on any creditor, nor was there any registration of these shares, except as shares paid up. That seems to me to dispose of the case." Per James, L. J., *Spargo's case*, 8 Ch. 413.

"One of the learned judges asserts, and I see no reason to question the accuracy of his statement, that creditors never think of examining the register of debentures; but the apathy of a creditor cannot justify an imputation of fraud against a company, or its members, who have provided all the means of

information which the Act of 1862 requires; and, in my opinion, a creditor who will not take the trouble to use the means which the statute provides for enabling him to protect himself, must bear the consequences of his own negligence." Per Lord Watson in *Salomon v. Salomon*, (1897) A. C. p. 40.

"Nor was the absence of any independent board material in a case like the present. I think it is an inevitable inference from the circumstances of the case that every member of the company assented to the purchase; and the company is bound, in a matter *intra vires*, by the unanimous agreement of its members. In fact, it is impossible to say who was defrauded." Per Lord Davey, *Salomon v. Salomon & Co.*, (1897) A. C. 57.

It is a "well settled principle" that "a company when registered is a corporation capable, by its directors, of binding itself by a contract, with themselves as promoters, if all material facts are disclosed. *Salomon v. Salomon & Co.*, (1897) A. C. 22, is the leading authority for this principle." Per Lindley, M. R., in *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, 422. And at pp. 425, 426, he says, "Notwithstanding all that has been said in *Erlanger v. New Sombrero Phosphate Co.* about the duties of the promoters of a company to furnish it with an independent board of directors, that decision does not require, or indeed justify, the conclusion that if a company is avowedly formed with a board of directors who are not independent, but who are stated to be the intended vendors, or the agents of the intended vendors, of property to the company, the company can set aside an agreement entered into by them for the purchase of such property simply because they are not an independent board. . . . After *Salomon's case*, I think it impossible to hold that it is the duty of the promoters of a company to provide it with an independent board of directors, if the real truth is disclosed to those who are induced by the promoters to join the company. Treating promoters of companies as in a fiduciary relation to them, and as having a power of appointing trustees (namely, directors), I cannot treat companies or their shareholders as so many *cestuis que trust* under disability, nor even as *cestuis que trust* for whom trustees are appointed without their consent."

But the disclosure by the promoters must be a real disclosure to the persons interested—the shareholders—and not a mere sham. Where "gentlemen set about forming a company to pay them a handsome sum for taking off their hands a property which they had contracted to buy with that end in view . . . appoint themselves sole guardians and protectors of this creature of theirs, half-fledged and just struggling into life, bound hand and foot while yet unborn by contracts tending to their private advantage, and so fashioned by its makers that it could only act by their hands and only see through their eyes," and the company goes to the public for share subscriptions, "'disclosure' is not the most appropriate word to use when a person who plays many parts announces to himself in one character what he has done and is doing in another. To talk of disclosure to the thing called the company, when as yet there were no shareholders, is a mere farce. To the intended shareholders there was no disclosure at all." Per Lord Macnaghten, *Gluckstein v. Barnes*, (1900) A. C. 240, 248, 249.

The Act of 1908 now makes provision, in sects. 81, 82, for the fullest disclosure as regards vendors to the company.

- (3) Once the promoter has commenced the promotion he must give to the company the benefit of any subsequent contract for the acquisition of property which the company, when formed, buys; *e.g.*, if, after beginning to promote, he enters into a contract to purchase property, he cannot properly sell to the company at a higher price than he gave without due disclosure (not merely of the price he gave, but of the fact that the company is entitled to take the property at that price), and if he do, the company, on discovering its rights, may either, at its option, rescind the contract or compel the promoter to surrender his profit (see *supra*, p. 133), or may compel him to pay the company compensation for his breach of duty. *Leeds and Hanley Theatres of Varieties*, (1902) 2 Ch. 809. And in such cases the fact that it has become impossible to rescind does not affect the company's alternative rights. See *supra*, p. 133, and *infra*.

There is nothing to prevent persons from buying property with a view to reselling it to a company; but if they once become promoters of a company which is to be formed to acquire a particular property, they cannot afterwards acquire that property for themselves and sell it to the company at a profit: the company is entitled to say, "You were acting for us; you were in a fiduciary position as regards this property, and now, therefore, as you have purported to sell this to us, we are entitled to take it at the price you originally gave for it." See *Ladywell Mining Co. v. Brookes*, 35 C. Div. 400; and *Cape Breton Co.*, 29 C. Div. 795, approved by the Privy Council in *Burland v. Earle*, (1902) A. C. 83; *Bank of London v. Tyrell*, 10 H. L. C. 26; *Erlanger v. New Sombrero Co.*, 5 C. D. 73.

- 1) Where a person acquires property or rights on his own account, and prior to the time when he becomes a promoter, he is at liberty to re-sell at a profit to the company he promotes provided he performs his duty to the company by making full disclosure to it of the material facts, and of the nature and extent of his interest. If he commits a breach of this duty, the company, on discovering the facts, may rescind the contract or may compel him to pay damages for his breach of duty. See cases, *supra*, p. 133.

According to the older cases, where rescission was impossible, *e.g.*, by reason of the property having been sold, forfeited or lost, the company was not entitled, as an alternative, to compel the promoter to account for his profit on the sale. However, in *Bentlinck v. Fenn*, 12 App. Cas. 652, Lord Macnaghten considered that a person in a fiduciary position committing a breach of his duty to disclose, though he might not be accountable for profits, would be liable to pay damages for such breach of duty even where rescission was imprac-

licable. And this view in relation to promoters was adopted by the Court of Appeal in *Leeds and Hanley Theatres of Varieties*, (1902) 2 Ch. 809. In that case rescission was impracticable; yet it was held that the promoters were liable to pay damages to the company for the breach of their duty to disclose. This decision, in effect, overrules *Lady Forrest (Murchison) Gold Mine*, (1901) 1 Ch. 582, and practically disposes of the difficulty raised in the earlier cases above referred to.

(5) A promoter who is not a real owner or part owner may not concur as an ostensible owner in a sale to the company, and if he violates this rule he commits a breach of his duty and misrepresents his position. *Westmoreland Green, &c. Slate Co.*, (1893) 2 Ch. 612.

(6) A promoter must use his position and powers fairly and reasonably, and in the interests of the company, and must abstain from exercising undue influence and, *à fortiori*, from fraud. *Gibson v. Jeyes*, 6 Ves. 278; *Huguenin v. Baseley*, 14 Ves. 273; *Erlanger v. New Sombrero Co.*, 3 App. Cas. 1218; *Gluckstein v. Barnes*, *supra*.

(7) A promoter who proposes to sell his property to the company he promotes, or otherwise to obtain some advantage from the company, cannot consistently with his duty put forward some nominee or tool as the owner or contractor, and thus conceal his interest. *Erlanger v. New Sombrero Co.*, 3 App. Cas. 1218, 1236; *Preston's case*, 16 W. R. 668; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Glasier v. Rolls* (1889), 42 Ch. D. 442; *Bentinck v. Fenn*, 12 App. Cas. 671. The disability to secure secret benefits at the expense of the company which attaches to a promoter is a personal disability arising from the fiduciary relationship which subsists between him and the company.

Where a person standing in a fiduciary relation obtains a secret benefit, the Court does not enter into the question whether the party at whose expense the benefit was obtained has or has not lost. All that the Court has to do is to examine whether a secret profit has, in fact, been made; and if it has, that profit must be accounted for. See *Parker v. McKenna*, 10 Ch. App. 118; *Aberdeen Co. v. Blackie* 1 Macq. 461; and *Emma Mining Co. v. Grant*, 11 C. D. 938.

In ascertaining the profit for which a promoter is to be made accountable, his disbursements in relation to the company may in some cases be allowed. Thus, in *Emma Mining Co. v. Grant* 11 C. D. 918. Jessel, M. R., said: "It seems to me that in estimating his [the defendant's] profit, I ought to find out his real profit, that is, the real result of the transaction which was left to him. . . . I think, therefore, we ought to ascertain the net profit, simply on the principle of deducting from all the receipts all the payments." But

Allowances
made to
promoter.

a promoter will not be allowed to bring into account payments which would have been *ultra vires* the company. *Lydney and Wippool Co. v. Bird*, 33 C. Div. 95. See also *Bagnall v. Carlton*, 6 C. D. 371. And in *Leeds and Hanley Theatres of Varieties*, (1902) 2 Ch. 809, Vaughan Williams, L. J., says (at p. 826): "Of course, large deductions must be made for the money which had to be expended by the promoting company, partly in promotion expenses, and partly in redecorating the halls and the like."

But a promoter can only recover from the company what he has paid in preliminary expenses, where he proves a contract by the company to pay. *English and Colonial Produce Co.* (1906) 2 Ch. 435. And this applies even to registration fees. *National Motor Mail Coach Co.*, (1908) 2 Ch. 515, overruling *English and Colonial Produce Co.* (*supra*) on this point.

Where the profit of a promoter consists of shares, he may, at the option of the company, be compelled to give up the shares or to account for the proceeds of sale, if sold, or for the value. *New Sombrero Co. v. Erlanger*, 5 C. Div. 75; 3 App. Cas. 1218; *Emma Mining Co. v. Lewis*, 4 C. P. D. 396; *McKay's case*, 2 C. Div. 1; *Pearson's case*, 4 C. D. 222; 5 C. Div. 336; *Nant-y-Gilo Co. v. Grave*, 12 C. D. 738; *Metcalf's case*, 13 C. Div. 169, and Chap. XX., *infra*.

It is not uncommon for promotion to be done by a promoting company or syndicate registered under the Companies Act, 1908, or the Acts which it has replaced. Such a promoting company, or syndicate, is usually one formed with wide financial objects (including the promotion of companies), and it may be a concern carrying on business accordingly and engaged in the promotion from time to time of companies; but more commonly its real and substantial though unexpressed object is to promote one particular company. The parties who would otherwise have assumed the rôle of promoters become shareholders in the promoting company, and thus the body corporate does the promoting, and when the promotion is complete the company, as *functus officio*, is wound up and the net proceeds are distributed amongst the shareholders.

Promoting
companies

This mode of promotion is sometimes adopted with a view to concealing the identity of the persons who are in reality interested in the promotion, for their personality is merged in the corporate existence. In such cases the persons interested and acting as directors of the promoting company generally assume that they are completely exempt from personal danger in relation to a promotion, and to a large extent no doubt this is so; for example, they are in no way liable on a contract made by the promoting company (see *supra*, p. 28); but there still remain cases in which the directors incur personal risk. If, for example, the promoting company commits a breach of duty or a fraud, it of course does so by its directors. In such cases the directors do not escape liability, for all persons who

Liability of
directors.

are parties to a fraud or other wrong are personally liable. No one can plead successfully that he committed a fraud or other wrong as agent for another person, because no authority can sanction such wrongdoing. Hence, if the promoting company fails to comply with, say, sect. 89 of the Companies Act, 1908 (as to the terms of paying underwriting commission), or commits a breach of sect. 82 of the same Act, its directors may be liable. So, too, there may be liability if the directors are parties to a breach of the duty to disclose committed by the promoting company, *e.g.*, by taking secret profits at the expense of the company promoted, for such a transaction very commonly is a fraud - may be a fraudulent breach of trust (*Emma Mining Co. v. Grant*, 17 C. D. 122), or at any rate a breach of trust in which the directors knowingly concur. *Barnes v. Addy*, 9 Ch. D. 244.

Moreover, if the syndicate or promoting company has made illicit profits out of the company promoted, the promoted company may, by virtue of the fiduciary relation of the promoting company, follow such profits into the hands of the members of the promoting company.

**Bankruptcy
of promoter.**

In most cases a promoter in receiving illegitimate gains commits a "fraud or fraudulent breach of trust" within sect. 30 of the Bankruptcy Act, 1883. See *Emma Mining Co. v. Grant*, 17 C. D. 122; *Ramskill v. Edwards*, 31 C. D. 100; *Milan Tramways*, 25 C. Div. 587. But it does not follow that non-payment of compensation for the fraud or breach of trust will amount to "default by a trustee or person acting in a fiduciary capacity, and ordered to pay, by a Court of Equity, any sum in his possession or under his control, within sect. 4 of the Debtors Act, 1869 (32 & 33 Vict. c. 62)." *Metcalf's case*, 13 C. D. 815.

A company which has recovered damages against a promoter in respect of a secret profit made by him on a sale to the company may prove for such damages in the bankruptcy of the promoter, such damages being ascertained and therefore a "demand in the nature of unliquidated damages arising otherwise than by reason of a contract." *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122.

Limitation.

As to the period of limitation. A promoter is usually held liable as a constructive trustee, and upon the footing that he has been guilty of fraud. Accordingly, he cannot rely on the provisions of sect. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59, not repealed by the Trustee Act, 1893); for the six years' limitation which in certain cases that statute establishes in favour of trustees (including constructive trustees) is not available, as its operation is excluded "where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use." See *Sale Hotel, &c. Co.*, 78 L. T. 368. That the Act of 1888 applies

both to express trustees and to constructive trustees, see *Lands Allotment Co.*, (1894) 1 Ch. 616.

Even where the statute does not apply, a claim against a promoter may still be barred by analogy to the statute by lapse of time, for it was well settled before the statute that a claim against a promoter, as a constructive trustee, in respect of a mere obligation to pay, as distinguished from an actual mis-application of trust money, was barred by six years' delay after discovery by the company of the facts. *Metropolitan Bank v. Heiron*, 5 Ex. Div. 319; and see *Beckett v. Wade*, 17 Ves. 97; *Re Cross*, 20 C. Div. 109; *Banner v. Berridge*, 18 C. D. 254; *In re Sharpe*, (1892) 1 Ch. 154, 167. As to the recovery of bribes paid to agents of companies, see *Lister & Co. v. Stubbs*, 45 C. Div. 1; *Mayor of Salford v. Lerer*, (1891) 1 Q. B. 168; *Horenden & Sons v. Millhoff*, 16 T. L. R. 506 (C. A.); 83 L. T. 41; *Grant v. Gold Exploration*, (1900) 1 Q. B. 23. And see notes to Form 251 (clause 93).

Prima facie, communication of the facts to the board of directors is notice to the company. *Metropolitan Bank v. Heiron*, *supra*. *Re General Exchange Bank, Preston's case*, 16 W. R. 107. But where the directors are tools or nominees of the promoter, it does not follow that notice to the directors is to be deemed notice to the company. *Fitzroy Bessemer Co.*, 32 W. R. 475; 33 W. R. 312; *Erlanger v. New Sombrero Co.*, 3 App. Cas. 1218; *Leeds & Hanley Theatre of Varieties*, (1902) 2 Ch. 809; *Gluckstein v. Barnes*, (1900) A. C. 392. For the presumption is that they would not disclose their own wrongdoing to the shareholders. *Cave v. Cave*, 15 Ch. D. 639.

"In the normal case, where the directors are truly and not merely in name the executive of the company, it may be assumed that they will be vigilant and critical of the particulars of a bargain of such paramount importance as the purchase of the property to be traded with, and that, dealing at arm's length, they will examine into anything bearing on that matter that does not tell its own story on its face. But, in the present case, the company was paralyzed so far as vigilance and criticism were concerned: for the board room was occupied by the enemy," says Lord Robertson, in *Gluckstein v. Barnes*, at p. 259.

"Disclosure' is not the most appropriate word to use when a person who plays many parts announces to himself in one character what he has done and is doing in another." Per Lord Macnaghten, *Gluckstein v. Barnes*, (1900) A. C. 240, 249. See *supra*, p. 134.

Thus, where the directors of the purchasing company were also the directors of the syndicate which promoted the company and sold the property to it, Lindley, M. R., said that "to impute to the [purchasing] company the knowledge which the directors had acquired in another capacity, and which knowledge they did not dis-

close to anyone, is neither law nor sense." *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, 431.

Notice to one director is not notice to the company, unless he, in fact, brings the matter to the notice of the board. *In re Marseilles, &c. Co.*, 7 Ch. 161; *Gover's case*, 1 C. Div. 182; *General Exchange Bank*, 16 W. R. 1097; *Hampshire Land Co.*, (1896) 2 Ch. 743. And see *David Payne & Co.*, (1904) 2 Ch. 608.

The secretary of a company is in a different position to a director, and not bound to pass on to the company knowledge which he has acquired as secretary of another company. *Fenwick, Stobert & Co.*, (1902) 1 Ch. 507.

As to notice to all the shareholders being notice to the company, see *supra*, p. 135.

As to Interest.

Interest.

Where a person in a fiduciary position is ordered to account for moneys or money's worth improperly received by him, he may be ordered to pay interest as from the time he received the same. *Nant-y-Glo Co. v. Grave*, 12 C. D. 738; *Liquidators of Imperial Mercantile Credit Assoc. v. Coleman*, L. R. 6 H. L. 189; *Drum Slate Co.*, 53 L. T. 250; *Re Hulkes*, 33 Ch. D. 552.

The interest is usually computed in these cases at the rate of 4l. per cent. per annum. In a Court of Equity interest at 5l. per cent. per annum is only exacted where a trustee has been chargeable with misuse or misappropriation of trust money, or where he has been guilty of wilful misfeasance or fraud (per Lord Cairns, in *Liquidators of Imperial Mercantile Credit Assoc. v. Coleman*, L. R. 6 H. L. 189, at p. 209; *Archer's case*, (1892) 1 Ch. 322, 344); and, as a rule, promoters making an improper profit do not appear to have been treated as coming within this rule. But see remarks of Lord Macnaghten in *Gluckstein v. Barnes*, (1900) A. C. at p. 255.

Death of Promoter.

The estate of a deceased member of an unincorporated syndicate which has made illegitimate profits by promoting a company, remains liable in an action by the company for deceit, or breach of trust, if the estate has benefited by the fraud or breach of trust. *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, 117; *Bagnall v. Carlton*, 5 Ch. D. 389; *Ramskill v. Edwards*, 31 Ch. D. 100; *Phillips v. Howfray*, 24 Ch. D. 439; *Twycross v. Grant*, 4 C. P. D. 40. But if the deceased's estate has not benefited the cause of action will not survive. *Peck v. Gurney*, L. R. 6 H. L. 393. *Actio personalis moritur cum persona*.

As to Disclosure.

How then, it may be asked, is a promoter, who desires to make a legitimate profit, effectively to bring the fact to the knowledge of the company, and obtain its consent? In order to answer this question we have to bear in mind:

How disclosure to be made.

- 1) That the company is, at any rate in some cases, to be deemed to have notice of the facts stated in its prospectus. Per Lord Cairns, L. C., *Erlanger v. New Sombrero Co.*, 3 App. Cas. 1239; *Gluckstein v. Barnes*, (1900) A. C. 240; *à fortiori* now that a prospectus, or the statement in lieu of it, is required to be filed. Companies Act, 1908, s. 80.
- 2) That, in the absence of fraud, every member of the company, and accordingly the company itself, is deemed to have notice of what is set forth in the company's memorandum and articles of association. See *Griffith v. Paget*, 6 C. D. 517, and other cases cited *supra*, pp. 76 to 78; but query whether this sort of imputed notice would cover things required by sect. 81 of the Act to be specified in the prospectus, and in fact not specified therein.
- 3) That, in the absence of fraud or misrepresentation (*Aaron's Reefs, Lim. v. Twiss*, (1896) A. C. 273), every member who subscribes on the footing of a prospectus must be deemed to have notice of the contents of any contracts thereby offered for inspection (see cases cited *infra*, pp. 143, 144) if the provisions of sect. 81 of the Companies Act, 1908, have been complied with, in cases where that section applies.
- 4) That any condition in a prospectus under sect. 81 of the Act purporting to bind a subscriber with notice of any contract, document, or matter not specifically referred to in such prospectus, is void. Sect. 81, sub-sect. 4, of 1908.

Thus, in reference to (3) *supra*, where the prospectus offered a contract for inspection, Jessel, M. R., said: "If the shareholders had gone to see it (and I think in a court of justice they cannot complain that they did not see it, but *must be treated as having notice of its contents*), they would have found," &c. *New Sombrero Co. v. Erlanger*, 5 C. D. 111. And in the House of Lords in the same case Lord Blackburn said: "I think that each allottee was fixed with the knowledge he would have had if he had read it." See, also, *Anderson's case*, 7 C. D. 75, 102, and *Hallows v. Fernie*, 3 Ch. 477. *Redgrave v. Hurd*, 20 C. D. 14. It should be mentioned that in *Sale Hotel, &c. Co.*, 78 L. T. 368, Wright, J., appears to have departed from the rule thus laid down, and to have treated the offer of a contract for inspection as ineffective, on the ground that it was notorious that shareholders seldom took the trouble to look at the contracts so offered. The cases above referred to were not, however,

cited, and it may be doubted whether the ground assigned affords a sufficient reason for rejecting the principle of constructive notice recognized by Jessel, M. R., and Lord Blackburn as above, and generally acted on during the last twenty years. Moreover, it is to be noted that the learned lords who took part in the decision in *Aaron's Reefs v. Twins*, (1896) A. C. 273, apparently recognized the rule as sound, for whilst holding disclosure in a prospectus of the date and parties to a contract insufficient notice of its contents, they did so upon the ground that the prospectus contained a misrepresentation, and therefore relieved an applicant from inspecting the contract; and the same view was taken, on the same grounds, in *Gluckstein v. Barnes*, (1900) A. C. 240. Jessel, M. R., gave the true principle in *Smith v. Chadwick*, 20 Ch. D. 57: "It has always been held, and I think rightly held, that if a man in a prospectus . . . falsely states the contents of a written document, he cannot escape from such false statement by saying, 'I offered to show you the document.' But if he make an incomplete statement, altogether true but imperfect, I take it he can."

- (5) That notice to the directors of the company, if they are an independent executive, but not otherwise, is equivalent to notice to the company. *Metropolitan Bank v. Heiron*, 5 Ex. Div. 319; *Re Fitzroy Beaumer Co.*, 32 W. R. 475; 33 W. R. 312; *Leeds and Hanley Theatres of Varieties*, (1902) 2 Ch. 809; *Gluckstein v. Barnes*, (1900) A. C. 240.
- (6) That the memorandum and articles of association are, by sect. 14 of the Act of 1908, made binding on the company and the members thereof, and accordingly the company must be treated as consenting to what is done in pursuance of the legal provisions thereof. *Overend, Gurney & Co v. Gibb*, L. R. 5 H. L. 480; *In re Westmoreland, &c. Co*, 1893, 2 Ch. 612; *Lagunas Nitrate Co. v. Lagunas Syndicate*, 1899, 2 Ch. 392.

By bearing in mind these facts the promoter can fairly discharge his obligation. Suppose, for instance, that A., the owner of property, desires to have a company formed to purchase and work the property, and that B. agrees to promote the company in consideration of a share of the purchase money. In such case the contract for sale to the company will disclose B.'s interest; the memorandum and articles will refer to that contract and disclose what B. is to get, and authorize the directors to carry it out, and will perhaps state that B. is not, by reason of his fiduciary relationship, to be precluded from accepting the remuneration; the prospectus or statement in lieu of prospectus must refer to the contract and offer it for inspection, and will disclose the fact that B. is being remunerated, and the amount paid or intended to be paid to him, and the consideration for the payment (sect. 81 (1) j of the Act); and the company will be formed with

an independent executive, who will in due course adopt the contract, which will be provisional, however, until the company is enabled to commence business. Companies Act, 1908, s. 87 (3).

Cases, however, sometimes arise in which there is an insuperable difficulty in complying with the rules above referred to; e.g., in the case of a private company formed to purchase and work the business of a firm the members of which are to be the only directors and to hold practically all the shares. In such a case there is no independent executive; and if the rule laid down by Lord Cairns in *Erlanger v. New Sombrero Co* were applicable, the parties could not effectively carry out a transaction which is perfectly legitimate. But in such case an independent executive is not essential, for the simple reason that all the parties are fully cognisant of all the facts of the case and consenting to the arrangement. See *supra*, p. 135.

And even where the company is not a private one and there is not an independent executive, if the articles of association show this fact e.g., by stating that the directors of the company are all directors and the only directors of the vendor syndicate which is selling to the company—and the prospectus states that the promoters are selling at a profit, a sufficient disclosure is made. *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392.

Whether a promoter is, apart from sect. 81 of the Act, bound to disclose not only the fact that he is making a profit, but the amount thereof, is unsettled. According to *Chesterfield and Boythorpe Co. v. Black*, 26 W. R. 207, and *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, it is sufficient to disclose the fact. In the case last mentioned, Lindley, M. R., said: "Having regard to what was disclosed and to the avowed object of the company, I do not consider the mere non-disclosure of the price paid by the syndicate [the vendor and promoters] and of the profits made by the sale to the Nitrate Company as fatal to the validity of the sale."

Disclosure of amount.

On the other hand, in *Olympia, Limited*, (1898) 2 Ch. 153, 166, the same learned judge says: "A promoter of a company, whose duty it is to disclose what profits he has made, does not perform that duty by making a statement not disclosing the facts, but containing something which, if followed up by further investigation, will enable the inquirer to ascertain that profits have been made and what they amounted to." And see the observations of Collins, L. J., at the top of p. 174 of the report of the same case. The judgments, however, of Lord Halsbury, L. C., and Lord Macnaghten, when the case was in the House of Lords (*sub nom. Gluckstein v. Barnes*), seemed to be based on the assumption that the prospectus was deliberately misleading; but Lord Robertson, (1900) A. C. 258, says: "I consider that the transaction in mortgage, on which a secret profit had been made, was so relevant to the question what price should the company pay for the property, that it was necessary that it should be disclosed to the company completely and in detail."

In that case the company was formed by a syndicate constituted by agreement in writing for the acquisition of certain property and the resale thereof to a company to be formed, or some other purchaser. The syndicate, in fact, formed the company, and resold the property at a profit disclosed in the prospectus; but neither in the prospectus nor otherwise did the syndicate disclose to the company a further profit on the transaction made by buying up at a discount certain mortgages on the property. It was held that the appellant, a member of the syndicate, was liable to account for this further profit. This case at any rate shows that to make a misleading or incorrect or imperfect statement of profits is in the highest degree dangerous. And see *Imperial Mercantile Credit Assoc. v. Coleman*, L. R. 6 H. L. 198.

So in *Lady Forrest (Murchison) Gold Mine*, (1901) 1 Ch. 582, Wright, J., held that directors of a company who were interested in the promotion of such company were bound to disclose the amount of the profit which, as members of the vendor syndicate, they were making. "They disclosed," said the learned judge, "the fact that they were directors of the vendor syndicate, and thereby they necessarily disclosed that they were making some profit. It is quite true they did not disclose what profit they were making, and in that, as it seems to me, they were wrong, and guilty of a breach of duty."

This is good sense, for without such knowledge how can the company give an intelligent consent to the profit being made?

The Act of
1908.

The Companies Act, 1908, has now made positive provisions for disclosure in a prospectus inviting subscriptions for shares, debentures or debenture stock, and this statutory obligation involves the direct disclosure of promoters' profits (if any). See in particular, sect. 81 (1) of the Act, clauses (f.), (g.), (h.), (i.), (j.), (k) and (m), *infra*, "Prospectuses."

Liability in respect of Prospectus.

Liability on
prospectus.

Not only are promoters liable under the obligations above referred to, but they may incur liability in respect of misstatements in the prospectus, where they take any part in its preparation, or authorize its issue. As to this, see sect. 84 of the Act of 1908 embodying the provisions of the Directors' Liability Act, 1890, and *infra*, p. 165 *et seq.*

Underwriting.

Under-
writing.

Of late it has become very common to get the capital of a company or a substantial part thereof, underwritten before the prospectus of the company is published. The underwriting is generally arranged by the promoters of the company. In making any such

arrangement the conditions of sect. 89 of the Companies Act, 1908, must be borne in mind. See further, *infra*, p. 279.

Preliminary Contracts.

Promoters sometimes desire to bring the company into existence and bound by some particular contract, e.g., to purchase property at a specified price, or to pay a specified sum for preliminary expenses. To do this is, however, difficult, if not impossible. As appears below, p. 321, a contract made on behalf of a company before its incorporation is not binding on the company; and a provision in the articles of association that the company shall adopt and be bound by such a contract, or shall enter into a particular contract, still leaves the company free, unless and until after its incorporation it chooses to bind itself by the contract. Even then the contract may be provisional only until the company is entitled to commence business. See Companies Act, 1908, s. 87 (3); *Northumberland Avenue Hotel Co.*, 33 C. Div. 16; *Eley v. Positive Government Co.*, 1 Ex. Div. 88; *Browne v. La Trinidad Co.*, 37 C. Div. 1; *Boston Deep Sea Co. v. Annall*, 39 C. Div. 339; *Dale v. Plant*, 61 L. T. 206; *Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate*, (1899) 2 Ch. 80; *North Sydney Investment Co. v. Higgins*, (1899) A. C. 268; *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, (1902) 1 Ch. 146.

Preliminary contracts.

And a company does not, by merely acting through its directors on a contract made before its formation, incur any contractual relation with or obligation to the vendor. *Northumberland Avenue Hotel Co.*, *supra*; *North Sydney Investment and Tramway Co. v. Higgins*, *supra*; *Johannesburg Hotel Co.*, (1891) 1 Ch. 119; *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, *supra*. Or even by taking the benefit of a pre-incorporation contract. *Rotherham Alum, &c. Co.*, 25 Ch. D. 103; *Clinton's claim*, (1908) 2 Ch. 515, overruling *English and Colonial Produce Co.*, (1906) 2 Ch. 435.

Nor can a company ratify a contract made before it was incorporated. *Kelner v. Baxter*, L. R. 2 C. P. 174, approved by the Privy Council in *Natal Land, &c. Co. v. Pauline, &c. Syndicate*, (1904) A. C. 120. And see *infra*, Chap. IV.

Apart from sect. 87 (3) of the Act of 1908, it has been suggested that the contract might be embodied in the articles of association, and that the vendor or promoter might subscribe the same and then rely on sect. 14 of the Act, which provides that the memorandum and articles "shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member, his heirs, executors and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of the Act." But the decisions in *Eley v.*

Positive Government Co., 1 Ex. Div. 88; *Browne v. La Trinidad Co.*, 37 C. Div. 1; and *Baring-Gould v. Sharpington, &c. Syndicate*, (1899) 2 Ch. 80, throw doubt on the efficacy of such a plan, and in the result it has not been usual to proceed in this way.

The usual and most effective mode of binding a company is to insert in the memorandum and articles proper clauses referring to the proposed agreements, and directing or empowering the directors to execute and carry the same into effect. The proposed directors usually examine and consider the agreements before the formation of the company, and the subsequent adoption thereof, in such a manner as to constitute a new contract, is, therefore, in most cases a foregone conclusion, though the fact that a company is formed for the express purpose of carrying out a particular contract will not relieve the directors from the obligation of exercising a proper judgment on the merits of such contract. *Brazilian Rubber Plantations* (No. 1), (1911) 1 Ch. 425.

It is, however, far better, in the interest of all parties in these cases, not to seek to control the discretion of the directors, but to leave them free to adopt or not, as they think fit, the preliminary contracts. Occasionally, however, in reliance on *Ashbury v. Watson*, 30 C. Div. 376, the memorandum of association refers to a particular contract, and provides that it shall be executed and carried into effect.

Whichever course is adopted, sub-sect. (3) of sect. 87 of the Act of 1908 (where that section applies) whereby a contract made before the company becomes entitled to commence business is merely provisional, must be borne in mind. *Supra*, pp. 20, 22.

Remuneration for services adopted by company.

There is some authority for saying that a promoter may, even in the absence of any express contract, be entitled, as against the company, to compensation for services rendered before the formation of the company, provided that the company can properly be considered to have adopted and derived benefit from those services. *Hereford, &c. Wagon Co.*, 2 C. Div. 621; *Terrell v. Hutton*, 4 H. L. C. 1093; *Rotherham Alum, &c. Co.*, 25 C. Div. 103.

But it is no easy matter to prove adoption and benefit. See *Rotherham Alum, &c. Co.*, 25 C. D. 103, and *National Motor Mail Coach Co.*, *Clinton's case*, (1908) 2 Ch. 515. The mere fact that the promoter pays the registration fees and *ad valorem* stamp on registering a company does not in itself entitle him to recover them from the company. *Clinton's claim, supra*, overruling on this point the decision of Buckley, J., in *English and Colonial Produce Co.*, (1906) 2 Ch. 435.

An article of association providing that the directors shall pay all expenses incurred in getting up and registering the company, only operates as an *authority* to the directors to pay such costs, and does not constitute a contract to pay them as between the company and the promoters (*Re Hereford and South Wales Wagon Co.*, *supra*).

Methado v. Porto Alegre Rail. Co., L. R. 9 C. P. 503; *Re Rotherham Alum, &c. Co.*, *supra*); and it makes no difference that the company has agreed with the promoter to pay the solicitor for his services. *Empress Engineering Co.*, 16 Ch. D. 125. So strict is the rule against allowing a company to be fixed directly or indirectly with a pre-incorporation contract, that a solicitor cannot even recover fees paid for registering the company. *National Motor Mail Coach Co.*, *Clinton's claim*, (1908) 2 Ch. 515.

Whether a solicitor has or has not a right as against the company may depend on whether he has agreed to look to the company for payment or has been retained by and agreed to look to the promoter for payment. *In re Tilleard*, 3 D. J. & S. 519. And even when the company agrees with the promoter to pay the solicitor, the latter does not thereby acquire any right as against the company (*Empress Engineering Co.*, 16 C. Div. 125; *Rotherham Alum, &c. Co.*, 25 C. Div. 103), unless it can be made out that there is a trust for the solicitor. See the above cases, and *Gandy v. Gandy*, 30 C. Div. 57; *Murray v. Flavell*, 25 C. Div. 89; *Touche v. Metropolitan, &c. Co.*, 6 Ch. 671.

As a general rule, "the promoters of companies are not partners (Lindley on Companies, 6th ed. p. 193), but they may agree to be so, and whether they have so agreed or not is a question of fact. There are many cases in which the arrangement between the promoters does beyond question constitute them partners, *quâ* the particular adventure, with the consequent right (*inter alia*) to each promoter to contract on behalf of the partnership; but where there is no partnership, one co-promoter has no implied authority as such to bind the promoters collectively. Each is only liable on contracts made by himself or with his authority, and, if he is sued on a contract made by another, that authority must be shown. Whether promoters are or are not in any particular case partners, there is not, in the absence of contract, any implied right in one of them, as against the others to remuneration for services rendered by him for the joint benefit of himself and them. *Holmes v. Higgins*, 1 B. & C. 74; *Lucas v. Peach*, 1 Man. & Gr. 417; Lindley on Companies, 6th ed. p. 811.

Promoters not necessarily partners.

But, of course, there is nothing to prevent promoters from jointly contracting with, and becoming liable to, a third party; *e.g.*, if they jointly retain a solicitor, they are jointly liable to him (*Mant v. Smith*, 4 H. & N. 324), and either of them is entitled to have the bill taxed. *Re Stephen*, 2 Ph. 562.

And where promoters have thus become jointly liable to a third party, and by virtue of that liability some are compelled to pay, they may have a right as against the others to enforce contribution. Lindley on Companies, 6th ed. p. 815; *Boulter v. Peplow*, 9 C. B. 493; *Batard v. Hawes*, 2 E. & B. 287; *Edgar v. Knapp*, 7 Jur. 583 (C. P.).

Where the promoters are an incorporated body (*e.g.*, a syndicate

--the syndicate is responsible for the acts and omissions of its directors in promoting and forming other companies. *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, 423. In such a case the directors, as between themselves, are acting jointly.

As to the joint liability for misfeasance by promoters, and their rights as to contribution, see *Flitcroft's case*, 21 C. D. 519; *Gluckstein v. Barnes*, (1900) A. C. 240, 247, 255, 259.

Occasionally, in the case of professional promoters, the solicitor employed agrees to look to the company for payment, or to make no claim except for "out of pocket" expenses, unless the company floats

**Danger of
making a
market**

Promoters should be careful lest in their desire to float the company they overstep the line of what is legitimate and permissible. For example, any attempt to "make a market" for the shares by buying, or pretending to buy, at a premium, or by "rigging the market," must be avoided as illegitimate and dangerous. This operation was referred to by Justice M. R. in *Morzett's case*, 28 W. R. 541, as follows: "I do not know the technical term for the thing, but it is to raise the value, or apparent value, of the shares on the Stock Exchange by buying up the few that are issued at a premium, so as to induce the public to come in and subscribe for the shares in the company under the notion that there is a *bonâ fide* premium to be obtained by subscribing. Whether one ought to call that a conspiracy or not does not much matter, but I suppose both in law and morality it is a conspiracy to defraud the public and nothing else."

And in *Twydross v. Grant*, 2 C. P. Div. 469, 495, Bramwell, L. J., said that the defendant "went into the market and bought a large number of shares, and various newspapers were induced, by payments to subordinate persons, to write favourably of the company. The shares rose to a premium; the public were attracted and subscribed for the capital, or a large part of it, both shares and debentures. The defendant attempted to justify giving this false appearance of value to the shares by saying that it continually happens that shares are made to appear worth less than their real value by people selling them when they have not got them. There are two answers to this. First, there is no reason to suppose that any such practice was apprehended by the company; next, that it cannot be right to counteract such a proceeding in the way here adopted; and indeed, further, if it is believed that a scheme is a good one, and people try to depreciate it by selling its shares, they should be countermined honestly, and not by a trick, by those who think well of it buying the shares so sold."

Again, in *Scott v. Brown*, (1892) 2 Q. B. 724, it was held that an agreement between two or more to purchase shares in a company in order to induce persons who might thereafter purchase shares in such company to believe, contrary to the fact, that there was a *bonâ*

the market for its shares, and that the shares were at a real premium, was an illegal transaction and might be made the subject of an indictment for conspiracy. This decision was based on *Rex v. De Berenger*, 3 M. & S. 67, in which it was held that it was a criminal conspiracy to agree to endeavour to raise the price of the public funds on a particular day by false rumours; and "this was not because it is an injury to the public to raise the value of the public funds, but because it is fraudulent against those who purchase a vendible commodity to raise the price of it at the time they purchase it by fraudulent falsehoods on which they are intended to act. The conspiracy was held to be criminal, not because the article to be dealt in was the public funds, but because the public funds were a vendible commodity. And it was held that the offence was complete the moment the agreement was made." Per Brett, L. J., *Reg. v. Aspinall*, 2 Q. B. Div. 48, 59.

The crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete although it had not been pursued to its consequences, or the parties had not been able to carry it into effect." Per Lord Ellenborough, *Rex v. De Berenger*, *ubi supra*. Equally, any attempt to obtain a quotation of the shares on the London or other Stock Exchange by illegitimate means, such as misrepresentation or concealment, should be avoided. For the result of a quotation is to induce the public to believe that the rules of the stock exchange have been complied with, and to deal in the shares on that footing. Any scheme, therefore, to deceive the committee may amount to a conspiracy to cheat and defraud those persons who might by reason of the quotation be induced to deal in the shares. See *Reg. v. Aspinall*, 2 Q. B. Div. 48. In that case the defendants, the promoters of a company, were convicted of a criminal conspiracy to defraud. They had obtained a quotation by falsely representing that more than two-thirds of the capital had been subscribed by the public, and that the application money of 10s. per share had been paid up thereon; whereas in fact the shares were applied for by dummies, the promoters paying the application moneys out of borrowed funds, which as soon as paid in were drawn out and applied to the payment of the application moneys on further shares, and so manipulated that the aggregate amount paid in appeared to be upwards of 17,000l. See also *Gray v. Lewis*, 8 Ch. 1035, 1051; *Stewart v. Weber* (C. A.), Times, Dec. 8, 1903; and *Salaman v. Warner*, 61 L. T. 598.

An agreement for such a scheme, however clearly expressed, cannot be enforced or sued on.

Recommendations to Intending Promoters.

Recommendations to promoters.

In conclusion it may be useful to submit the following recommendations to promoters:—

- (1) Where it is intended to purchase property and resell at a profit, either to a company or otherwise, be careful not to take any steps towards the promotion of the company, or procure directors or subscribers, until you have a valid contract with the vendors; and, having regard to sect. 81 of the Act of 1908, sub-sects. 1 (f) and (g), and sub-sect. 2, where practicable, have the contract completed and the purchase-money paid before the date of the prospectus.
- (2) Remember that grasping at too much profit may easily defeat itself by bringing about the failure of the enterprise.
- (3) See that the company is provided with an independent board of directors, and that due disclosure is made to them and to the company. Independent here means directors who are not interested in the promotion, e.g., by receiving vendor's shares or being qualified by the promoters.
- (4) See that, where there is or may be any doubt as to the independence of the executive, full disclosure is made of all the variety of matters which *prima facie* ought to be disclosed to an independent executive. See p. 134, *supra*.
- (5) See that the memorandum and articles contain all requisite provisions for the protection of the promoters (see *Brazilian Rubber Plantations* (No. 1), (1911) 1 Ch. 425), and, at the same time, do not contain anything open to hostile comment, or anything unfair to the company or the subscribers.
- (6) See that the prospectus or statement in lieu thereof, especially if the promoters have any part in its preparation or issue, is fairly and honestly framed. *Infra*, pp. 165 *et seq.*
- (7) Take care in particular that the provisions of sects. 81 and 82 of the Act are complied with.
- (8) Bear in mind sect. 89 of the Act, and do not be a party to the payment out of the purchase-money, whether directly or indirectly, of any commission for subscribing or procuring the subscription of shares.

PRECEDENTS.

AGREEMENT *by* PROMOTERS *to* PAY *Preliminary* EXPENSES *in* **Form 1.** *consideration of* VENDOR'S SHARES.

AN AGREEMENT made the — day of —, between A., of —, Parties.
of the one part, and B., of —, and C., of — (hither called "the
group"), of the other part.

WHEREAS the sd A. has entered into a provisional agreement (hither Recitals.
called the scheduled contract) with the — Limtd (hither called the
coy), for the sale of certain patents and other ppty to the coy in conson
of 20,000l., whereof 15,000l. is to be satisfied by the allotment to the
sd A. of 1,500 fully paid-up 10l. shares in the capital of the coy: AND
WHEREAS by the scheduled contract it is among other things provided
that the sd A. shall pay all the preliminary expenses, that is to say,
[here set out particulars]: AND WHEREAS the prospectus, a copy of
which is herunto annexed, has been approved by the board of
directors of the coy, and has been duly filed with the Registrar of
Cos, and the group is willing to advertise the same at their own
expense

NOW THEREFORE IT IS AGREED as follows:

1. The group shall advertise and circulate the sd prospectus in a What B.
sufficient and effective manner [or in accordance with the scheme set to do.
forth in the schedule hereto].

2. The group shall pay all the preliminary expenses aforesaid, and Further.
shall indemnify the sd A. against all proceedings, claims and demands
in respect thereof.

3. If the group shall duly perform their obligations under clauses 1 Considera-
and 2 hereof, they shall be enttd to — of the sd 1,500 fully paid-up tion.
shares, and the sd A. will procure the coy to allot the same to them
accordingly.

4. Unless before the — day of — next the coy shall have become Conditions.
entitled to commence business, the group shall forfeit all claim to the
sd fully paid-up shares, and, save as hitherto expressly provided, the
group shall not be enttd to any remuneration for their services in
respect of the premises.

IN WITNESS, &c.

[Schedule.]

As to the company being entitled to commence business, see sect. 87 of the
Act, *supra*, p. 26.



Form 2. *AGREEMENT to PAY Preliminary EXPENSES in consideration of COMMISSIONS.*

Parties. AN AGREEMENT made, &c., between the — Coy, Limtd (hnter called "the coy"), of the one part, and A., of —, of the other part.

Recital. WHEREAS a prospectus of the coy (whereof a copy is hereunto annexed) has been filed with the Registrar of Companies and is about to be published and circulated.

NOW THEREFORE IT IS AGREED as follows:

A. to pay the preliminary expenses.

1. The sd A. shall procure the sd prospectus to be extensively advertised and circulated, and shall pay all the preliminary expenses of the coy, that is to say, all the costs, charges, and expenses of and incidental to the preparation and filing of the sd prospectus and the publication and circulation thereof, and of and incident to the preparation, execution, and registration of the coy's memdm and arts of asson, and of these presents, and all other expenses of and incident to the establishment of the coy down to the time when the coy becomes entld to commence business, or if the directors of the coy shall, within the period of — weeks from the date hereof, resolve not to proceed to allotment, then down to the date of such resolution, and also the expenses of returning the amounts paid on application and of winding up the coy: And the sd A. shall indemnify the coy and the directors thereof from and against all proceedings, claims and demands in respect of the sd preliminary expenses. Such expenses shall not include his expenses of and incident to the procuring of persons to subscribe or underwrite shares in the capital of the coy.

Consideration.

2. In conson of the premises the coy shall, within 14 days after it becomes entld to commence business, pay to the sd A. a commission at the rate of [1] p.c. on the nominal capital of the coy, viz., £—, but in the event of such resolution as afd being passed, the sd A. shall not be entld to any remuneration in respect of the premises. [Such commission shall be payable exclusively out of the premiums received under the sd prospectus.]

IN WITNESS, &c.

Form 3. *AGREEMENT for SALE of CONCESSION to PROMOTER, who is to form COMPANY.*

Parties.
Sale.

Parties: A., 1; and B., 2.

1. The sd A. shall sell, and the sd B. shall purchase, the concession specified in the schedule hereto, and the full benefit thereof, at the price of 50,000l., whereof £— shall forthwith be pd to the sd A. by way of deposit.

2. If before the — day of — [the time for completion] the sd B. shall have resold the sd concession to a coy duly formed under the Cos Act, 1908, for the purpose, *inter alia*, of acquiring and carrying out the sd concession, and with a nominal capital of 200,000*l.*, divided into 20,000 shares of 10*l.* each, [and with a working capital of £— at the least,] and bound by agreement with the sd B. to purchase from him the sd concession, the sd B. shall have the option of satisfying any part of the balance of the purchase-money not exceeding 40,000*l.* by procuring the allotment or transfer to the sd A. of fully pd-up shares in such coy to be treated as of par value.

Form 3.

Option to pay in shares.

3. The sd A. shall show a good title to the sd concession in himself or some other person willing and bound to convey by his direction, and shall prove that the concession is valid and in full force, and shall duly transfer the same to the sd B. or his nominee at or before the time for completion hnter fixed.

Title

4. The purchase shall be completed on the — day of — next, at —, or at such other place in the City of London as the sd B. shall fix, and thereupon the purchase-money shall be pd or satisfied as hnter provided.

Completion.

5. The sd B. shall before the time hnter fixed for completion appoint some competent agent in — to examine and report on the title to the sd concession, and to certify the transfer thereof, and a telegram from such agent stating that the title is satisfactory and that the transfer is complete shall be sufficient evidence of the facts.

Report of agent.

6. The sd B. may at any time before the — day of — next, by notice in writing to the sd A., annul the sale, and if the said purchase-money shall not be pd or satisfied at the time and in manner asd, then and in such case the sd A. may at any time afterwards by notice in writing to the sd B. annul the sale.

Rescission.

7. If the sale is annulled under clause 6 hereof, the deposit shall be forfeited to the sd A., and neither party shall have any claim against the other for expenses, damages, or otherwise.

Forfeiture of deposit.

IN WITNESS. &c.

[The Schedule containing particulars of concession.]

Not uncommonly an agreement as above is made without any provision for a deposit, so that practically it imposes no liability on the purchaser, but in that case B. (see Clause 6 above) ought not to have power to annul the sale.

The promoter, having secured the agreement, forms his company, and enters into an agreement with the company for the sale of the concession at an advance in price. There is no objection to such an arrangement, provided that due disclosure is made to the company. But if the company is inviting the public to subscribe for its shares, great care must be taken in framing the prospectus. *Ross v. Estates Investment Co.*, 3 Ch. 682, 689; *Capel v. Sims*, 36 W. R. 689; Companies Act, 1908, s. 81.

Form 4. AGREEMENT *to contribute to a* PRELIMINARY EXPENSES FUND.

Parties. AN AGREEMENT made the — day of —, between A., of — (hence called "the tree"), of the one part, and B., of —, and the several other persons who shall sign their names and affix their seals hereto (hence called "the subscribers"), of the other part: WHEREAS it is proposed very shortly to register under the Cos (Consolidation) Act, 1908, a company to be called "the — Coy, Limited" (hence referred to as "the company"), with a memorandum and articles of association which have already been prepared and approved by the parties hereto: AND WHEREAS it is desired to provide a fund in the manner and for the purposes hereafter set forth.

NOW THEREFORE each of the subscribers hereby agrees with the said A., as trustee for the subscribers, as follows:

Fund. 1. A fund shall be established to consist of the contributions of the subscribers pursuant to this agreement.

Application. 2. The funds shall be placed in the hands of the trustee and he shall apply the same under the direction of the committee in paying the costs of obtaining the engineer's report, which is to be set out in the prospectus of the company, and in paying the expenses of the experiments referred to in the schedule hereto, and in paying the general expenses of forming and promoting the company, and any other expenses which the said trustee, with the sanction of the committee, shall think it expedient to pay.

Committee. 3. There shall be a committee of subscribers for the purpose of this agreement, and the first members of such committee shall be C., D., and E.

Proceedings. 4. The committee may fill up any vacancy in their body which shall arise from death, resignation, or otherwise, and the members for the time being of the committee may act notwithstanding any vacancies in their body. The decision of the majority of the members of the committee for the time being shall be regarded as the decision of the committee.

Calls. 5. The trustee may from time to time, with the sanction of the committee, make such calls on the subscribers as he shall think fit; but every such call shall be made on the subscribers *pari passu*, and three days' notice at least of every such call shall be given to the subscribers, and no subscriber shall be liable to pay in the aggregate more than 150*l.* under this agreement.

Defaults. 6. If any subscriber makes default in payment of a call made on him hereunder, he shall pay interest at the rate of 10 p.c. on the amount in arrear until actual payment; and if the default continues for more than 7 days, the trustee may draw a bill of exchange on the defaulting subscriber for the amount, and may authorize any persons to accept the sums on behalf of such defaulting subscriber, and such

acceptance shall be effective, and such bill of exchange may be made payable on demand.

Form 4.

7. The tree and the committee are to subscribe the memdm of asson of the coy for the whole of the founders' shares in the coy's capital, and are in due course to distribute the same amongst the subscribers rateably in proportion to their contributions hereunder.

Founders' shares.

8. Any notice for the purposes hereof may be given to any subscriber by sending the same through the post, addressed to such subscriber at his address below mentd; and any notice so sent shall be deemed to be served at the expiration of two days after it is posted.

Notice of service.

9. If any subscriber makes default in payment of any call made pursuant hto, the tree may, with the sanction of the committee, declare the interest of such subscriber under this agreemt to be forfeited; and thereupon such subscriber shall cease to have any rights under this agreemt, and any contribution pd by him shall be considered forfeited for the benefit of the other subscribers hto.

Forfeiture.

10. The majority of the subscribers hto may, at any time, by writing under their hands, remove the tree for the time being hercof and appoint another tree or trees in his place; and they may also appoint a new tree or trees to fill up any vacancies in the trusteeship howsoever caused.

New trustees.

AS WITNESS the hands and seals of the parties hto.

Signed, sealed, and)
delivered by, &c.)

Instead of forming an association as above, it is more usual to register a promoting syndicate. See *infra*, p. 158.

SYNDICATE AGREEMENT for PURCHASE and RE-SALE of MINES.

Form 5.

Heads of Agreement.

1. A syndicate is hby established for the purpose of acquiring the mines situate at —, and known as the — mines, and of disposing of the same at a profit. The capital of the syndicate shall be £—, and shall be considered to be divided into — shares of £— each. The holders for the time being of the shares shall be members of the syndicate. Each of the subscribers is to be entld to the number of shares set opposite his signature. The shares are to be transferable, but not divisible. A transfer must be registered.

Syndicate established.

Capital.

Members.

2. In entering into the contract dated — for the acquisition of the sd mines, A., one of the subscribers hto, shall be deemed to have been acting on behalf of the syndicate, and the syndicate shall forthwith repay him the deposit, and shall indemnify him against his liabilities under the contract.

Preliminary contract.

3. A. and B. shall be managers of the syndicate.

Managers.

Form 5.	4. £—— per share shall be pd to the managers forthwith, and they may from time to time make calls on the members in proportion to their shares, but no member is to be liable to pay more than the amount of his shares.
Calls.	5. All moneys pd to the managers in respect of calls or otherwise shall be applied for the purposes of the syndicate.
Application of funds.	6. The managers shall have the entire control of the affairs of the syndicate, and may conduct the same in such manner as they think best.
Conduct of business.	7. It is expressly declared that the managers, if they think fit, (a) may sell the mines to a person, or firm, or coy; (b) may form and float, or procure the formation and floating of a coy to purchase the mines; (c) may fix the price and agree to accept any pt of it in fully pd-up shares, debentures, or otherwise; (d) may keep the mines going until disposed of.
Express powers of managers.	8. The managers may convene meetings of the syndicate to deliberate and decide on any of the affairs of the syndicate: every share to confer one vote: majority to decide; votes may be given in person or by proxy. Three days' notice of each meeting to be given.
Meetings.	9. The consen for sale or disposition of the mines shall be applied, first, in paying all debts and liabilities of the syndicate: secondly, in repaying any capital contributed by the members in respect of their shares: thirdly, the surplus shall be divided amongst the members in proportion to their shares. And for the purposes of this clause the managers may convert into money any shares, debentures, or other specific assets, and may divide any such assets in specie, and make such other arrangements for adjusting the rights of the members as they think fit.
Division of proceeds.	10. Notices to each subscriber may be given by post, addressed to him at his address below mentd. Notice so given to be deemed served twelve hours after posting.
Notices.	Dated the —— day of ——.

Syndicates.

Syndicates are sometimes formed under an agreement as above, but the agreement constitutes a partnership, and the members are therefore individually responsible for what the managers do, without any real limit of liability; and if the number of members, by oversight or otherwise, exceeds twenty, the syndicate becomes an illegal association. These objections to a syndicate agreement now very commonly induce the formation of an incorporated syndicate.

The following are a few examples of the cases in which syndicates are commonly formed:—

1. A. has a patent for an invention, but no capital. The utility of the invention is fairly obvious; but it requires to be more thoroughly tested, and expense must be incurred in so testing it, and also in obtaining foreign patents, and perhaps in floating a company to purchase the patent rights. B., C. and D. agree to form a syndicate

Form 5.

which shall find the requisite funds. The patent rights are made over to the syndicate, on the footing that A. shall have, say, one-third of the shares in the syndicate free, and that the other subscribers shall pay up their shares in cash. The capital of the syndicate is fixed accordingly, say at 3,000*l.* in 100*l.* shares. The invention is tested, and, if found satisfactory, foreign patents are obtained, and the public company is formed and floated. The patents are re-sold to the public company at a profit, and the net proceeds of sale are divided rateably amongst the members of the syndicate, which is then dissolved.

2. C. has obtained in America or in one of the Colonies an option or contract to purchase some mining property. Money is wanted to send out an independent expert, and perhaps to work the property to a limited extent, and thus prove its capabilities. C. places his option or contract and knowledge at the disposal of the syndicate in consideration of shares in the syndicate. The syndicate then obtains the necessary reports, works the property more or less, and re-sells it at a profit, either to some company formed for the purpose of acquiring it or to anyone who is willing to buy it on satisfactory terms.
3. A. has a going business which requires immediate financial assistance. For certain reasons it is not practicable to convert the business at once into a company, and go to the public, and accordingly a syndicate is formed to find the requisite funds in consideration of a share in the business and the power to dispose of it. The syndicate takes over the business, sets the concern on its legs, and then, on a favourable opportunity, disposes of it on the best terms obtainable.
4. The prospects of some company are likely to be damaged by hostile attacks and fictitious sales of its shares. A., B., and C., and others who are interested in the company and desire to resist these attacks, form a syndicate to buy up all shares offered for sale and to hold the same for a limited period, and then re-sell on the best terms obtainable.
5. Some mercantile commodity is likely to rise in value. A syndicate is formed to acquire and hold a large stock of it and to re-sell when the rise has taken place.
6. A company is about to be brought out, but considerable preliminary expenses will have to be incurred in advertising, legal charges, fees to brokers, solicitors, and otherwise. A syndicate is formed to find the requisite funds, the vendor agreeing to repay them with a bonus out of the purchase consideration which he is to obtain from the company. The company is then floated, and in due course the vendor pays off the syndicate's advance and bonus.
7. It is desired by certain parties to apply to some government authority for a concession, charter, or other special privilege. In order to obtain this expense must be incurred, and the requisite funds can only be found by co-operation. Accordingly A., B., and C. and others form a syndicate.

In order to form an incorporated syndicate it is necessary to prepare a suitable memorandum and short articles of association. The name of the company not uncommonly includes the word "syndicate," *e.g.*, The ——— Syndicate, Limited. The objects must be made wide enough to cover what is wanted, and usually it is considered expedient to express them in terms so general as not to disclose the particular scheme the parties have in view; *e.g.*, if the real object is to acquire a particular concession for which A. has been negotiating, the objects will be to acquire any concessions, and to work and dispose of them, and to form any company, and to raise money, &c. See Form 178. The capital

Form 5.

will be fixed at such a figure as may suffice to cover the probable outlay. The articles of association will probably adopt Table A. with modifications. See Form 252. The syndicate is usually registered as a PRIVATE COMPANY under sect. 121 of the Act. See *infra*, p. 910. In due course the syndicate will enter into an agreement with A. to acquire the benefit of his negotiations and services in consideration of some paid-up shares, say one-third of the capital. The rest of the capital of the syndicate will then be subscribed, and steps will be taken to obtain the concern. When the concession has been acquired, it will be sold to a company promoted by the syndicate, and the proceeds will be distributed and the syndicate dissolved.

There is great advantage in an incorporated syndicate, for it is a separate entity recognized by the law and not a mere partnership, and accordingly in all contracts its corporate name is used, the members enjoy limited liability, and the directors or managers are not the agents of the members individually but of the body corporate, which is the promoter, and is responsible for the acts and omissions of the directors. *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, 423.

Besides, it is often found that capitalists and others who would become members of an unincorporated syndicate are ready enough to become members of an incorporated syndicate in their own names or through nominees.

As to syndicates limited by guarantee, see *infra*, Chap. X.

The doubts as to the status and regularity of incorporated syndicates consisting of a very few substantial persons, which were caused by a decision of the Court of Appeal, were completely dispelled by the reversal of that decision in the House of Lords. *Salomon v. Salomon & Co.*, (1897) A. C. 22. See Chap. X. And now a private company may consist of any two or more persons. See p. 911, *infra*.

Form 6.

AGREEMENT by SHAREHOLDERS to POOL their SHARES and have them SOLD by TRUSTEES.

Pooling
agreement.

Recitals.

AN AGREEMENT made, &c., between A. B., of —, and the several other persons named in the first schedule hto, of the first or one part. and The — Trust Coy, Limtd (hnter called "the trustees"), of the second or other part: WHEREAS the several persons named in the first schedule hto are collectively entitled to 20,000 fully pd-up shares of 10*l*. each in the capital of The — Coy, Limtd (numbered — to — inclusive), and the number held by each of them is set opposite his name in the fourth column of the sd schedule: AND WHEREAS the sd several persons have lately transferred their respective shares asfd into the names of divers other persons as nominees of the trustees: NOW THESE PRESENTS WITNESS AND DECLARE that it is hby agreed as follows:—

Pool.

1. The sd shares (hnter called "the pooled shares") and the proceeds of sales thereof, and all income therefrom, shall constitute a joint stock fund (hnter called "the pool"), to be dealt with as hnter provided.

Shares in
pool.

2. The pool shall be deemed to be divided into — shares, and each of the parties hto of the first part shall be entld to the number of shares in the pool set opposite his name in the fifth column of the

schedule hto- that is to say, at the rate of one share in the pool for each ten of the pooled shares to which he is entld as afsd. Form 6.

3. The trustees shall hold the pooled shares upon trust to sell the same as and when they, in their absolute discretion, think fit, and upon such terms and in such manner as they in their absolute discretion may consider expedient, with full power to pay commissions to any persons for placing, or assisting to place, any of the sd shares, and to give to any person who shall buy or place any of the sd shares the call of further of the sd shares for a limited period and at a specified price, and the trustees shall receive any dividends payable in respect of such of the sd shares as shall for the time being remain unsold.

Sometimes a minimum price is specified, and very commonly a scale is given providing that the first 1,000 shall not be sold for less than — per share, the second 1,000 at not less than — per share, and so on.

It is not safe to empower the managers to buy shares in the company, lest it should be found as a fact that the object of the scheme was unduly to raise the price of the shares, see *supra*, p. 150.

4. The trustees shall apply all moneys received by them under these presents in or towards paying all costs, charges, and expenses incurred by them in relation to the trusts hereof, and shall from time to time, as and whenever the surplus in hand is sufficient to pay a dividend of at least £—, apply such surplus in paying to the holders of shares in the pool a rateable dividend. Distribution of cash.

5. The shares in the pool shall be numbered — to — inclusive, and each holder of any share in the pool shall be entld to a certificate of title to his share or shares therein, framed in accordance with the form set forth in the second schedule hto. Such certificate shall be under the seal of the trust. Certificates

6. The trustees shall keep at their registered office a register of the shares in the pool, and the registered holder of shares in the pool shall be at liberty at all reasonable times to inspect the sd register. Register

7. Every holder of a share in the pool may transfer the same by instrument in writing in the usual common form, which shall be signed both by the transferor and by the transferee. Until the registration of the transfer the transferor shall be deemed to remain the holder of the share. The instrument of transfer must be delivered to the trustees, accompanied by the certificate relating to the share comprised therein, and such other evidence as the trustees may require to prove the title of the transferor; and the trustees may charge a fee of 2s. 6d. for each transfer registered. Transfer.

It is not usual to make shares in a pool transferable.

8. The registered holder of any share in the pool shall be recognized and treated as the absolute owner thof, and in the case of the

Equities disregarded

- Form 6.** death of any one or two or more joint registered holders, the coy will only recognize the survivor or survivors as the absolute owner or owners thof, and the receipt of any such person or persons so recognized as absolute owner or owners afsd in respect of any moneys payable by the trees in respect of such share shall be a good discharge to the trees, notwithstanding any notice, express or otherwise, they may have as to claims under any trust or otherwise.
- Dividends posted.** 9. All dividends on shares in the pool may be paid by cheque sent through the post to the registered address of the holder, or in case of joint holders, to the registered address of that one of them who is first named on the register in respect of such shares.
- Closing pool.** 10. The pool shall be closed at the expiration of one year from the date hereof, but the holders of two-thirds of the shares in the pool may at any time previously, by notice in writing to the trees, close the pool, and the same shall be closed accordingly.
- Distribution of pooled shares.** 11. When the pool is closed as afsd, such of the pooled shares as have not been sold, and also any cash in the hands of the trees and available for distribution, shall be distributed among the holders of shares in the pool as nearly as may be rateably in proportion to the shares in the pool held by them resply.
- Surrender of certificates.** 12. Before making any such final distribution as afsd the trees may require all or any of the certificates afsd relating to shares in the pool to be given up to be cancelled, and the same shall be given up accordingly.
- Guarantee.** 13. The trees guarantee that their nominees afsd shall duly hold and dispose of the sd 20,000 shares in accordance with these presents.
- Remuneration.** 14. The trees shall be entitled as remuneration for their trouble in executing the trusts hereof to be remunerated at the rate of the sum of £— per annum.
- Indemnity.** 15. The trees shall be indemnified out of the trust premises against all expenses and liabilities incurred in relation hto, and they shall have a lien for such indemnity on the pooled shares and all moneys arising therefrom.
- Modification of rights hereunder.** 16. The holders of three-fourths of the shares in the pool may, by writing under their hands, assent to any modifications of the rights hby conferred on the holders of shares in the pool, and such assent shall be binding on all the holders of shares in the pool, and they shall all be bound to give effect thereto.
- Notices.** 17. A notice under these presents may be served by the trees upon any registered holder of any share in the pool, either personally or by sending it through the post in a registered prepaid envelope or wrapper to his or her registered place of address, and any notice so served by post shall be deemed to be served at the expiration of forty-eight hours after it is posted.

FIRST SCHEDULE.

Form 6.

In five columns—(1) names, (2) addresses, (3) descriptions, (4) particulars of pooled shares, (5) particulars of shares in pool.]

THE SECOND SCHEDULE.

[Form of Certificate.]

It is not at all uncommon to establish a pool so that a number of shareholders may benefit *pari passu*.

Sometimes a pool is established where a number of underwriters have been stuck with large blocks of shares, and wish to dispose of their shares gradually, so as not to run the prices down by overloading the market. In such cases, the members of the pool are generally prohibited from transferring. In other cases, the object of the pool is to create a voting trust which will be worked for the benefit and protection of the members of the pool.

At other times a pool is established for the purpose of splitting up a series of founders' shares into fractions, e.g., 100 founders' shares may be represented by, say, 10,000 shares in the pool. Sometimes the term "trust" or "syndicate" can be used instead of "pool."

It is not safe to provide for the purchase of shares for the benefit of the pool, for if the pool by purchasing runs up the price, there will be danger of the association being held to be a conspiracy. See *supra*, p. 134

POOLING AGREEMENT *with* PROVISION *for* TRANSFER OF SHARES.

Form 7.

AN AGREEMENT made, &c., between A. B., of — (hereafter called "the trustee"), of the one pt, and the several other persons who shall subscribe their names hto, of the other or second pt. [Recitals, see Form 6.]

Another
pooling
agreement.

1. The sd shares (hereafter called "the pooled shares"), &c. [Form 6.]
2. The pool shall be deemed to be divided into as many shares as the pooled shares, and each of the parties hto shall be entitled to the same number of shares in the pool as the number of shares set opposite his signature hto.

Pool.
Shares in
pool.

3. The tree shall hold, &c. [Form 6.]

4. It shall rest with the tree to determine which of the pooled shares shall on each occasion be sold or dealt with, and for the purpose of giving effect to any sale or disposition of any of the pooled shares, the registered holders of the pooled shares shall resp'y, upon the request of the tree, sign all transfers thereof which the tree shall require, and if any holder makes default in complying with any such request, the tree may sign any such transfer for the defaulting shareholder, and the tree's certificate in writing that the member has made such default shall, as regards any purchaser or transferee and the co'y, be conclusive.

Transfers.

5 et seq. on lines of Form 6.]

PROSPECTUSES.

CHAPTER III.

INTRODUCTORY NOTES.

WHERE it is intended to appeal to the public for the capital required to work a company, the usual course is to issue a prospectus inviting applications for shares or debentures or both. Prior to 1862 a prospectus was almost always issued *before* the formation of a company; but after the Act of 1862, which rendered the formation of a company a much simpler and inexpensive matter, it became the general practice to issue the prospectus *after* the formation (*i.e.*, the registration) of the company. And this practice it is desirable to continue, since it prevents many disputes and difficulties which used to arise under the old practice, and are not less likely to occur under the Companies Act, 1908, although that Act distinctly contemplates (sect. 80) a prospectus in relation to any *intended* company.

When prospectus to be issued

In most cases the prospectus of a new company is prepared by or under the direction of the promoters before the company is formed, and after its formation the prospectus is submitted to the directors of the company, who pass a resolution approving of it, with or without modification, and directing it to be filed and issued. The mode in which the prospectus is brought to the notice of the public varies considerably. In some cases the parties rely almost entirely on the circulation, by post or otherwise, of printed copies of the prospectus; but generally the document, or an abridgment thereof (*infra*, p. 175), is advertised in the newspapers.

How prepared and published.

The preparation of a prospectus requires both skill and judgment, and involves great responsibility; for not only does the success of the company's appeal to the public depend to a considerable extent on the attractiveness of the document, but if it is improperly framed, either by putting in what is incorrect or misleading or omitting what ought to be disclosed, the company, its directors and promoters, may be exposed to actions by any number of persons who have subscribed for shares on the faith of the prospectus, and to other liabilities of the most harassing and serious character.

Skill required and responsibility involved.

As already mentioned, the prospectus is usually prepared by or under the direction of the promoters, and with the privity of the directors.

Practice.

Very commonly, legal advice as well is taken on the draft; for ignorance of law in general and of the requirements of the Act of 1908 in particular, or want of judgment on the part of those who issue a prospectus, may lead to the most disastrous consequences. *Bona fides* and honesty are indeed absolutely essential, but by themselves they are not a sufficient protection. A person, for instance, may be fully aware that he is bound to state all material facts; but from his position, or under the influence of sanguine expectations, he may be unable to form an impartial judgment as to what facts are material. He may know well enough that he must abstain from misrepresentation, and yet be totally unable to see that an ingeniously-framed statement, which he or some other person desires to insert, is misleading. He may believe a statement to be true, but be forgetful or ignorant of the danger he incurs in stating as a fact that which he only knows by hearsay. He may forget, or misconstrue, the provisions of the Act of 1908 with reference to prospectuses. He may think that as documents are offered for inspection, applicants will be fixed with knowledge of their contents, and may not notice in the prospectus a misrepresentation as to their terms which renders the offer nugatory. He may imagine that this or that is only a small matter, and may be surprised a few months or years later to find that his want of judgment has led to his being made a defendant in seventy or eighty actions. All these possibilities make the assistance of a trained legal mind very desirable.

The memorandum and articles of association and any preliminary contracts are generally settled at the same time as the prospectus, for these documents are commonly framed in contemplation of the prospectus, and with reference to what it is desired to say or not to say therein. The prospectus should not be finally settled until after the formation of the company.

Important
points to be
observed in
settling a
prospectus

In settling a prospectus it is necessary to bear in mind-

- A. That it should be framed so as to comply with the numerous and in many cases onerous requirements of the Act of 1908, particularly sect. 81, so far as applicable.
- B. That the prospectus should be made as attractive as is consistent with truth, and should not be open to hostile criticism on the ground of significant omissions therefrom, or vague statements on vital points. See *infra*, pp. 182, 183.
- C. That it should be framed so as to comply with the general law, apart from the Act of 1908, and so as not to give rise to any charge of unfairness or deception. See *infra*, p. 183.

Provisions of the Companies (Consolidation) Act, 1908.

Particulars to be disclosed.

Sect. 81 of the Act of 1908 runs thus:—

81.—(1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state

Specific
requirement
is to particu-
larise
prospectus

The object of this section is to compel the disclosure in a prospectus of a series of facts which the Legislature considers it material to have disclosed to persons invited to become subscribers—facts which are within the knowledge of those issuing the prospectus, and are not within the knowledge of those receiving it.

"**Prospectus**," as defined by the Act (sect. 285), means "any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures [or debenture stock] of a company."

Issued by or on behalf of the company. The words "or in relation to any intended company," which occur in sect. 9 (see *infra*, p. 179), do not appear here; but the words "or by or on behalf of any person who is or has been engaged or interested in the formation of the company" appear to be wide enough to cover a prospectus issued by the promoters before the registration of a company—especially having regard to the words of sub-sect. (4): "subject, &c., this section shall apply to any prospectus, whether issued on or with reference to the formation of a company or subsequently."

Sect. 245 makes the section apply to every existing company as if it had been registered under the Act of 1908.

Contents of Memorandum.

(a) the contents of the memorandum of association, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company; and

Setting out
memorandum
of association

Everything in the memorandum except the signatures of the witnesses is to be set out. As the practice is to sign the names in full the whole memorandum is practically required to be copied into the prospectus. There seems to be no objection to the method now adopted of printing the contents of the memorandum in the fold of the prospectus, and referring to it in the body of the document. See

sub-sects. (7) and (8) as to not setting out the memorandum in certain cases.

"Subscribed for" means subscribed for in the memorandum.

Founders' and
management
shares.

The memorandum itself usually states all that is required by the section as to the founders', management and deferred shares (if any), but sometimes those shares are merely mentioned there without the nature and extent of the interest of the holders in the property and profits of the company being specified, and in such case these particulars must be added in the prospectus.

Sub-sect. (5), whilst making it unnecessary to specify in a prospectus issued as a newspaper advertisement the contents of the memorandum, the signatories thereto and the number of shares subscribed for by them, does not extend the provision to the particulars as to the founders' or management shares.

Articles as
to directors'
qualification
and remuneration.

(b) The number of shares, if any, fixed by the articles of association as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and

Articles of association. This expression must mean the articles in force when the prospectus is issued, including any alterations that may have been made by special resolution. The section does not say the original articles.

Qualification.

There is no obligation to insert in the articles any qualification clause, but if such a clause be inserted and provide for a *share* qualification, the number of shares must be stated in the prospectus.

A director may be qualified by holding the requisite number of shares *jointly* with another. *Glory Paper Mills, Ex parte Dunster*, (1894) 3 Ch. 473; *Grundy v. Briggs*, (1910) 1 Ch. 44. For directors to accept qualification shares from a promoter on the terms of holding them on trust for him is misfeasance. *London and S. W. Canal Co.*, (1911) 1 Ch. 346.

A debenture or debenture stock qualification need not be mentioned in the prospectus.

Directors'
names, &c.
Minimum
subscription
Application
and allotment
moneys.
Previous
issue.

(c) the names, descriptions and addresses of the directors or proposed directors; and

(d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted; and the amount, if any, paid on the shares so allotted; and

As to "Directors or proposed Directors." It must not be forgotten that by sect. 72, where the prospectus is "issued by or on

behalf of the company" (not being a company registered before January 1st, 1900, or a company registered after that date which has survived for a year after being entitled to commence business), and the company is one which invites public subscriptions for shares. The names of directors or proposed directors are not to be stated in the prospectus unless the requirements of sect. 72 have been satisfied. See the notes to that section, *supra*.

As regards shares, the minimum subscription is dealt with by sect. 85 of the Act (see *supra*, p. 9). The Act, however, does not contain any similar provision as regards debentures or debenture stock, and accordingly it is open to argument that this section (81) only requires the minimum subscription as regards shares to be stated. But the words are wide enough to cover both. The expression "the minimum subscription on which the directors may proceed to allotment" is perfectly sensible, whether applied to shares or debentures or debenture stock, and may, consistently with reason, be read as referring, in regard to shares, to the minimum subscription mentioned in clause 85, and as regards debentures or debenture stock, to such minimum subscription as may be fixed in the prospectus. But when the whole of sub-sect. (d) is read, and note is taken of the fact that the clause is silent as to debentures and debenture stock, whereas shares are expressly mentioned, and when the clause is read with sect. 85 (1) (2), wherein the new expression "minimum subscription" is defined, there can be little doubt that sect. 81 (1) (d) is meant to apply to shares only.

And in the case of a second or subsequent offer." This requirement in its original form was a very onerous one, as the company might in the course of its career have made many issues of shares and debentures, but the disclosure required is now restricted to issues within the two preceding years."

- (c.) the number and amount of shares and debentures issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued; and

Fully paid
shares and
debentures.

The consideration." It is apprehended that it will be sufficient to state the general nature of the consideration, and that it will not be necessary in each case to set out all the details of the consideration. *N. Frost & Co.* (1899) 2 Ch. 207. That may be ascertained later on from the return of allotments required by sect. 88 (1) (b).

Statement of
consideration.

- (d.) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the

Unpaid
vendors'
names, &c.

Amount
payable to
unpaid
vendor

issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of the issue of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor; provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors.

"Of the vendors," &c. This stringent provision must be read in conjunction with sub-sect. (2) of sect. 81, *infra*. The object is to strip off the mask which in the past was too often used to conceal the real vendor. But the wording of the sub-section is very general, and covers many cases which can scarcely have been contemplated. Take for example, the case of a manufacturing company carrying on a going business, in the course of which it always has in hand a considerable amount of materials supplied on credit, and paid for periodically or by instalments. Does the sub-section apply to every such case, and render it necessary to specify the name of each vendor and the amount payable to him? If the property "is to be paid for wholly or partly out of the proceeds of the issue," it is apprehended that the sub-section applies; but when goods have been sold on credit, so that the property has passed and the company has obtained possession, it may be that such goods do not fall within the words "the purchase or acquisition of which has not been completed at the date of the publication of the prospectus." The acquisition in such case has, in a sense, been completed.

Doubts like these help to make the section very troublesome to business men with the best intentions. It contains no exception of purchases in the ordinary course of business similar to that in par. (k), *infra*, but looking at the sense of the thing and the policy of the prospectus section, it seems highly improbable that the clause was intended to apply to ordinary business contracts.

The whole of the consideration, cash, shares, or debentures, payable to anyone by the company in respect of the purchase or acquisition of the property must be stated. *Brookes v. Hansen*, (1906) 2 Ch. 129.

Where a company is the purchaser of property which at law as well as in equity belongs absolutely to the vendor, it is not necessary under this paragraph that the prospectus should disclose the amount of the purchase-money paid by the vendor upon his acquisition of the property. *Ibid*.

A company, generally speaking, is not a sub-purchaser for the purposes of this paragraph unless it has to pay purchase-money to someone other than its own vendor; nor need the prospectus contain a statement of the amount of any consideration paid or to be paid by anyone other than the company itself.

Purchase-
money paid
or payable

(g) the amount (if any) paid or payable as purchase-money in cash, shares, or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill; and

The concluding words will render it necessary or expedient to specify the amount payable for goodwill separately in the contract, for where it is not so stated difficulty will or may arise as to the apportionment.

- (A) the amount (if any) paid within the two preceding years, or payable as Under-writing commissions commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in or debentures of the company, or the rate of any such commission; Provided that it shall not be necessary to state the commission payable to sub-underwriters; and

See sect. 89, which legalises such payment on terms, and *infra*, Chap. IV.

It would seem that underwriting and placing contracts are not in all cases material contracts, the dates and parties to which must, under paragraph (k), *infra*, be stated in the prospectus. If the amount to be paid—which is the material matter—is disclosed, it may be that the dates and parties need not be disclosed—are not material: but see *infra*, par. (k).

- (i) the amount or estimated amount of preliminary expenses; and

Preliminary expenses

If the amount is stated, as by this paragraph required, the dates and parties to the contracts can scarcely be material to subscribers; at all events, they are not required to be set forth here.

Perhaps such contracts, even if material, come within the exception in paragraph (k), as contracts in the ordinary course of business.

It is not to be necessary to disclose the amount or estimated amount of preliminary expenses in a prospectus published more than one year after the date at which the company became entitled to commence business. See sub-sect (8).

- (j) the amount paid within the two preceding years or intended to be paid to any promoter and the consideration for any such payment; Payments to promoters.
and

As to what persons are promoters, see *supra*, Chap. II.

- (k) the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected; Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract entered into more than two years before the date of issue of the prospectus; and Contracts

This provision is in substitution for sect. 38 of the Companies Act, 1867, repealed by sect. 33 of the Act of 1900. There is no definition

in the Act of the term "material contract." The expression, no doubt, means any contract material to the subscriber in deciding whether he will or will not subscribe in response to the prospectus. See the notes on sect. 38 of 1867, *infra*, p. 226.

It would seem, therefore, that, subject to the exemption contained in the proviso, every contract is material which would be likely to influence the judgment of an intending applicant as to whether he should or should not subscribe for or purchase any shares, debentures, or debenture stock offered him by the prospectus.

The following, for example, would seem *prima facie* to be material, namely:

- Any contract by a vendor to give the promoters a commission or other advantage in relation to the formation of the company;
- Any contract for the purchase of property or rights which are to be resold to the company at a profit;
- Any contract for purchase by the company, or by the promoters or others, even though the purchase has been completed;
- Any contract under which the promoters or directors are obtaining any advantage at the expense of or in relation to the company;

but each case must depend on its own circumstances. The decisions, however, on sect. 38 of the Companies Act, 1867, *infra*, p. 226, as to what are material contracts under that section, throw considerable light on the question, What are material contracts under this section?

As the clause provides for inspection, it apparently only applies to contracts in writing, whereas sect. 38 of the Companies Act, 1867, covered verbal contracts. *Arkwright v. Newbold*, 17 Ch. D. 301.

Where the prospectus is published more than *one* year after the company is entitled to commence business, the obligation to disclose material contracts is limited to a period of *two* years prior to the prospectus. Sub-sect. (4) (b), *infra*. But this is not much of a concession.

"Provided that," &c. This exemption from disclosure of ordinary business contracts meets the great difficulty which the Courts experienced in dealing with the unqualified language of sect. 38 of the Act of 1867, "any contract entered into by the company, or the promoters, directors, or trustees thereof."

Whether a particular contract has been entered into in the ordinary course of the business carried on, or intended to be carried on, by the company is a question of fact.

Contracts made before the incorporation of the company (*e.g.*, by the vendors) may be regarded as contracts entered into in the ordinary course of the business "intended to be carried on by the company."

"More than two years before," &c. Two years is now substituted for three. Thus a company is relieved from the necessity of

going back for an indefinite period. The material contracts which have to be specified are only those entered into within two years before the date of issue of the prospectus. And see the possibly shorter time in the case mentioned in sub-sect. (8).

- (7) the names and addresses of the auditors (if any) of the company; and Auditors
 (m) full particulars of the nature and extent of the interest (if any) of Director,
 every director in the promotion of or in the property proposed to be interests
 acquired by the company, or where the interest of such a director
 consists in being a partner in a firm, the nature and extent of the
 interest of the firm, with a statement of all sums paid or agreed to
 be paid to him or to the firm in cash or shares, or otherwise, by any
 person either to induce him to become or to qualify him as a director
 or otherwise for services rendered by him or by the firm in connection
 with the promotion or formation of the company.

Full particulars." The object of this is to enable subscribers to judge how far the directors who invite subscriptions are independent and trustworthy. A., B. and C. named in a prospectus may constitute an apparently independent and trustworthy board, but if the fact be disclosed that they are all in the pay or under the control of the vendors or promoters—have, in effect, accepted a retaining fee from someone with interests different to those of the company—they have disqualified themselves from acting as advisers of the company, and intending subscribers will be put on their guard.

It is not enough to indicate that the director has an interest. Full particulars of the nature and extent of the interest are to be given.

As an illustration of this, see *Imperial &c. Assoc. v. Coleman*. L. R. 6 H. L. 190.

- (n) Where the company is a company having shares of more than one class the right of voting at meetings of the company conferred by the several classes of shares respectively.

(2) For the purposes of this section every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

What
 "vendor"
 includes.

- (a) the purchase-money is not fully paid at the date of issue of the prospectus; or

"For the purpose," &c. This sub-section must be read in connection with sub-sect. (1) (f), *supra*: see note thereto.

"Deemed to be a Vendor," &c. See note to sub-sect. (1) (f), *supra*.

- (b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or

(c) the contract depends for its validity or fulfilment on the result of that issue.

Lessor is a
vendor.

(3) Where any of the property to be acquired by the company is to be taken on lease, this section shall apply as if the expression "vendor" included the lessor, and the expression "purchase-money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

Waiver
conditions
useless.

(4) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

"Any condition," &c. Sect. 38 of the Companies Act, 1867, did not prohibit a condition for waiver, and it was for many years customary to insert waiver clauses in prospectuses so as to protect the directors and promoters from the dangers of that very vague and stringent enactment. The exact effect of a waiver clause was for a long time not clearly ascertained, but in *Macleay v. Tail*, (1906) A. C. 24, it was decided by the House of Lords that a director or promoter might be protected by a waiver clause provided it was honest, but it must be honest, for the proper function of such a waiver clause is to avoid danger resulting from an unintentional slip. It will not avail where used for "the protection of trickery" (Lord Lindley), or "as part of the machinery of fraud" (Lord Halsbury). *ibid.* And see *Cackett v. Keswick*, (1902) 2 Ch. 456; *Greenwood v. Leather Shod Wheel Co.*, (1900) 1 Ch. 421. A waiver clause should contain a frank and fair avowal of the nature of the contract in respect of which the subscriber is asked to waive his rights under sect. 38. *Watts v. Bucknall*, (1903) 1 Ch. 766.

For the future, however, this sub-section invalidates, as regards the section, any such condition. The section, indeed, goes further, for it invalidates any condition binding any applicant to waive or purporting to affect the subscribers with notice of any contract, document or matter not specifically referred to in the prospectus. Thus it is useless to say in a prospectus to which the section applies that applicants will be deemed to have notice of contracts not specifically referred to, i.e., by dates and names. See as to constructive notice of documents, *Gluckstein v. Barnes*, (1900) A. C. 240, and *Aaron's Reefs, Limited v. Twiss*, (1896) A. C. 273.

But as a set-off against this disallowance of the "waiver clause," the Act allows a director to set up (see sub-sect. (6) (a) (b)) grounds of defence—ignorance and honest mistake of fact—which were not available to him under sect. 38 of the Act of 1867. This redresses the balance.

Dispensation
in case of
newspaper
advertisements.

(5) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum of association or the signatories thereto, and the number of shares subscribed for by them.

This sub-section reduces the very heavy cost of advertising a prospectus, but it affords only a small measure of relief. It is therefore material to consider whether an advertisement cannot be so framed as to avoid the necessity of setting out the mass of detail which the section requires in a prospectus. As to this, it is apprehended that if the advertisement is not a prospectus "offering to the public for subscription or purchase, shares or debentures or debenture stock," it is not touched by the section. Thus an advertisement which does not actually offer shares, &c. for subscription, but states that the company is issuing a prospectus whereby it offers for subscription certain shares, debentures or debenture stock, and that the prospectus states (*inter alia*) so and so, and that copies may be obtained at specified places, appears not to be a prospectus within the section.

See further, *infra*, pp. 259, 260, where the subject of abridged prospectus is touched on.

6) In the event of non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—

Modified liability of honest directors.

a) as regards any matter not disclosed, he was not cognisant thereof; or

b) the non-compliance arose from an honest mistake of fact on his part.

Provided that in the event of non-compliance with the requirements contained in paragraph (m) of sub-sect. (1) of this section no director or other person shall incur any liability in respect of such non-compliance unless it be proved that he had knowledge of the matters not disclosed.

"In the event of non-compliance," &c. Nature of remedy. Remedy.

The section somewhat strangely leaves it in doubt what is the nature of the redress available to a person subscribing on the faith of a prospectus which does not comply with the statutory requirements. Is it a remedy by action for damages against the directors or other persons issuing the prospectus? Or is it rescission of the contract to take shares? Or is it both? Or may criminal proceedings be taken?

From some recent decisions (*Wimbledon Olympia, Limited*, (1910) 1 Ch. 630; and *South of England Natural Gas Co.*, (1911) 1 Ch. 573) it appears that rescission is not the remedy given by the section, and that the remedy given is an action for damages against the directors or other persons responsible for the prospectus. In the former case the prospectus omitted to mention the fact that on two previous occasions the company had offered shares for public subscription and the number allotted in response to those offers, and it was contended that this omission entitled the applicant to rescission of contract. Neville, J., however, held that this was not so. "The section," said his Lordship, "does not in terms so provide, and I cannot attribute to the Legislature the intention that the mere fact of the omission of any of the facts required by this section to be stated should give the shareholders the right to get rid of their shares. Of course there may be omissions of such a character that

they would on other grounds entitle the shareholders to this relief (*see infra*, pp. 183, 193, 195), but in this case we have only the bare fact of omission." This was followed by Swinfen Eady, J., in the second case. In that case the prospectus failed to mention a previous offer to the public of shares, but it was held that this did not give an allottee the right to rescind, and that his remedy was an action for damages against the persons responsible for the prospectus. The learned judge drew attention to the fact that sect. 86 gave to an allottee the right to a return of his money where an allotment was made in breach of sect. 85, but that there was no corresponding provision in regard to sect. 81. "There is no provision," said his Lordship, "of that kind in sect. 81 nor in any other section relating to the omission relied on in this case, but the section does contemplate the liability in damages on the part of the 'directors and other persons responsible for the prospectus,' for sub-sect. (6) exonerates such persons from liability if they can prove certain matters; that is equivalent to saying that they are liable if they cannot prove them. In my opinion the allottee is not entitled to rescind his contract because of any breach of the statutory requirements which extend to such comparatively unimportant matters as the names and addresses of the auditors. His remedy is against the 'directors and other persons responsible for the prospectus.'"

This remedy is founded on general principles. Thus in *Crouch v. Steel*, 3 E. & B. 402, the broad principle was laid down that whenever a statutory duty is created, any person who can show that he has sustained injury from the non-performance of that duty can bring an action for damages against the person on whom the duty is imposed; but in *Atkinson v. Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex. Div. 441, it was decided that this proposition could not be supported—that it was too widely stated—and that in determining whether a person prejudiced by the non-performance of a statutory duty was entitled to bring an action for damages, regard must be had to the purview of the Legislature in the particular Act, and the language employed therein. See, for example, *Cowley v. Newmarket Local Board*, (1892) A. C. 345; *Municipality of Picton v. Geldert*, (1893) A. C. 524; *Saunders v. Holborn District Board of Works*, (1895) 1 Q. B. 64; *Johnston v. Consumers' Gas Co. of Toronto*, (1898) A. C. 447, 454; and *Groves v. Wimborne*, (1898) 2 Q. B. 402. There can be no doubt that sect. 81 of the Act of 1908 imposes on the directors and other persons responsible a statutory duty to comply with its requirements, and the purview of the Act and the language employed both indicate an intention to protect subscribers who act on the faith of a prospectus, and therefore entitle them to sue for damages sustained by breach of the statutory duty.

In such an action the plaintiff must prove

- (a) That the defendant issued, or authorized or sanctioned the issue, of the prospectus:

- (b) That the prospectus did not truly set forth the information required by sect. 81 of the Act;
- (c) That the matter untruly stated or suppressed was material;
- (d) That the plaintiff was induced to subscribe by the non-compliance with the section;
- (e) That the plaintiff has sustained consequential damages

There is no need to prove fraud, and, on the other hand, non-compliance may be excused where the defendant has no cognizance. See sub-sect. (6) (a) of sect. 81.

For instance, he is not misled or damaged where he is shown to have had knowledge of the omitted information, or where, by his own admission or otherwise, it is shown that, had he been cognisant of the omitted information, he would none the less have applied, or where it is not shown that knowledge of the omitted information at any rate might have induced him to abstain from applying. In this respect *Nash v. Calthorpe*, (1905) 2 Ch. 237, though decided on sect. 38 of the Companies Act, 1867, appears to be in point; and see *Smith v. Chadwick*, 9 App. Cas. 187; *Macleay v. Tait*, (1906) A. C. 24. With regard, however, to the influence of a prospectus, Lord Halsbury's observations in the case last mentioned may be cited, where he says that where misstatements have been made in a prospectus and people been led thereby "to take shares, the taking of which has led to loss, it is quite a fair inference to draw, that if the prospectus is calculated to induce people to take shares, and they do take shares, that the prospectus, tainted with falsehood as it is, has acted as a whole, and people cannot be expected to analyse their own mental sensations so minutely as to be able to explain what particular statement had induced them to become shareholders."

And see similar observations by the same learned judge in *Aaron's Reefs v. Twiss*, (1896) A. C. 273, 284, *supra*.

Directors' Defences.

He was not cognisant thereof" (see *supra*, p. 175). These words, it is apprehended, mean merely that he did not know of the matter disclosed. The section does not impose on a director the duty to search for and obtain information as to facts not within his own knowledge.

Thus, a director only has to consider what contracts he personally is cognisant of, and which of them he has to disclose. He is not bound to investigate the whole position and history of the company, so as to find out every material contract, nor is he expected to know everything that is in the books of the company.

But if he knows generally that there are contracts in existence which may or may not fall within the section, and does not choose to inquire into those contracts at all, the absence of inquiry and conse-

quent ignorance would not excuse him from liability if it turned out that some of the contracts ought to have been set out, and he might have ascertained that by making proper inquiries. Per Romer, L. J., in *Tait v. Macleay*, (1904) 2 Ch. 631, 639, *supra*, a case on sect. 38 of the Act of 1867, reversed, but not on this point, in (1906) A. C. 24. And see *Watts v. Bucknall*, (1903) 1 Ch. 766; and *Brazilian Rubber Plantations* (No. 1), (1911) 1 Ch. 425.

It is to be noted that sub-sect. (6) in no way applies to a statement in lieu of prospectus under sect. 82 of the Act.

"Honest mistake of fact." This relates to facts which by the section have to be stated; thus, if by an honest mistake the directors state that A. B. is the vendor, whereas C. D. is the vendor, the directors will be absolved.

Whether a particular contract is or is not material within paragraph (k) of sub-sect. (1) is a question of fact, and if by an honest mistake the directors hold that it is not material, they will be absolved. The fact that they have taken legal advice, and have acted thereon, is evidence of honesty.

In this respect the section ameliorates the law as it stood under sect. 38 of the Companies Act, 1867, for under that section a mistake as to the materiality of a contract afforded no defence to an action. *Twycross v. Grant*, 2 C. P. D. 469; *Macleay v. Tait*, (1906) A. C. 24. And see *infra*, p. 205.

The onus probandi. If the plaintiff in an action proves a breach of the sub-section, he is not bound to go further and prove that the director or other person sued was cognisant of the matter not disclosed, or that he acted dishonestly. It is for the defendant to set up and establish, if he can, one of the defences allowed by this sub-section. In this respect—putting the onus on the director—the enactment follows the analogy of the Directors' Liability Act, 1890, now embodied in sect. 84 of the Act of 1908.

Circular to existing members or debenture holders.

(7) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or debentures of the company whether with or without the right to renounce in favour of other persons, but, subject as aforesaid, this section shall apply to any prospectus whether issued on or with reference to the formation of a company or subsequently.

"Shall not apply," &c. The words "shall not apply," &c., introduce an obviously reasonable qualification. Existing members do not need the same protection as persons newly subscribing. There was an ambiguity in the language of the sub-section as it stood in the Act of 1900, which left it doubtful whether the words were to be read distributively, namely, as referring to a circular offering

members further shares, and (2) to a circular offering debenture holders further debentures; or whether they included a circular offering to members either shares or debentures, and to a circular offering debenture holders either shares or debentures, or both. This ambiguity has been cleared up in the Consolidation Act of 1908.

Subject as aforesaid," &c. These words make it clear that the section is not confined to the first issue, except in the cases expressly mentioned.

8) The requirements as to the memorandum, and the qualification, remuneration, and interest of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

Relaxation of requirements where prospectus published more than a year after company entitled to commence business.

"The requirements," &c. These requirements are those set forth in sub-sect. (1) in the earlier part of clause (a) and in clauses b), (c), (i) and (m).

Entitled to commence business." See sect. 87, *supra*, p. 20.

9) Nothing in this section shall limit or diminish any liability which any person may incur under the general law apart from this section.

Liability under general law preserved.

Hence any action which would lie, apart from this section, will still be available. Thus, even if the prospectus complies with the section, it may still by reason of false or fraudulent statements give a subscriber the right to take legal proceedings for rescission of his contract, or for compensation or damages, under sect. 84, incorporating the provisions of the Directors' Liability Act, 1890, or in an action of deceit. See further, *infra*, p. 202.

Naming Directors in Prospectus.

As to naming unqualified directors in prospectus, see sect. 72 of the Act of 1908, *supra*, p. 6.

Sect. 72 of Act of 1908.

As to Filing Prospectus.

In addition to the above provision, sect. 80 of the Act must be borne in mind, which runs thus:—

80.—(1.) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

Filing of

(2.) A copy of every such prospectus shall be signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, and shall be filed for registration with the registrar of companies on or before the date of its publication.

(3.) The registrar shall not register any prospectus unless it is dated and the copy signed in manner required by this section.

(4.) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(5.) If a prospectus is issued without a copy thereof being so filed, the company and every person who is knowingly a party to the issue of the prospectus shall be liable to a fine not exceeding five pounds for every day from the date of the issue of the prospectus until a copy thereof is so filed.

The object generally of this section is twofold—(1) To preserve an authentic record of the terms on which the public have been invited to subscribe for shares, debentures, or debenture stock; and (2) to secure that the directors of the company accept responsibility for the statements in the prospectus.

It would seem to make a company's prospectus (or statement in lieu of prospectus, see sect. 82), like its memorandum and articles, a public document, of which all persons dealing with the company will have constructive notice, and it remains to be seen how this new departure may affect the purchaser of shares in the market. See *Peck v. Gurney*, L. R. 6 H. L. 403; *Andrews v. Mockford* (1896) 1 Q. B. 172.

The words "every prospectus," &c., mean every "prospectus, notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any shares or debentures [or debenture stock] of a company." See sect. 285.

The words "by or on behalf of a company or in relation to any intended company" apply the section to every company registered under the Act. The section also extends to every prospectus issued before the company is registered.

Moreover, it is not confined to prospectuses of a company or notices inviting persons to *subscribe* for shares, as was the now repealed sect. 38 of the Act of 1867.

It applies also to a prospectus which offers shares, debentures, or debenture stock for sale, *e.g.*, where they are taken by vendors or financiers and then offered for sale by the company.

It does not apply to a prospectus issued by the owners of shares in a company which has been actually registered who desire to dispose thereof, for the prospectus is not "issued by or on behalf" of "the company," but it would seem to apply to such a prospectus if issued by the company on behalf of the owners. And although sect. 80 does not apply in a given case, it may still be necessary to comply with sect. 81, *e.g.*, where the prospectus is issued by or on behalf of some person "who is or has been engaged or interested in the formation of the company." See first paragraph of sect. 81.

Letters of a private nature recommending shares to a few business friends are not a prospectus. *Sleigh v. Glasgow and Transvaal Options*, 6 F. 420, Ct. Sess.

Nor is a prospectus marked "Strictly private and confidential:

not for publication," issued by a director on his own account to private friends. *Showell v. Combined Incandescent Mantles Syndicate*, 23 T. L. R. 482.

Date of Prospectus. The prospectus must be dated, and the date is of importance, as, unless the contrary is proved, it is to be taken as the date of publication of the prospectus. See sect. 72 (1) and sect. 85 (4).

A copy of the prospectus must be filed on or before the date of its publication, and unless "dated and the copy signed in manner required" it is not to be *registered*, which probably means that a copy must not be accepted for filing unless it is so dated and signed. Apparently, therefore, it may bear a date posterior to that of the filing. On the other hand, it must, before it is issued, state on the face of it that it has been filed before being issued, but the date of filing need not be mentioned. Presumably, as a copy must be filed, that copy also must state that the prospectus has been filed, although when the prospectus is signed—and it must be signed before filing it has not been filed. To make sense, the words "proposed to be issued" should be read into sub-sect. (2) after the word "prospectus."

No prospectus shall be issued until," &c. This makes compliance with the section a condition precedent to the issue of a prospectus as defined by sect. 285. If a prospectus not duly dated and signed is submitted for filing the registrar will reject it.

The section extends not merely to the first prospectus, but to all subsequent prospectuses. If a prospectus is issued before it has been filed the issue is illegal, and those who make it may be criminally liable. *Reg. v. Tyler*, (1891) 2 Q. B. 594. Moreover, anyone who subscribes on the faith of a prospectus so issued may be held entitled to repudiate his contract, for no company can keep a contract obtained on the faith of an illegal prospectus.

A fortiori, if the prospectus thus wrongfully issued states, in apparent compliance with the section, that it has been filed, this false statement entitles any subscriber to repudiate his contract and to take proceedings under sect. 84, replacing sects. 3 and 4 of the Directors' Liability Act, 1890.

Sect. 83 of the Companies Act, 1908, is as follows:

83. A company shall not prior to the statutory meeting vary the terms of a contract referred to in the prospectus, except subject to the approval of the statutory meeting.

Restriction on alteration of terms mentioned in prospectus.

See the notes to sect. 87 in Chap. V. p. 332. As to the statutory meeting, see sect. 65, and the notes thereto in Chap. IX. p. 689

As to Attractiveness of Prospectus.

Attractiveness
of prospectus.

No receipt can be given for making a prospectus attractive. The attractiveness must depend essentially on the subject-matter and on the condition of the market. Where a company is formed to take over some well-known and profitable business concern, a very plain and unadorned statement of the facts may be enough to induce the public to rush in and subscribe for three times the number of shares offered. And where, as so often happens, the public is for the time being specially enamoured of some class of investment (*e.g.*, gold, electric light, cycles, motor-cars, breweries, trusts, or industrial concerns), a very prosaic prospectus may suffice. But there are many schemes which, though perfectly sound and *bonâ fide*, may yet have little or no chance of floating without the assistance of a prospectus framed with great skill and judgment so as to put its merits in the right light: in fact, a scheme may be good in itself, but, unless the public can be made to see its excellence, the capital will not be forthcoming.

Effect on
public of
names of
directors,
brokers, audi-
tors, and
solicitors and
promoters

It need scarcely be said that the names of the directors, brokers, auditors, and solicitors given in a prospectus are regarded by the public and their advisers as affording a good criterion of the character of the scheme put forward; for it is—perhaps too readily—assumed that persons of credit and position who thus officially associate themselves with a new venture, have at any rate satisfied themselves as to the *bona fides* of the undertaking, and think sufficiently well of it to prospect to lend their names; whereas, if the directors and others are unknown persons, *à fortiori*, if any of them are in bad odour, the public and their advisers may naturally feel distrust, may hesitate and think it better to abstain from subscribing. So, too, the fact that a company is launched by professional promoters may affect the public subscription unfavourably.

The above are matters for the consideration of the promoter and financier more than of the lawyer: at the same time, when a prospectus is submitted to a lawyer for settlement, he would be wanting in his duty to his clients were he to confine himself to the mere legal aspects of the case, and not to point out practical defects which strike him as likely to prejudice an appeal to the public.

Significant Omissions and Vague Statements.

No significant
omissions or
vagueness.

Take, for instance, the case of a going concern: the following questions may arise on the prospectus:—

Where a
going
concern

- (1) If this is such a very profitable concern, why does the vendor part with it—or part with it on such moderate terms?
- (2) What have been the average profits during the last few years? Have they been rising or falling?

- (3) Has any independent person or firm examined the books and certified as to the profits?
- (4) Does the vendor take any substantial proportion of the purchase consideration in shares, or does he retire altogether?
- (5) Has any and what independent valuation been made of the assets to be taken over, and how much is to be given for goodwill?
- (6) Have the vendors agreed not to compete with the company?
- (7) Is the real proprietor selling to the company, or is there an intermediate vendor, and is he making a profit on the transaction?
- (8) Are the vendors paying any promotion money and, if so, how much?

The "General Law" as to Liability in respect of Prospectuses.

Sect. 81 (9) of the Act provides that "nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section."

Hence, any cause of action, which would lie, apart from sect. 81, is still available. Thus, even if the prospectus complies with that section, it may by reason of untrue or misleading statements give a subscriber the right to take legal proceedings for rescission of his contract, or for compensation or damages under sect. 84 (incorporating the provisions of the Directors' Liability Act, 1890), or in an action of deceit. See *infra*.

It is necessary, therefore, to consider what are the requirements of the general law as to prospectuses irrespective of this section (sect. 81), and as to this the following rules should be borne in mind:—

- (1) The prospectus should not contain a misrepresentation of any material fact, or any deceptive or misleading statement, or any ambiguous statement, which is not true in every sense in which it might reasonably be understood.
- (2) It should disclose every material fact subject to the qualifications below mentioned. As to what are material facts, see p. 171, *supra*.
- (3) The provisions of sect. 84 (reproducing the Directors' Liability Act, 1890 (p. 208)), should be borne in mind, and the precautions below suggested (p. 222 *et seq.*) should be taken.

The disregard of these rules may give any allottee of shares—

- (a) The right to repudiate the allotment and rescind the contract;
- (b) The right to sue, for damages or compensation, those who issue the prospectus, and others who are by statute responsible—a most serious liability.

And, first, as to the cases in which the allottee, induced by the prospectus to subscribe, is entitled to rescind on the ground of misrepresentation or non-disclosure—*suggestio falsi* or *suppressio veri*.

Legal requirements before Act of 1900.

Effect of non-compliance.

Repudiation for misrepresentation or non-disclosure.

In order to establish this right, the allottee must prove—

- (1) That the prospectus was issued by the company or by some director, promoter, or other person whose acts the company has authorized or adopted.
- (2) That the prospectus mis-represented some material fact, or omitted to disclose some material fact or contract.
- (3) That he was induced to subscribe by such misrepresentation or non-disclosure.

Proof of
issue by
company or
directors or
promoters.

As to (1), there is rarely any difficulty in proving this. In most cases the prospectus is issued after the incorporation of the company, and with the sanction of its directors. Clearly, in such cases the representations of the prospectus are as between the company and the persons who apply for shares on the faith of the prospectus, the representations of the company. *Lagunas Nitrate Company v. Lagunas Syndicate*, (1899) 2 Ch. 392, 428, 431. In other cases the prospectus is issued by the promoters on the formation of the company, and the directors allot with knowledge that the shares are subscribed on the basis of the prospectus. Here again the company, in effect, adopts the prospectus.

Occasionally a prospectus is issued by the promoters before the company's incorporation, and applications are made on the basis of that prospectus and handed in after incorporation. In such cases also the company, in accepting the applications and allotting the shares, in effect adopts the prospectus and, if it is misleading, cannot keep the contract so obtained. *Karberg's case*, (1892) 3 Ch. 13. "Speaking generally, there is," said Lindley, L. J., in that case, "no doubt that a misrepresentation, in order to vitiate a contract, must be made by a party to it, or by his agent. But this rule is not without exception. *Stewart's case*, 1 Ch. 574, and *Dornes v. Ship*, L. R. 3 H. L. 343, warrant the proposition that an application to a company, when formed, for shares based upon a prospectus issued by the promoters of the company before its formation, cannot be discovered by the company from such prospectus." In *Karberg's case*, *supra*, the application was made before incorporation. It was addressed to one of the promoters, and stated that the applicant desired to subscribe for 200 shares in the proposed company, and requested the promoter, "on the formation thereof, to obtain the allotment of such shares to me"; but it did not refer to the prospectus, although in fact the applicant underwrote on the basis of a prospectus. After its incorporation, the company allotted the shares so applied for, and it was held that the allottee was entitled, as against the company, to rescission of the contract on the ground of misrepresentation in the prospectus.

This case is the more important because the directors, in allotting, were not aware that the application was made on the basis of the prospectus. This was found as a fact by Kekewich, J. (p. 6): "The

company received from Mr. Karberg an application for shares independently of any prospectus; it is not shown that they ever knew that he made the application on the faith of the prospectus, nor even that he had received any prospectus at all from anyone." This appears to have been overlooked in *Lynde v. Anglo-Italian Hemp, &c. Co.*, (1895) 1 Ch. 178, for in that case Romer, J., treats *Karberg's case* as an instance of an allotment where "the directors of a company know, when allotting, that an application for shares is based on the statements contained in a prospectus."

For other cases in which a company has been held responsible for a prospectus, see *Henderson v. Lacon*, 5 Eq. 249; *Ross v. Estates Investment Co.*, 3 Ch. 682; *Peck v. Gurney*, L. R. 6 H. L. 377, 491; *Re Denham*, 25 C. D. 752, 765; *Tamplin's case*, W. N. (1892) 94, 146.

Nor can the company, where the prospectus is improperly framed escape the consequence by throwing the blame on its directors, and saying that it did not authorize them to make any misrepresentation; for "the cases clearly show this—that any misrepresentations made by the agents of a company which form the foundation of a contract between that company and a third person—those misrepresentations lying at the root of the contract—will entitle the other party to avoid the contract, and the company must in that sense take upon themselves the consequences of the misrepresentations of their agents." Per Page-Wood, V.-C., *Henderson v. Lacon*, 5 Eq. 249, 261.

On the same principle, where A. takes shares as agent for B., but without disclosing to the company the agency, B. cannot claim relief unless A. was deceived. *Capel v. Sims*, 58 L. T. 807; *Huslop v. Morel*, 7 T. L. R. 263.

As to (2), the obligation of those who issue prospectuses inviting application for shares was long since laid down by Vice-Chancellor Kindersley in *Brunswick, &c. Co. v. Muggeridge* (1861), 1 Dr. & Sm. 383, in words which Page-Wood, V.-C., described as a "golden rule." *Henderson v. Lacon* (1867), 5 Eq. 362. "Those," said Kindersley, V.-C., "who issue a prospectus, holding out to the public the gr. advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality, of the privileges and advantages which the prospectus holds out as inducements to take shares." And in *Central Railway of Venezuela v. Kisch*, L. R. 2 H. L. 113, Lord Chelmsford said that, though some high colouring and even exaggeration in the description of advantages to be enjoyed by subscribers might be expected, no misstatement or concealment of any material facts or circumstances ought to be permitted; that

The golden rule as to framing prospectuses.

the public who were invited by a prospectus to join in any new venture ought to have the same opportunity of judging of everything which has a material bearing on the true character of the adventure, as the promoters themselves possessed, and that the utmost candour ought to characterise their public statements; and his Lordship referred with approval to the rule laid down by *Kindersley, V.-C.*, as above mentioned.

Nevertheless, this "golden rule" partakes somewhat of the nature of a "counsel of perfection"; at all events, it has been qualified by subsequent decision. Thus, in *Peek v. Gurney*, L. R. 6 H. L. 493, it was held that, to support an action of deceit, there must be some active misstatement of fact, or, at all events, such a partial or fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false; but this, it may be observed, was said in regard to an action of deceit, in which fraud is of the essence of the action, and which differs essentially from one brought to obtain rescission on the ground of misrepresentation of a material fact. Per *Herschell, L. C.*, *Derry v. Peek* (1889), 14 App. Cas. 359.

In *McKeown v. Boudard, &c. Co.* (1896), 74 L. T. 712, however, it was held that even in an action for rescission mere non-disclosure of material facts is not sufficient to vitiate the contract. "I think," said *Rigby, L. J.*, in that case, "the law is this, that if you rely as a ground for the rescission of a contract on the omission of a statement, you must show that the omission of that statement makes what is stated misleading. It is not that the omission of material facts is an independent ground for rescission, but the omission must be of such a nature as to make the statement actually made misleading. In other words . . . suppression of the truth may contain a suggestion of falsity." And see *Components Tube Co. v. Naylor*, (1900) 2 I. R. 1.

So, also, in *Aaron's Reefs v. Twiss*, (1896) A. C. 273, Lord Watson said: "The duty of disclosure is not the same in a prospectus inviting share subscriptions as in the case of a proposal for marine insurance. In an honest prospectus many facts and circumstances may be carefully omitted, although some subscribers might be of opinion that these would have been of materiality as influencing the exercise of their judgment. But the statement of a portion of the truth, accompanied by suggestions and inferences which would be possible and credible if it contained the whole truth, but becomes neither possible nor credible whenever the whole truth is divulged, is, to my mind, neither more nor less than a false statement." See also, *Heymann v. European Central Rail. Co.*, 7 Eq. 154.

In *Aaron's Reefs v. Twiss* the prospectus standing alone did not contain any misrepresentation of facts, but read in conjunction with certain contracts offered thereby for inspection, it was false and misleading, and relief was granted accordingly; and the following

words of Lord Halsbury are specially deserving of attention: "It is said that there is no specific allegation of fact which is proved to be false. Again, I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was this a misrepresentation? I do not care by what means it is conveyed—by what trick, or device, or ambiguous language: all these are expedients by which fraudulent people seem to think they can escape from the real conditions of the transaction. If, by a number of statements, you intentionally give a false impression, and induce a person to act upon it, it is not the less false, although, if one takes each statement by itself, there may be a difficulty in showing that any specific statement is untrue." See, further, *supra*, p. 177.

But, of course, a person getting a false impression from a prospectus does not make the prospectus misleading, unless there is something in the prospectus calculated to cause such a false impression. Many people deceive themselves.

A misrepresentation of law is not a misrepresentation of fact. Law or fact.
Beattie v. Lord Ebury, 7 Ch. 777.

But a statement of something as a fact is not the less a representation of fact because it involves a representation of law. *West London Commercial Bank v. Kitson*, 13 Q. B. Div. 360; *Derry v. Peek*, 14 App. Cas. 337; *New Brunswick Co. v. Conybeare*, 9 H. L. C. 711; *Eaglesfield v. Londonderry*, 4 C. Div. 693, 702. In the case last mentioned, Jessel, M. R., said, "A misrepresentation of law is this: When you state the facts, and state a conclusion of law, so as to distinguish between facts and law, the man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law." Accordingly, in *Derry v. Peek*, *ubi sup.*, it was not disputed that a statement that a company had by special Act of Parliament certain powers was a statement of fact.

A representation that something will or should be done or come to pass is not necessarily a representation of fact; *e.g.*, the company "will construct," or "will acquire further concessions," or "on these figures the profits should be very large." The authorities establish that a mere representation that something "will" be done is not a representation of fact; for "there is a clear difference between a misrepresentation in point of fact, a representation that something exists at the moment which does not exist, and a representation that something will be done in the future. Of course, a representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation, if it is anything, it is a contract or promise." Per Mellish, L. J. *Beattie v. Lord Ebury*, 7 Ch. 804. And see *Alderson v. Maddison*, 5 Ex. D. 293, and (*sub nom. Maddison v. Alderson*) 8 App. Cas. 467; *Hallows v. Fernie*, 3 Ch. 467; *Bellairs v. Tucker*, 13 Q. B. D. 562;

Belief,
opinion
expectation,
intention.

Knox v. Hayman, 67 L. T. 137. Thus a calculation as to future profits is not a statement of fact. *Bentley v. Black*, 9 T. L. R. 580.

But "a representation of belief, opinion, expectation, or intention is a representation of an existing fact, for the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what is the state of a man's mind at a particular time, but if it can be ascertained, it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact." Per Bowen, L. J., *Edgington v. Fitzmaurice*, 29 C. Div. 459, 483. See also *Peck v. Gurney*, L. R. 6 H. L. 377, 404, where Lord Cairns appears to have considered that a statement as to the opinion of the directors might, if false, have amounted to a misrepresentation of fact. And see *Karberg's case*, (1892) 3 Ch. 1, 11.

"But . . . I do not think," said Lord Halsbury, L. C., in *Aaron's Reefs v. Twiss*, (1896) A. C. 273, 284, "any particular form of words is necessary to convey a false impression. Suppose a person goes to a bank where the people are foolish enough to believe his words, and says, 'I want a mortgage upon my house, and my house is not completed, but in the course of next week I expect to have it fully completed.' Suppose there was not a house upon his land at all, and no possibility, therefore, that it could be fully completed, can anybody say that that was not an affirmative representation that there was a house which was so near to completion that it only required another week's work upon it to complete it? . . . So here, when I look at the language in which this prospectus is couched, and see that it speaks of a property which requires only the erection of machinery to be either at once or shortly in a condition to do work, so as to obtain all this valuable metal from the mine, it seems to me that, although it is put in ambidextrous language, it means as plainly as can be that this is now the condition of the mine: that such and such additions to it will enable it shortly to produce all those great results, and that there is a representation of an actually existing fact. . . . If you are looking to the language, as *only* the language of hope, expectation, and belief, that is one thing; but . . . you may use language in such a way as, although in the form of hope and expectation, it may become a representation as to existing facts; and if so, and if it is brought to your knowledge that those facts are false, it is a fraud."

It is conceived that there is nothing inconsistent with these views in *Jordan v. Money*, 5 H. L. C. 185; *Citizens' Bank v. First National Bank*, L. R. 6 H. L. 352, 360; and *Maddison v. Alderson*, 8 App. Cas. 467. A man who truly states his intention is not estopped from changing that intention. The expression of intention may, in some circumstances, amount to a contract, or to evidence of a contract, but it does not give rise to an estoppel. See *Re Moore Brothers & Co., Bartholomew's case*, 79 L. T. 70.

In *Todd v. Millen* (1910), S. C. 868, Ct. of Sess., the prospectus of a company signed by the vendors, who were directors of the company, stated that the vendors "have agreed to subscribe for the balance of 500l. of the ordinary shares," and it was held on the liquidator's application to put the vendors on the list of contributories, that the language of the prospectus did not import a contract between the company and the vendors binding the vendors to take the shares (diss. Lord Galvesen). *Re Moore Brothers, supra*, followed.

As to liability in case of careless language and ambiguous statements:—The representation relied on as misleading need not be clear and unambiguous, if it is reasonably capable of bearing the meaning which the allottee attributed to it; for "if persons publishing a prospectus use such careless language that their statements, literally read, are untrue, although this literal sense is different from what they intended, this amounts to a misrepresentation." Per Lord Chelmsford, *Hallows v. Fernie*, 3 Ch. 476. This has been repeatedly laid down by judges of eminence. "A person who issues a statement is not only answerable for what he in his own mind intended to represent, but he is answerable for what anyone might reasonably suppose to be the meaning of the words he has used." Per Cotton, L. J., *Arkwright v. Newbold*, 17 C. Div. 322.

Careless language and ambiguous statements.

"If a man makes a statement, which according to its ordinary meaning bears a particular construction, he, in my opinion, is liable to those who reading it and construing it reasonably do put upon it the primary meaning and the fair construction of the words used." Per Cotton, L. J., *Peck v. Derry*, 37 C. D. 541.

In the case of an ambiguous statement, it is immaterial that the words are intended by those who issue the prospectus to be understood in a sense in which they are true, if they are reasonably capable of being understood in a sense in which they are false, and the allottee shows that he understood them in that sense. *Smith v. Chadwick*, 20 C. Div. 27, 45; 9 App. Cas. 187.

"If a man uses language which taken in its natural sense conveys a wrong impression, he cannot be heard to say that he did not intend to deceive." Per Lindley, L. J., *Arnison v. Smith*, 41 C. D. 372.

But the construction which the recipient of a prospectus is entitled to put upon it must be a reasonable construction, that is one which the words will fairly admit of. See *Edgington v. Fitzmaurice*, 29 C. Div. 459. There it was held that the plaintiff had no right to assume that the word "debentures" used in the prospectus imported any charge on the company's property.

Misrepresentation of a single material fact or (in the case of shares) suppression of a single material fact may be sufficient to entitle the allottee to rescission. *Derry v. Peck*, 14 App. Cas. 359; *London and Staffordshire Co.*, 24 C. D. 149; *Denton v. Macneil*, 2 Eq. 352, 355. But see cases at p. 175, *supra*.

Single misrepresentation or suppression sufficient.

Belief of
directors in
truth of state-
ment.

And where a representation as to a material fact in a prospectus is untrue, it is no defence, where *rescission of contract* is sought, that it was an innocent one, and the directors when they made it believed it to be true. The shareholder is equally prejudiced. See judgment of Lord Cairns in *Smith's case*, 2 Ch. 601, 615, and in *Reese River Co. v. Smith*, L. R. 4 H. L. 79; *Arkwright v. Newbold*, 17 Ch. D. 320; *Mathias v. Yetts*, 46 L. T. 502 (Ct. of App.).

Evidence of
misrepresenta-
tion and
non-disclosure.

As to evidence of misrepresentation and non-disclosure:

The shareholder, whether he seeks to rescind his contract or sue for damages, must, of course, prove the facts he relies on. Evidence of information and belief is not admissible in such cases, for the proceeding is not interlocutory in character. *Gilbert v. Endean*, 9 C. Div. 266. The shareholder may, of course, rely on the admission of the defendants. But, if an admission of the company is relied on, it must be shown that it was made in such circumstances as to bind the company. For example, in *British Burmah Co.*, 56 L. T. 815, the company had directed an expert to report on the value of the mine, and his report, to the effect that it was worthless, though read at a general meeting of the company and circulated among the shareholders, was not allowed to be taken as an admission by the company. See also *Dorval Provident Co.*, 22 C. D. 593.

Examples of Misrepresentations.

Examples of
material misrep-
resentations.

The following are examples of material misrepresentations and non-disclosure entitling to rescission:

- (1) Where the company was formed to construct and work a railway, and it was—(1) untruly stated that the contract for the execution of the works had been entered into with a responsible contractor; (2) untruly stated that the contract price was considerably within the available capital; (3) not mentioned that the concessions which the company was formed to carry out had been purchased from the original grantor at a cost of 50,000*l.* See *Central Ry. Co. of Venezuela v. Kissel*, L. R. 2 H. L. 99.
- (2) Where it was untruly stated that "more than half the first issue of shares has been already subscribed for," and that "upwards of 70,000*l.* has already been expended on the estate by the vendor in buildings and improvements, in addition to the purchase-money paid by him for the land." See *Ross v. Estates Investment Co.*, 3 Eq. 122; 3 Ch. 682.
- (3) Where it was stated that "one-half the required capital has been subscribed by the directors and their friends," whereas not one-fourth had been subscribed. *Kent v. Freehold Land Co.*, 4 Eq. 588; 3 Ch. 493. And see *Henderson v. Lacon*, 5 Eq. 249, and *Arnison v. Smith*, 41 C. Div. 348.
- (4) Where it was stated that a particular mine "containing very valuable claims, some of which are in full operation, and make large daily returns," had been contracted to be purchased, whereas the mine was, in fact, worthless, and there were no claims in operation. *Reese River Co. v. Smith*, L. R. 4 H. L. 64.

- 5) Where, in the case of a banking company, it was untruly stated (a) that the bank had arranged to take over several successful banking institutions of old standing; and (b) that the directors had had an offer of support as to capital and business from a large and powerful bank in Paris. See *Curling v. London and Leeds Bank*, 56 L. T. 115.
- (6) Where it was stated that "the surplus assets, as appear by the last balance-sheet, amount to upwards of 10,000L." whereas, in fact, there was a deficit. See *London and Staffordshire Co.*, 24 C. D. 149. In this case it was admitted that the misrepresentation was made *bona fide* in consequence of a mistake of fact, but relief by rescission was granted.
- (7) Where some of the directors named in the prospectus had not accepted office. *Blake's case*, 34 Beav. 639; compare *Scottish Petroleum Co.*, 23 C. D. 3; and *Hallows v. Fernie*, 3 Ch. 467; and where some of the members of the council of administration had not consented to act. *Hainwright's case*, 62 L. T. 30; 63 L. T. 429; *Karberg's case*, (1892) 3 Ch. 1.
- (8) Where the company was formed to acquire a business, and it was stated that the profits of the business had, during a specified period, amounted to or averaged so much, whereas in fact they were much less. *Glazier v. Rolfe*, 42 C. D. 436.
- (9) Where the company was formed to work a mine, and it was untruly stated that a particular reef or bed had been found on the property, and that the mine was similar in character to some other mine. See *Mount Morgan Co.*, 56 L. T. 622.
- (10) Where it was stated untruly that the profits had amounted to 17 per cent. on the capital employed. *Glazier v. Rolfe*, 42 C. D. 436.
- (11) Where it was stated that the company had an agreement to acquire part of a well-known mine, whereas it was an entirely different property.
- (12) Where it was stated that the promoters had expended a large specified sum in opening up or testing the property, whereas the statement was wholly, or to a considerable extent, untrue.
- (13) Where the prospectus stated in effect that the company was formed to acquire an existing patent, whereas only provisional protection had been obtained. *Scott v. Snyder, & Co.*, 66 L. T. 278.
- (14) Where the company was formed to work a patented invention, and it was stated that it had obtained an exclusive licence to work such invention in a particular district, whereas the licence was not exclusive.
- (15) Where it was stated that no promotion money was to be paid, whereas there was an agreement to pay large sums. *Lodwick v. Earl of Perth*, 1 T. L. R. 76.
- (16) Where it was stated that the company held the property under lease at a small ground rent, whereas there was a considerable royalty in addition.
- (17) Where it was stated that a specified sum was to be paid for the property, whereas the sum included a large sum for promotion money. *Kent v. Freehold Land Co.*, 4 Eq. 588; *Gibb v. Great Southern Mysore Co.*, Ct. of App. 10 Feb. 1882; *Capel v. Sims*, 58 L. T. 807.
- (18) Where the company was formed to buy a mine, and extracts from the report of an expert were set forth which gave a misleading impression of the report, and induced the belief that the mine was similar to a rich adjacent mine. *Mount Morgan Co.*, 56 L. T. 622.
- (19) Where the company was formed to work an invention, and it was untruly stated that a contract had been made for the purchase from the company of 50,000 of the patented machines. *Snook v. Self-Acting Co.*, 3 T. L. R. 612.

- (20) Where in the case of a tramway company it was stated that the company had by the special Act the right to use steam, whereas it only had that right with the sanction of the Board of Trade. *Derry v. Peek*, 11 App. Cas. 337.
- (21) Where it was untruly stated that the guaranteed dividend was secured by deposit with trustees of a sufficient amount of Government securities. *Knox v. Hayman*, 67 L. T. 137.
- (22) Where a promoter, who was to get part of the purchase-money, was untruly put forward as one of the vendors. *Capel v. Sims*, 58 L. T. 807.
- (23) Where it was untruly stated that the vendor was to pay all the preliminary expenses. *Liberian Government Concessions*, 9 T. L. R. 136.
- (24) Where it was untruly stated that the company were the sole manufacturers of asbestos in France, and had a practical monopoly. *Hyde v. New Asbestos Co.*, 8 T. L. R. 121.
- (25) Where it was untruly stated that the company's process was a commercial success. *Stirling v. Pancharg Gases*, 8 T. L. R. 71.
- (26) Where it was stated that the vendors to the company had purchased for 140,000*l.* payable in cash, and had agreed to re-sell to the company for 180,000*l.*, whereas they had also purchased debentures incumbering the same property, on which they had made a further profit of 20,000*l.*, which was only referred to in the prospectus as follows: "Any other profits made by the syndicate"—the vendors—"from interim investments are excluded from the sale to the company." *Gluckstein v. Burnes*, (1900) A. C. 240.
- (27) Where it was stated that the vendors of nitrate grounds had obtained and brought, in pipes, to them a supply of water, and that the company would have the right of using a certain part of the water, whereas the water supply was insufficient. *Lugunas Nitrate Co. v. Lugunas Syndicate*, (1899) 2 Ch. 392, 397, 429.
- (28) Where it was falsely represented that patented articles were a commercial success and beyond the experimental stage. *Greenwood v. Leather Shod Wheel Co.*, (1900) 1 Ch. 921.
- (29) Where it was stated that share capital had been "subscribed," when in fact it had only been allotted in fully paid shares to the company's contractor. *Arnison v. Smith*, 40 Ch. D. 567.

Other instances of misrepresentations may be found in *Jackson v. Turquand*, L. R. 4 H. L. 305; *Moore v. Explosives Co.*, 56 L. J. Ch. 235; *Wright's case*, L. R. 7 Ch. 35; *Lyon's case*, 35 Beav. 646; *Bellairs v. Tucker*, 13 Q. B. D. 562; *New Brunswick Co. v. Congreave*, 9 H. L. C. 724; *Nicol's case*, 3 D. G. & J. 387; *Re Devala Provident Gold Mining Co.*, 22 Ch. D. 593; *Drincqbier v. Wood*, (1899) 1 Ch. 393; *Components Tube Co. v. Naylor*, (1900) 2 Ir. R. 1 Q. B.

The following are instances in which the misrepresentation or non-disclosure relied on was held to be insufficient:

- (1) Where it was stated that an invention to be acquired by the company had been tested, and that according to the experiments the material could be produced at a specified cost, but that it was intended to test the invention further, and it in fact turned out worthless. *Denton v. Macneil*, 2 Eq. 352.

Examples of cases where the misrepresentation or non-disclosure was insufficient

- 2) Where the prospectus mentioned "a guaranteed dividend of not less than 15 per cent. for the first five years," whereas there was only some unrecorded understanding with the vendor that he was to give such guarantee. *Kent v. Freehold Land Co.*, 4 Eq. 588. Here it was considered that there was enough to put the plaintiff on inquiry.
- 3) Where the prospectus did not disclose an arrangement between promoter and director for the qualification of the latter. *Hegmann v. European Central Rail. Co.*, 7 Eq. 151; and see *Glover's case*, 1 C. Div. 182.
- 4) Where the prospectus omitted to state that the company would have to make a deposit of 20,000*l.* by way of guarantee, with liability to forfeiture. *Central Rail. Co. v. Kisch*, L. R. 2 H. L. 99; and see *Smith v. Chadwick*, 9 App. Cas. 187.
- 5) Where it was stated that the company was to have "a free grant of 30,000 acres in the provinces through which the railway is to pass," whereas the 30,000 acres were to be granted only out of the provinces benefited by the railway, and private property in those provinces was excepted. *Central Rail. Co. v. Kisch*, L. R. 2 H. L. at p. 115.
- 6) Where a government guarantee of 9 per cent. per annum on the capital was mentioned, without reference to the fact that it was to last so long only as the capital did not produce 9 per cent. for a reason not imputable to the company.
- 7) Where it was stated that certain reports on the property had been prepared "for the directors," though really made for the promoters. But in this case there was no finding of fraud. *Angus v. Clifford*, (1891) 2 Ch. 419.

As to (3), *supra*, p. 133.

The allottee is not entitled to rescission unless he was induced to enter into the contract by the representation or suppression which he establishes, that is unless it was *dans locum contractui*.

It is not an inference of law that a party who takes shares on a prospectus containing a misrepresentation was induced to subscribe by that misrepresentation. Per Lord Blackburn, in *Smith v. Chadwick*, 9 App. Cas. 187. It is a question of fact to be determined with due regard to all the circumstances. But "if it is proved that the defendants, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement." Per Lord Blackburn. *ibid.* p. 196. And the following passage from the judgment of Lord Halsbury, L. C., in *Arnison v. Smith*, 41 C. D. 369, points in the same direction. "It is," said his Lordship, "an old expedient, and seldom successful, to cross-examine a person who has read a prospectus, and ask him as to each particular statement what influence it had on his mind, and how far it determined him to enter into the contract. This is quite fallacious; it assumes that a person who reads a prospectus and determines to take shares on the faith of it, can appropriate among the different parts of it, the effect produced by the whole. This can rarely be done even at the time, and for a shareholder thus

No rescission if allottee was not induced by the representation, etc., to contract to take the shares.

to analyse his mental impressions after an interval of several years, so as to say which representation in particular induced him to take shares, is a thing all but impossible. A person reading the prospectus looks at it as a whole, he thinks the undertaking is a fine commercial speculation, he sees good names attached to it, he observes other points which he thinks favourable, and on the whole he forms his conclusion. You cannot weigh the elements by ounces. It was said, and I think justly, by Sir G. Jessel, in *Smith v. Chadwick*, that if the Court sees on the faith of the statement that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, unless it is shown that he knew the facts, or that he avowedly did not rely on the statement whether he knew the facts or not. I think, therefore, that the second proposition is proved—that the plaintiffs were induced to take stock by the misrepresentation.” Lord Halsbury has recently, in *Macleay v. Tait*, (1906) A. C. 24, given expression to similar views. But this inference does not arise when the statement, being ambiguous, is only false in one sense; in such a case it rests with the allottee to show that he understood the words in the sense in which it was false, and was thereby induced to subscribe. *Smith v. Chadwick*, 9 App. Cas. 187.

Usual stated grounds for relief.

Onus of proof;

What happens in most cases is that the allottee swears that he was induced by the particular misrepresentation or suppression to take the shares, or that he subscribed on the faith of the prospectus, and that he would not have subscribed had he known the facts. And where on this or other evidence a *primâ facie* case for rescission has been thus established, the onus of proving that the allottee was not so induced, or is otherwise not entitled to rescind, is cast on the company.

Grounds of Defence.

how discharged.

This onus may be discharged in various ways, *e.g.*, by showing—

- (1) That the allottee subscribed before he saw the prospectus. *Smith v. Chadwick*, 20 C. D. 68.
- (2) That he was really induced to subscribe by arrangement with promoters.
- (3) That he was really induced to subscribe by representations made by parties for whom the company was not responsible.
- (4) That he did not rely on the statements, but investigated the matter himself. *Jennings v. Broughton*, 5 D. M. & G. 126; 17 Beav. 238; and see *Mathias v. Yette*, 46 L. T. 497; *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 693.
- (5) That the prospectus itself showed that the statements were based on hearsay, and were to be verified subsequently. *British Burmah Co.*, 56 L. T. 815.

- (6) That the allottee is a person of such experience and character that it is not credible that he was misled by the statement relied on.*

An allottee will not lose the right to rescission because the particular misrepresentation complained of was not the sole inducement to him to subscribe. *Nicol's case*, 3 D. & J. 420; *Edgington v. Fitzmaurice*, 29 C. Div. 459; *Carling v. London and Leeds Bank*, 56 L. T. 115; *Araison v. Smith*, 41 C. Div. 348; *Scott v. Snyder, & Co.*, 66 L. T. 283; *S. C.*, 67 L. T. 104; *Peck v. Derry*, 37 Ch. D. 541; *Knox v. Hayman*, 67 L. T. 139. It is sufficient that it was an inducement.

Where the prospectus merely states that A. B. reports so and so, the applicant is not, as between himself and the company, entitled to assume that those who issue the prospectus guarantee the truth or accuracy of A. B.'s report. *Smith's case*, 2 Ch. 604; *Rawlins v. Wickham*, 3 D. & J. 304; *Bentley v. Black*, 9 T. L. R. 580.

Thus where the promoters of a company to work a lead mine in Burmah issued a prospectus having appended to it a report by the vendor of the mine, and the prospectus, referring to the report, spoke in the highest terms of the quantity of ore, but proposed sending out someone to test it, which was never done, and the report turned out totally false, and an action for rescission was brought by an allottee who subscribed on the faith of the prospectus, it was held that the promoters had frankly told the allottee all they knew, and could not be taken to guarantee the truth of the report. *Re British Burmah Lead Co.*, 56 L. T. 815.

But it is otherwise if the company represents the reports as facts. "If," said Turner, L. J., "a company will take upon itself to assume the authenticity of, and give credit to, the reports which are made to it, and represent as facts the matters stated in those reports, it must take the consequences. If the company had confined themselves to saying 'we have received reports, from which we believe, and have reason to believe, that these mines are in full operation and are making daily large returns,' it might, and no doubt would, have been difficult for Mr. Smith to be relieved from the contract; but the company, instead of thus referring to the information received, stated the circumstances as facts." *Smith's case*, 2 Ch. App. 611.

In *Bentley v. Black*, *supra*, the prospectus set out a report by an accountant, and the Court of Appeal held that there was no representation by the directors that the report was correct. "It was true that Mr. L. was a chartered accountant, and that he had made a particular report, and that was all that the directors said in the prospectus."

* "It is important to see whether the plaintiff was a person likely through inexperience to be misled by a prospectus, or to place implicit reliance on all that it contains." Per Lord Chelmsford, *Hallows v. Fernie*, 3 Ch. 467; and see *Bellairs v. Tucker*, 13 Q. B. D. 577; *Smith v. Chadwick*, 9 App. Cas. p. 191.

Per Lord Esher, M. R. If the prospectus misrepresents the contents of a report or other document, or states its contents in a deceptive manner, the subscriber is not bound to look at the document to see whether it bears out what is stated. *Redgrave v. Hurd*, 20 C. D. 23.

"The applicant is entitled to say: You at least, who have stated what is untrue, cannot accuse me of want of caution, because I relied on your fairness and honesty." Per Lord Chelmsford, *Central Rail Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99.

"The representation once made releases the party from an investigation, even if the opportunity is afforded." Per Cotton, L. J., *Redgrave v. Hurd*, 20 C. D. 23; and see *Liberian Government Concessions*, 9 T. L. R. 136; *Aaron's Reefs v. Twiss*, (1896) A. C. 273; *Ex parte Kintrea*, 5 Ch. App. 100.

Issue of prospectus before incorporation.

Formerly it was customary to issue the prospectus before the incorporation of the company, and in such case it was held that any substantial variance between the objects of the company, as stated in the prospectus, and in the subsequently registered memorandum of association, entitled the allottee to repudiate his shares. *Ship's case*, 2 De G. J. & S. 544; *Webster's case*, 2 Eq. 741; *Stewart's case*, 1 Ch. 574.

Reference to memorandum and articles.

But this course is now rarely adopted. Moreover, in *Peel's case*, 2 Ch. 674, Lord Cairns laid down rules, in regard to relief in such cases, which have practically put an end to further claims on the ground of variance: "If," he said, "the memorandum and articles are in existence when he (the applicant) applies for shares, and if he agrees to take his shares on the footing of the memorandum and articles, then I think that he ought to be held bound to look at them before he applies for shares. But where the memorandum and articles are not in existence at the time of application, I think that, at the very latest, when he receives his allotment of shares, he ought to satisfy himself that there is nothing in the memorandum and articles to which he desires to make any objection." This was approved in *Oakes v. Turquand*, L. R. 2 H. L. 352; and see *Downes v. Ship*, L. R. 3 H. L. 359.

Where representation only true at time.

Sometimes a representation which was true when the prospectus was issued becomes false before the allotment is made. In such case the fact ought to be communicated to the applicant. *Scottish Petroleum*, 23 C. Div. 438; *Traill v. Baring*, 4 D. J. & S. 318; *Henderson v. Lacon*, 5 Eq. 249; and per Lord Blackburn, *Brownlie v. Campbell*, 5 App. Cas. 950.

Contract Voidable, not Void.

In every case the contract is voidable, not void.

A contract to take shares, debentures, or debenture stock, which has been induced by misrepresentation or suppression of material facts, is voidable, not void; that is to say, the shareholder has the option to affirm or avoid the contract, but until the shareholder elects to avoid

it, it remains good. *Oakes v. Turquand*, L. R. 2 H. L. 325; *Peck v. Gurney*, L. R. 6 H. L.

The right to avoid the contract is, however, qualified, that is to say. Prompt action and before winding-up.
(1) it must be exercised, if at all, promptly on discovering the facts, and (2) the right, in the case of shares, will be lost, if a winding-up commences before the contract is effectually avoided.

If a man claims to rescind his contract to take shares in a company, on the ground that he has been induced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts, or else he forfeits all claims to relief." Per James, L. J., *Sharpley v. Louth, &c. Rail. Co.*, 2 C. Div. 663, 685; and see *Ashley's case*, 9 Eq. 263; *Ogilvie v. Currie*, 37 L. J. Ch. 541; *Reese River Silver Mining Co.*, 2 Ch. 612; *Karberg's case*, (1892) 3 Ch. 14. For his name being on the register, he is held out to the public as a member.

Persons may be induced to act on the faith of his membership. *Oakes v. Turquand*, L. R. 2 H. L. 325. Hence, Lord Cairns, L. C., in *Scholey v. Central Rail. Co. of Venezuela*, 9 Eq. 267, n., said: "He certainly thought the Court would be most careful to see, in the case of a company going on and trading, in which the rights of the shareholders and others varied from day to day, that a person coming to complain of misrepresentations, and coming to avoid a voidable contract, came within the shortest limit of time which was fairly possible in such a case."

A short delay may be sufficient to deprive him of the right to rescind. Thus in *Taite's case*, 3 Eq. 795, a delay of a month after the shareholder had given notice of repudiation, which the directors declined to permit, was deemed fatal. And in *Peel's case*, 2 Ch. 674, Lord Cairns was of opinion that a delay of two months might be fatal. It may be that a delay of even fourteen days would bar the remedy. *Ogilvie v. Currie*, *supra*; see also *Scottish Petroleum Co.*, 23 C. Div. 413, 434 (where, however, the point was not necessary to the decision of the case); *Skelton's case*, 68 L. T. 210; *Jackson's case*, 15 W. R. 894; *Kent v. Freehold Land Co.*, 3 Ch. 493; *Reese River Co. v. Smith*, L. R. 4 H. L. 64; *Central Rail. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99; and *London, &c. Electric Lighting Co.*, 55 L. T. 670.

And although time does not run till discovery of the facts giving the right to rescind, a shareholder is not entitled to shut his eyes and ears.

Thus, if the directors send him a report showing that there have been misrepresentations, and he admits its receipt, he must be taken to have read it, and time will run accordingly. *Scholey v. Central Rail. Co.*, 9 Eq. 266, n.; *Dunkley's case*, 7 T. L. R. 234. See, however, *Karberg's case*, (1892) 3 Ch. 1; 66 L. T. 184.

And he is not at liberty to "stand by when a great number of people tell him that misrepresentations have been made by which shareholders have been induced to take shares, and wait until it is

Mere rumour
or suspicion.

decided by a Court of justice that there has been a misrepresentation; on the contrary, it is his duty in such a case to go and ascertain for himself whether there is a misrepresentation or not." Per Romilly, M. R., *Ashley's case*, 9 Eq. 269. Nevertheless, mere rumour that the company is a swindle, or mere suspicion, is not enough. Thus, in *Central Rail. of Venezuela v. Kisch*, L. R. 2 H. L. 99, the allotment was on July 15th, and the allottee admitted having heard adverse rumours soon after the allotment, but he did not actually discover the facts till 22nd November, and it was considered that he was not barred by this delay. Lord Chelmsford, L. C., said "that although the respondent might have heard unfavourable rumours, and conceived suspicions of the company at an early period after he obtained his shares, yet that he received no certain information upon which he could act until the month of November, and he did nothing between that day and the 28th of January, 1865 (when he filed his bill), which amounted to acquiescence." And see *Reese River Co. v. Smith*, L. R. 4 H. L. 64, and *Aaron's Reefs v. Twiss*, (1896) A. C. 273, 293. It has been held that when a company relies for defence on non-repudiation within a reasonable time after receipt of a circular disclosing facts giving a right to repudiate, it is for the company to prove the receipt of the circular. *London and Staff. Co.*, 24 C. D. 149.

Reasonable
delay.

A limited delay may be excused where it has resulted from *bona fide* negotiations between the repudiating shareholder and the company. *Neill's case*, 15 W. R. 894; *Paul's case*, 4 Ch. 497; *Tibbatts v. Boulton*, 73 L. T. 534.

Effect of
forfeiture on
right to
repudiate
shares.

If the company forfeits the shares and gives notice of the forfeiture to the shareholder, and the shareholder had not lost his right to repudiate at the date of the notice, the relation of company and shareholder is severed, and the latter becomes a mere debtor to the company for calls; and if he has not done any act to repudiate the contract, he is not then bound to take any step for the mere purpose of getting rid of his liability to pay the calls, but to an action to recover them may set up the misrepresentation as a defence. *Aaron's Reefs v. Twiss*, (1896) A. C. 273, 295.

When a shareholder is suing for rescission, the Court can restrain a forfeiture of the shares pending the hearing. *Lamb v. Sambas Rubber Co.*, (1908) 1 Ch. 845; *Jones v. Pacaya Rubber Co.*, (1911) 1 K. B. 455.

Effect of
winding-up
on the claim.

A shareholder must not only give prompt notice of repudiation after discovering the facts entitling him to rescind, but must follow up the notice by proceedings to have his name removed before a winding-up has commenced; that is to say, where the winding-up is by the Court, before the *presentation* of the petition on which the order is made, and where the winding-up is voluntary (with or without the supervision of the Court), before the resolution for winding-up is passed. *Oakes v. Turquand*, L. R. 2 H. L. 325;

Kent v. Freehold Land and Brickmaking Co., 3 Ch. 493; *Stone v. City and County Bank*, 3 C. P. Div. 282; *Central Klondyke Gold Co.*, *Thomson's case*, 5 Mans. 282; *General Railway Syndicate*, *Whiteley's case*, (1899) 1 Ch. 770. Whether the company is solvent or not makes no difference. *Burgess's case*, 15 C. D. 507.

But this rule (as to taking active steps) does not apply to the avoidance of an irregular allotment under sect. 86 of the Companies Act, 1908. In that case notice of repudiation is enough. *Re National Motor Mail Coach Co.*, (1908) 2 Ch. 228.

The ground of the decision in *Oakes v. Turquand*, *ubi supra*, was that the contract was voidable, not void; that a voidable contract could not be avoided after the rights of third parties had supervened, that by the winding-up the rights of the company's creditors had supervened, and that thereupon a new statutory liability arose to contribute to the assets.

What is an effectual repudiation:—

Effectual
repudiation.

- 1) It is sufficient if the shareholder, without undue delay, gives notice to the company that he repudiates, and the directors thereupon *bona fide* assent to the rescission of the contract before a winding-up commences. An order of the Court is not necessary in such a case. *Wright's case*, 7 Ch. 55; *Reese River Co. v. Smith*, 4 H. L. 64, 74. And this may be sufficient even where the directors do not in fact remove the name of the repudiating shareholder from the register of members. *Blake's case*, 13 W. R. 486.

And it may be sufficient, although the ground put forward by the shareholder for rescission is not sufficient, provided the directors know that there are in fact valid grounds on which rescission might be claimed. *Wright's case*, 7 Ch. 55.

- (2) It is sufficient if the shareholder, without undue delay, and before a winding-up commences, takes legal proceedings to enforce rescission, even though the winding-up commences before the order for rescission is obtained. *Reese River Co. v. Smith*, L. R. 4 H. 1.

But it may be too late if the proceedings are not taken until after the company has become publicly insolvent. *Lennett v. City of Glasgow Bank*, 4 App. Cas. 615; *Carling v. London and Leeds Bank*, 56 L. T. 115.

- (3) And where proceedings to enforce a call are taken, and the company asks for judgment under Ord. XIV., and the defendant in his affidavit sets up misrepresentation, and states that he intends to counterclaim for rescission, that, it has been held, is sufficient, although his counterclaim is not put in until after a winding-up is commenced. *Whiteley's case*, (1900) 1 Ch. 365.
- (4) It is sufficient if the shareholder gives notice of rescission, and, although the directors do not assent to rescission, it is agreed that the matter shall abide the result of some pending legal proceeding against the company, *e.g.*, a test case at the suit of a shareholder claiming relief on similar grounds. *Paule's case*, 4 Ch. 497; *Scottish Petroleum Co.*, 23 Ch. D. 433; *Hare's case*, 4 Ch. App. 503. But in the absence of such an agreement the mere fact that proceedings are pending is not enough to excuse delay. *McNeill's case*, 10 Eq. 503; *Ashley's case*, 9 Eq. 263.

Insufficiency.

But it is not sufficient—

- (1) If the shareholder gives notice of repudiation, but the directors decline to assent to rescission, and the shareholder, his name being on the register, does not promptly take legal proceedings. *Hare's case*, 1 Ch. 503; *Re Scottish Petroleum Co.*, 23 C. Div. 413.
- (2) If the shareholder takes proceedings, but abandons them. *Reid v. London and Staffordshire Co.*, 32 W. R. 94; 49 L. T. 468.
- (3) If the shareholder gives notice of repudiation, and before the directors assent to rescission, or legal proceedings are taken, a winding-up commences. *Onken v. Turquand*, L. R. 2 H. L. 325; *Reese River Co. v. Smith*, L. R. 4 H. L. 64.
- (4) If the shareholder to an action for calls pleaded that he was induced to take the shares by fraud, and obtained a verdict, but took no further action to have the contract rescinded before a winding-up. *Cleveland Iron Co.*, 16 W. R. 95; but see *Whiteley's case*, *supra*, in which this case was doubted.

If a person who has never agreed to become a shareholder is told by the company that he is a shareholder, it is sufficient for him to repudiate the shares. He need not take steps to get his name removed (*Gorissen's case*, 8 Ch. App. 519), and the same principle applies where there has been no real agreement to take shares owing to a mistake as to the company's identity. *Baillie's case*, (1898) 1 Ch. 110; *Cundy v. Lindsay*, 3 Ch. App. 459, 465.

Conduct of shareholder apparently affirming contract.

The right to rescind may be lost not only by delay or a winding-up but also by conduct which shows an election on the part of the shareholder to affirm the contract.

Thus, if the shareholder, after discovery of the facts giving him a right to rescind, treats the contract as subsisting, *e.g.*, by endeavouring to sell the shares (*Ex parte Briggs*, 1 Eq. 483), by executing a transfer of the shares (*Crawley's case*, 4 Ch. 322), or otherwise dealing with the shares (*Nicol's case*, 3 D. & J. 431), by paying calls or instalments or receiving dividends (*Scholey v. Central Rail. Co.*, 9 Eq. 266, n.; *Kent v. Freehold Land Co.*, 4 Eq. 588; *Shearman's case*, 66 L. J. Ch. 25), or by attending and voting at a general meeting in person or by proxy (*Sharpley v. Louth, &c. Co.*, 2 C. Div. 663), he cannot afterwards repudiate. So, too, he may be bound if he takes a transfer of other shares (*Paige's case*, 15 W. R. 892), but a transfer of part of the shares before discovery does not preclude relief as to the rest. *Mount Morgan (West) Gold Mine*, 56 L. T. 622. And the shareholder is allowed a reasonable time to obtain evidence. *Central Rail. Co. of Venezuela v. Kisch*, 2 H. L. 99; and *British Burmah Lead Co.*, 56 L. T. 856. Negotiations may excuse delay. *Tibbatts v. Boulton* (1895), 73 L. T. 534.

It is conceived that acting as a member will not operate to affirm the contract if, before so acting, the shareholder has definitely elected to avoid the contract, *e.g.*, by issuing his writ. For "if a man once determines his election it shall be determined for ever." Com. Dig.

"Election" (C. 2). *Quod semel placuit in electionibus amplius displicere non potest.* Co. Litt. 146 a; *Clough v. L. & N. W. Rail.*, L. R. 7 Ex. 26. See also *Scarf v. Jardine*, 7 App. Cas. 345, 360, in which case Lord Blackburn, referring to the above maxim, said: "That is Coke upon Littleton, and I do not doubt that there are many older authorities to the same effect; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of two things, you cannot retract it and do the other thing; the election once made is finally made."

This rule was recognized by the Court of Appeal in *Foulkes v. Quartz Hill Co.* (1884), 1 C. & E. 156; in that case it was held that the issue of a writ claiming rescission of a contract was a definitive election by the plaintiff to avoid the contract, and accordingly that in subsequently voting at a meeting of the company he did not prejudice his position. The case is not reported on appeal, but the following note appears in the report above referred to: "The Court of Appeal reversed the above decision, holding that the issue of the writ was a definitive election to rescind, and that this election was not affected by the subsequent voting at the meeting."

This seems clear enough, and the rule was recently acted on by Wright, J., in *Tomlin's case*, (1898) 1 Ch. 104; but the learned judge appears to have doubted "whether the Court meant to lay down the rule so absolutely as is stated in the note to the report." It is, however, difficult to see how so well-settled a rule could be laid down otherwise than absolutely.

A shareholder who, after discovering that he has a right to rescind, elects to affirm the contract, may afterwards be entitled to rescind in respect of some subsequently discovered misrepresentation. Per Chitty, J., *Lond. and Prov. Co.*, 55 L. T. 670; *British Burmah Co.*, Kay, J., 21 June, 1888. See, however, *Campbell v. Fleming*, 1 A. & E. 40; and as to variance in objects, see *Whitehouse's case*, 3 Eq. 790.

Subsequent grounds for rescission.

If the shareholder elects in due time and in proper form to avoid the contract, it is avoided altogether, and the case stands as if it had never been made; accordingly, he cannot be placed on the list of contributories, even as a past member, for the contract is avoided *ab initio*. *Wright's case*, 12 Eq. 331; 7 Ch. 55. In legal proceedings by a shareholder to have his contract rescinded and his money returned, he will be given interest thereon although no case of fraud be established. *Karberg's case*, (1893) 3 Ch. 17.

Effect of avoiding

Interest.

But, in all these cases, what Lord Justice Turner said in *Jennings v. Broughton*, 5 D. M. & G. 126, 140, should be borne in mind. Although it is the undoubted duty of this Court to relieve persons who have been deceived by false representations, it is equally the duty of the Court to be careful that, in its anxiety to correct frauds, it does not enable persons who have joined others in speculations

to convert their speculations into certainties at the expense of those with whom they have joined."

Action of Deceit or other Remedy.

Action of
deceit, or
proceedings
under Direc-
tors' Liability
Act, 1890.

A person who has been induced by fraudulent misrepresentation to subscribe for shares, debentures, or debenture stock, may, as an additional or alternative remedy, be entitled to bring an action of deceit against those who have deceived him, or to take proceedings against them under sect. 84 of the Act (incorporating the provisions of the Directors' Liability Act, 1890), or under sect. 86 (2) of the Act (reproducing sect. 5 of the Companies Act, 1900). Where these sections apply, they give to the subscriber a more effective remedy than an action of deceit, and have to that extent displaced the remedy obtainable in such an action; but there are still a considerable number of cases (see *infra*) in which the statutory remedy is not available, and in all such cases it may be necessary to have recourse to the old remedy by action of deceit. It will therefore be convenient to state here, concisely, some of the principal rules applicable in the case of an action of deceit.

"In an action of deceit . . . it is the duty of the plaintiff to establish two things: first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and, secondly, he must establish that this fraud was an inducing cause to the contract, for which purpose it must be material and it must have produced in his mind an erroneous belief influencing his conduct." Per Lord Selborne, L. C., *Smith v. Chadwick* (1884), 9 App. Cas. 187, 190.

This statement, as applied to a prospectus, may be formulated as follows:—

The plaintiff must prove—

What to
prove.

- (a) That the defendant issued, or authorized the issue of, the prospectus or notice, or sanctioned its issue, or that the misrepresentation relied on was made by the defendant to those who issued the prospectus with the intention that it should be used for the purposes of the prospectus.
- (b) That the prospectus or notice contained a misrepresentation of a matter of fact.
- (c) That the fact misrepresented was a material fact.
- (d) That the plaintiff was induced by such misrepresentation to subscribe or buy.
- (e) That the plaintiff has sustained damage.
- (f) That the defendant made the misrepresentation fraudulently.

See in support of these propositions the following cases: —*Peek v. Gurney*, L. R. 6 H. L. 377; *Smith v. Chadwick*, 9 App. Cas. 187; *Bellairs v. Tucker*, 13 Q. B. D. 562; *Edgington v. Fitzmaurice*, 29 C. Div. 459; *Derry v. Peek*, 11 App. Cas. 337; *Arnison v. Smith*, 41 C. D. 348; *Glazier v. Rolls*, 42 C. Div. 436; *Arkwright v. Newbold*, 17 C. D. 301; *Knox v. Hayman*, 67 L. T. 137; *Aaron's Reefs v. Twiss*, (1896) A. C. 273.

As to (a) — The responsibility for the prospectus is a question of fact. Where, under the old system, a man applied for shares in response to a prospectus purporting to be issued by the company, and had shares allotted to him by the directors, there was often some little difficulty in proving that the directors issued, or authorized the issue of, the prospectus. They could be interrogated, it is true, and were rarely in a position to deny responsibility. Even if a director denied the fact, evidence might be forthcoming (*e.g.*, that he distributed prospectuses or concurred in the allotment) which would countervail such denial. See *Peek v. Derry*, 37 C. Div. 541; *Glazier v. Rolls*, 42 C. D. 436; *Bellairs v. Tucker*, 13 Q. B. D. 562; *Ship v. Crosskill*, 10 Eq. 73; *Henderson v. Lacon*, 5 Eq. 249. But in the absence of some such evidence he was not liable. *Watts v. Atkinson*, 8 T. L. R. 235.

Now that a copy of every prospectus is required to be filed, "signed by every person who is named therein as a director, or proposed director of the company, or by his agent, authorized in writing" (sect. 80 (2) of the Act), the matter is greatly simplified. As to the cases in which a director may be held responsible for a fraud committed by his co-directors, see *Cargill v. Bower*, 10 C. D. 502; *Weir v. Bell*, 3 Ex. D. 238, 249; *Glazier v. Rolls*, 42 Ch. D. 457; and *Land Credit Co. of Ireland v. Lord Fermoy*, 5 Ch. App. 772.

And so where, as occasionally happens, the prospectus purports to be issued not on behalf of the company, but by some firm or company as the owners, or on behalf of the owners, of the shares, debentures, or debenture stock offered for subscription or sale, there is rarely any difficulty in proving the issue by the firm or company.

Where a prospectus is issued on behalf of a company with the authority of the directors acting as its agents, the company is, in point of law, deemed to have authorized the issue, and may be held liable on that footing (see *supra*, pp. 36, 37 *et seq.*); unless the plaintiff has lost his right to repudiate his shares; for it is now settled that an allottee of shares cannot keep the shares and also claim damages as against the company. *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317.

Even a third party may make himself liable. Thus, if A. (*e.g.*, a promoter of a company) makes false representations to B. and C. (*e.g.*, directors of a company), with the intention that such representations shall be embodied in a prospectus of the company inviting public subscription, A. may be held liable, in an action of deceit by

Issue on
behalf of
company

Issue on
behalf of
owners of the
shares, de-
bentures, &c.

Company
liable for
issue by
directors.

Promoter's
misrepre-
sentation.

an allottee, as having authorized the making of such false representations to the allottee. *Barry v. Croskey*, 2 J. & H. 1; approved in *Peek v. Gurney*, L. R. 6 H. L. 413; and see *Andrews v. Mockford* (1896) 1 Q. B. 372, 378.

Ratification
of a tort

Responsibility for a misrepresentation may also be incurred by ratification, for a tort may be ratified. *Cartier v. St. Mary Abbot's Vestry* (1900), 61 J. P. 548; Clerk & Lindsell on Torts, 4th edit. 68, 110, 111; Broom's Legal Maxims, 49 S. J. 347.

Office of
prospectus

It must always, however, be borne in mind what the function of a prospectus is. The representations contained in it are made with a view of inducing persons to apply for and take from the company the shares or securities thereby offered for subscription, and accordingly it is those, and those only, who so apply and take up shares, who are entitled to rely on the statements and to complain if they are incorrect. Hence a person who, after reading the prospectus, has bought shares in the market is not *prima facie* entitled to complain. *Peek v. Gurney*, L. R. 6 H. L. 413; *Worth's case*, 4 Drew, 529. So the statements in a report to the shareholders in general meeting cannot *prima facie* be relied on by a subscriber as inducing him to subscribe. *Nicol's case*, 3 D. G. & J. 387. They are not made to him.

Where, however, it is proved that the prospectus was in fact intended to induce people to buy in the market, then those who issued it may be held responsible to those who act on it. *Andrews v. Mockford*, (1896) 1 Q. B. 372.

Misrepresentation
as to
existing fact.
Non-disclosure.

As to (b).—The misrepresentation relied on must be a misrepresentation of some existing fact. See as to this, *supra*, p. 190.

In the case of an action for rescission, the non-disclosure of a material fact is sufficient to entitle the plaintiff to relief; but in the case of an action of deceit, non-disclosure is not enough, unless it renders what is stated false, and so fraudulent.

"Mere non-disclosure of material fact, however morally censurable, however that non-disclosure might be a ground in a proper proceeding, at a proper time, for setting aside an allotment or purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false." Per Lord Cairns, *Peek v. Gurney*, L. R. 6 H. L. 403; *Aaron's Reefs v. Twiss*, (1896) A. C. 273.

"Everybody knows that sometimes half a truth is no better than a downright falsehood." Per Lord Macnaghten in *Gluckstein v. Barnes*, (1900) A. C. 240, 251. And see *Akwright v. Newbold*, 17 Ch. D. 320, and *Derry v. Peek*, 14 App. Cas. 359.

*And estoppel
aloud to say.*

"Though a person may be deceived by another with the knowledge of a third person, if that third person is not party to the deceit and

owes no legal duty or obligation to the person deceived, and does nothing but preserve silence . . . he cannot be held liable in an action for damages at the instance of the party deceived." *Morham v. Weaver*, 80 L. T. 412, per Rorer, J.

"As far as I know, silence has never yet been held to amount to misrepresentation." Per Joyce, J., in *Seddon v. North Eastern Salt Co.*, (1905) 1 Ch. 326, 335.

As to (c).—It must be shown that the misrepresentation was material. It is not every misrepresentation that gives a right of action

A misstatement," as Jessel, M. R., said, in *Smith v. Chadwick*, (20 Ch. D. 46), "may be so trivial as that the Court will be of opinion that it could not have affected the plaintiff's mind at all, or induced him to enter into the contract." For misrepresentations which have been held material, see *supra*, pp. 190—192.

As to (d).—It must be shown that the plaintiff was induced by such misrepresentations to subscribe or buy. Generally, the plaintiff swears to the fact, and when the misrepresentation is material, and it is shown that the plaintiff took shares in response to the prospectus, it is a fair inference of fact that he was induced by the prospectus to subscribe. *Smith v. Chadwick*, 9 App. Cas. 187; *Redgrave v. Hurd*, 20 Ch. D. 1; *Nash v. Calthorpe*, (1905) 2 Ch. 237; and see the observations of Lord Halsbury in *Macleay v. Tait*, (1906) A. C. 21, *supra*, p. 158. As to what is sufficient to prove or negative reliance on the misrepresentation, see *supra*, pp. 194, 195. A plaintiff may succeed even where the misrepresentation relied on was not the sole inducement to subscription. *Edgington v. Fitzmaurice*, 29 C. Div. 459; *Carling v. London and Leeds Bank*, 56 L. T. 115; *Peek v. Derry*, 37 C. Div. 541; *Arnison v. Smith*, 41 C. D. 348.

As to (e).—Unless damage is shown, the plaintiff has no right to complain. *Smith v. Chadwick*, 9 App. Cas. 187; *Polhill v. Walter*, 3 B. & Ald. 114. When a person is induced by fraud in a prospectus to apply for shares, the loss is sustained as soon as he parts with his money. *Arnison v. Smith*, 41 Ch. D. 366.

As to (f).—Fraud by the defendant must be established. It is of the essence of the action. And it is established when it is shown (1) that the representation relied on was false to the knowledge of the defendant, or (2) that it was made by the defendant recklessly, without caring whether it was true or false, or (3) that the defendant did not in fact believe it to be true. *Derry v. Peek*, 14 App. Cas. 337. The last alternative, in fact, covers both the others; and accordingly, in an action of deceit, the knowledge that must be proved, in order to establish that a false statement was fraudulently made, is that the defendant did not in fact believe that the statement was true. *Knox v. Hayman*, 67 L. T. 137. A false statement allowed to pass by culpable carelessness, but without fraud, is not enough. *Angus v. Clifford*, (1891) 2 Ch. 449; *Watts v. Atkinson*, 8 T. L. R. 235.

Material fact

Subscriber influenced by statement

Damage shown.

Fraud.

Note the difference in this respect between an action of deceit and an action for rescission, in which actual fraud need not be shown.

And note further the difference in the case of non-compliance with any of the requirements of sect. 81 of the Companies Act, 1908. In the case of sect. 81, (a) there is no liability *under the section* for non-disclosure if the defendant was not cognizant of the matter not disclosed; (b) if the non-compliance arose from an honest mistake of fact; or (c) where the non-compliance consists in not giving full particulars of a director's interest in promotion or property acquired by the company, &c., unless it is *proved* that he had knowledge of the matters not disclosed. Sect. 81 (6). See *supra*, p. 177.

Defendant
himself
deceived.

If, in an action of deceit, the defendant can prove that he did believe the statement to be true, the plaintiff must fail, even though he shows that the grounds on which the belief was founded were unreasonable. This was decided by the House of Lords in *Derry v. Peek*, 14 App. Cas. 337, reversing the decision of the Court of Appeal. Nevertheless, "A consideration of the grounds of belief is, no doubt, an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made is not to be accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief he alleged." Per Lord Herschell, *ib.* pp. 339, 367.

Fraud may be established when the representation was "made in the *bonâ fide* belief that it was true, and before allotment the party who made it finds out that it was untrue and remains silent." Per Lord Blackburn, *Brownlie v. Campbell*, 5 App. Cas. 950. In such case the directors ought to say, "We cannot contract with the gentleman. The application was based on a misstatement authorized by us. The only thing we have now to do is to tell him that the prospectus is erroneous, and that we cannot accept his application. We must not deceive; we must return his money." Per Page-Wood, V.-C., *Henderson v. Lacon*, 5 Eq. 249; and see the remarks of Turner, L. J., in *Traill v. Baring*, 4 D. J. & S. 318.

Limitation
of time for
action.

As to the period of limitation in an action of deceit. Having regard to 21 Jac. 1, c. 16, an action of deceit is *prima facie* barred unless it is brought within six years from the time when the cause of action accrued. But when the plaintiff shows that he did not discover, and had not reasonable means of discovering, the fraud until within six years before the action, and that the existence of such fraud was fraudulently concealed by the defendant until within the six years, time will not run till such discovery. *Gibbs v. Guild*, 9 Q. B. D. 59; and see *Re McCullum*, (1901) 1 Ch. 143.

No delay in bringing an action of deceit short of that fixed by the statute will bar the action. *Peck v. Gurney*, L. R. 6 H. L. 377.

As to death or bankruptcy.—On the death or bankruptcy of a person in whom there is vested a right of action for fraudulent misrepresentation whereby he has lost money, the right of action passes to his legal personal representatives or trustee in bankruptcy, as the case may be (*Twycross v. Grant*, 4 C. P. Div. 40), but subject to the general rule, "*actio personalis moritur cum persona*." *Peck v. Gurney*, L. R. 6 H. L. 377.

Death or
bankruptcy
of person
defrauded

The test of the applicability of that rule is, has the wrongdoer's estate profited by the wrong? If it has, the executors or administrators of a delinquent director or other person who made the misrepresentation will be liable to that extent. *Phillips v. Homfray*, 24 C. D. 439; *Dacoren v. Wootton*, (1900) 1 I. R. 273; *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, 117; otherwise, if the estate has not benefited, *Peck v. Gurney*, L. R. 6 H. L. 393.

But where A. purchased from B. worthless shares in a company for 250*l.* and claimed to prove for 250*l.* as damages for misrepresentation in an action for the administration of B.'s estate, Romer, J., disallowed the claim, holding that as there was nothing among the assets that at law or in equity belonged to A., and the damages unliquidated and uncertain, the executors could not be sued merely because B.'s estate might have benefited by the wrong, and that the damages were none the less unliquidated and uncertain from the fact that A. might be able to prove that the measure of his damages was the amount of the purchase-money. *Re Duncan, Terry v. Sweeting*, 1899 1 Ch. 387.

As to bankruptcy.—Demands in the nature of unliquidated damages, arising otherwise than by reason of a contract, promise, or breach of trust, are not provable in bankruptcy. Sect. 37 (1) of the Bankruptcy Act, 1883. Hence, damages for fraudulent misrepresentation by a director are not provable in his bankruptcy, unless they have been ascertained by judgment obtained before the receiving order. *Re Newman*, 3 C. D. 494; *Greenwood v. Humber & Co. (Portugal)*, W. N. (1898) 162.

Proof in
bankruptcy.

But if judgment has been obtained they are provable. *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122. If not provable they are not extinguished by the bankrupt getting his discharge, for the discharge only releases him from provable debts (Bankruptcy Act, 1883, s. 30 (2)); nor does it release him from debts incurred by fraud or fraudulent breach of trust" (*ibid.*); and if the claimant pursues his rights the Court of Bankruptcy will not restrain the action. (*Ex parte Coker*, 10 Ch. D. 653.) *Quere*, if he did not, whether the Statute of Limitations would not run against him.

The measure of damages is the difference between the amount paid for the shares and their then value, *i.e.*, immediately after allotment.

Measure of
damages.

This value is not necessarily the market value, for the allottee is not bound to sell nor market value always the true value. The true value is ascertained by the light of subsequent events showing

the inherent worthlessness of the company. *Peck v. Derry*, 37 Ch. D. 541; and see *Arnison v. Smith*, 41 Ch. D. 364; *Arkwright v. Newbold*, 17 Ch. D. 312; *Davidson v. Tulloch*, 3 Macq. 783; *Twyer v. Grant*, 2 C. P. D. 544.

Directors' Liability.

Sect. 84 of the Act takes the place of the Directors' Liability Act, 1890. It runs thus:

Liability for
statements in
prospectus.

84.—(1.) Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorized the naming of him and is named in the prospectus as a director, or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorized the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

- (a) With respect to every untrue statement, not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe, that the statement was true; and,
- (b) With respect to every untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation. Provided that the director, person named as director, promoter, or person who authorized the issue of the prospectus, shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it; and,
- (c) With respect to every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement, or copy of or extract from the document,

or unless it is proved (i) that, having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent, or (ii) that the prospectus was issued without his knowledge or consent, and that, on becoming aware of its issue, he forthwith gave reasonable public notice that it was issued without his knowledge or consent, or (iii) that after the issue of the prospectus, and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2.) Where a company existing on the eighteenth day of August, one thousand eight hundred and ninety, has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures, issues a

prospectus, a director shall not be liable in respect of any statement therein, unless he has authorized the issue of the prospectus, or has adopted or ratified it.

(3.) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorized or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorized the issue thereof shall be liable to indemnify the person named as aforesaid against all damages, costs and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any action or legal proceedings brought against him in respect thereof.

Indemnity where name of person has been improperly inserted as a director.

(4.) Every person who by reason of his being a director, or named as a director, or as having agreed to become a director, or of his having authorized the issue of the prospectus, becomes liable to make any payment under this section, may recover contribution from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

Contribution from co-directors, &c.

(5.) For the purposes of this section

The expression "promoter" means a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company.

The expression "expert" includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him.

Looking at the interpretation section (sect. 285), it is clear that this section is only to apply to prospectuses inviting subscriptions for shares, debentures, or debenture stock of companies formed under the Act of 1908. The section has no application to railway, gas, water, tramway, or other parliamentary companies, or to foreign or colonial companies, or to companies incorporated by royal charter, or to companies constituted by deed of settlement and not brought within the operation of the Companies Act, 1908. Any right of action under the corresponding provisions of the repealed Acts is preserved by sect. 38 of the Interpretation Act, 1889.

Act only applies to companies under Companies Act, 1908.

It is confined to prospectuses issued by or on behalf of the company. For example, if the owners of, say, 100,000 shares in a company offered such shares for public subscription, it would seem that the section would not apply, and subscribers must still rely on the general law.

The section fundamentally alters the law as to the consequences of misrepresentation in prospectuses inviting subscriptions for shares, debentures, or debenture stock. It does not purport or attempt to alter or extend the remedy afforded by the action of deceit. It establishes a new and much more effectual remedy. "The Act" (on which the present section is based) "was passed," says Cozens-Hardy, L. J., in *McConnell v. Wright*, (1903) 1 Ch. 546,

Sub-sect. 1 gives new remedy.

558, "in 1890, the year after *Peek v. Derry* (14 App. Cas. 337) had been decided in the House of Lords, and, as it seems to me, for the express purpose of getting rid of the effect of that decision, so far and so far only as directors and promoters issuing a prospectus on the one hand, and persons taking shares and debentures on the other hand are concerned."

Questions
under sub-
sect. 1.

As regards the right of action conferred by sub-sect. 1, it will be convenient to consider, *seriatim*, the following questions:—

Who may be
sued.

A. *Who may be sued as a defendant?*

Subject to the Supreme Court Rules and the decisions thereunder, as to which see *infra*, Chap. XVIII.,

Director.

(1) Every person who is a director of the company at the time of the issue of the prospectus; and

Person named
as director.

(2) Every person who, having authorized such naming of him, is named in the prospectus as a director, or as having agreed to become a director of the company, either immediately or after an interval of time.

Promoter.

(3) Every promoter who was a party to the preparation of the prospectus, or of the portion thereof containing an untrue statement.

(4) Every person who has authorized the issue of the prospectus.

(1) "Director" here includes "any person occupying the position of director by whatever name called." Sect. 285.

Corporation
as promoter.
22.

As to (3)—

The question whether a body corporate is a person or promoter within this section and so capable of being sued, is one of some difficulty. By sect. 19 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), the word "person," unless the contrary intention appears, is to include any body of persons, corporate or unincorporate. Now the section makes the person or promoter liable to pay compensation, unless, amongst other alternatives, it is proved that he believed the untrue statement and had reasonable grounds for such belief; and it may be said that a body corporate is incapable of belief, and accordingly would not be able to prove the facts requisite for its defence. See *Pharmaceutical Society v. London and Provincial Supply Assoc.*, 5 App. Cas. p. 862, where Lord Selborne stated his opinion, "that if a statute provides that no person shall do a particular act except on a particular condition, it is, *prima facie*, natural and reasonable (unless there be something in the sub-context, or in the manifest object of the statute, or in the nature of the subject-matter, to exclude that construction) to understand the Legislature as intending such persons as, by the use of proper means, may be able to fulfil the condition; and not those who, though called 'persons' in law, have no capacity to do

so at any time, by any means, or under any circumstances whatsoever." This view, it may be contended, is equally applicable to the case of a statute, like that now under consideration, which provides that a person shall do a particular act, namely, pay compensation unless he complies with a particular condition, namely, proves belief. On the other hand, it may justly be said that corporations are within the mischief intended to be remedied by the Act, and that the words are sufficiently wide, and should, if possible, be held to cover such bodies, for bodies corporate may and do act as promoters, and ought to be and are liable for the acts of their directors (*Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392), and there would be no real difficulty in their establishing a defence since, in the case of a corporation, the belief of its agents acting in the matter must be imputed to the corporation. In an action of deceit against a corporation proof of its agents' belief would relieve the corporation. See *supra*, pp. 33, 34 *et seq.*

See also as to a limited company being a "person," *Willmott v. London Road Car Co.*, (1910) 2 Ch. 525.

As to (4) —

The words "has authorized" are at first sight extravagantly wide. They might include a broker, banker, advertising agent, or shop-keeper who authorizes his clerks or servants to hand copies of the prospectus to customers or others, and even the manager of a newspaper who authorizes the publication of the prospectus therein. But it would be absurd to place such a construction on the words. They cannot reasonably be held to apply to such persons as bankers, brokers, accountants, solicitors, and engineers who merely consent to their names appearing as such in the prospectus. Lord Alverstone, when Attorney-General, and Lord Davey, when at the bar, both so advised; and the section itself distinguishes between authority to name and authority to issue. It is conceived that a person is not one who "has authorized the issue" within the meaning of the section, unless in common parlance he would be so described, and that the issue means the initial putting forth, or launching of the document, and not the subsequent distribution of it.

In the case of a director there is seldom any difficulty in showing that he has authorized the issue. *Broome v. Speak*, (1903) 1 Ch. 586, affirmed as *Shepherd v. Broome*, *infra*.

Person
authorizing
issue of
prospectus
or notice.

B What is "a statement" within the section?

An ordinary statement of fact, *e.g.*, that "10,000 shares have been already subscribed," or that "the profits of the business during the last five years have averaged 20,000*l.* per annum," or that certain specified contracts are the only contracts to which the company is a party (*Shepherd v. Broome*, (1904) A. C. 342), or that the company has acquired a valuable property (*McConnell v. Wright*, (1903) 1

What is a
statement
within sub-
sect. 1?

Ch. 546), is obviously a statement within the section, in respect of which, if untrue, a defendant may be held liable. Nor is there any reason to doubt that statements to the effect that the directors or others "believe," "anticipate," "hope," or "intend" so and so, or are of this or that "opinion," are statements within the section. There is, however, an important distinction between such statements of belief or opinion and ordinary statements of fact, for, as regards the latter, the plaintiff has merely to prove that the fact was not as stated, and then it is for the defendant to show that he had reasonable grounds to believe and did believe, that what was stated was true, or, as Cozens-Hardy, L. J., puts it in *McConnell v. Wright*, (1903) 1 Ch. 558, "the plaintiff has only to prove, in addition to damage, that a material statement is untrue, and he can maintain an action, unless the defendant can establish that he had reasonable ground to believe, and did believe, the statement to be true; in other words, the onus of proof is shifted." In the case of a statement as to belief, anticipation, hope, intention, or opinion, on the other hand, the onus is on the plaintiff to prove that the defendant did not believe, anticipate, hope, or intend as the case may be—a matter of no small difficulty. Hence, as regards this latter class of statements, the plaintiff is in substantially the same position as he was before the Act.

It must not, however, be supposed from this that directors and others may safely indulge in reckless statements as to belief, anticipation, hope, intention, or opinion, for in the absence of reasonable grounds for such belief, &c. the Court may be asked to find, and may find as a fact, that he did not really entertain the alleged belief, anticipation, hope, intention, or opinion. *Western Bank of Scotland v. Addie*, L. R. 6 H. L. (Sc.) 168. See *Aaron's Reefs v. Twiss*, (1896) A. C. 273, and *supra*, p. 187.

Liability may be incurred under the section not only in respect of statements in the prospectus itself, but also in respect of the following, namely:

Statement-
outside
prospectus
or notice.

Report or
memorandum
noticed in
prospectus,
&c.

Reference to
copies or
extracts.

(1) Any untrue statement in any report or memorandum appearing on the face of the prospectus, or by reference incorporated therein or issued therewith, but not made by or contained in what purports to be a copy of, or extract from, a report or valuation of an expert.

(2) Any untrue statement in any such report or memorandum purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, where it is proved that the director, person named, promoter, or other person who authorized the issue of the prospectus or notice, had no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it.

"Expert" here includes engineer, valuer, accountant, and any

other person whose profession gives authority to a statement made by him.

As to reports, see *Re Reese Silver Mining Co.*, 2 Ch. App. 611; *Rawlins v. Wickham*, 3 D. G. & J. 304; *Att.-Gen. v. Ray*, 9 Ch. App. 402, n.; *British Burmah Land Co.*, 56 L. T. 815; *Angus v. Clifford*, 39 W. R. 252; (1891) 2 Ch. 449.

As to the liability of experts for false or negligent reports, see *Cann v. Willson*, 39 Ch. D. 39; *George v. Skivington*, L. R. 5 Ex. 1; *Fletcher v. Galland*, 90 L. T. N. 278.

C. Who may bring an action under the section?

All persons who subscribe for any shares, debentures, or debenture stock on the faith of the prospectus."

These words give a right of action for compensation to every such person. It is presumed that the word "subscribe" means "apply for and accept any allotment from the company." This is the usual sense in which the word "subscribe" is used. *Ross v. Estates Investment Co.*, 3 Ch. 682; *Henderson v. Lacon*, 5 Eq. 258; *Arnison v. Smith*, 41 C. Div. 348. And this construction is supported by the fact that the section assumes that there will be an "allotment" under the prospectus.

The words are susceptible of a wider construction. They might be held to extend to a subscription or taking up of shares, debentures, or debenture stock offered for subscription, not by or on behalf of the company, but by or on behalf of some person, firm, or company who or which had previously become owners thereof, whether by allotment or purchase; *e.g.*, suppose that a company is formed to acquire a business, and that the consideration for the acquisition of such business includes 100,000*l.* of debentures, and that the vendor, after holding these debentures for a time, sells them to a trust company or bank, which in its turn offers them for public subscription or sale. Is the section to apply to such a case? For the reason already stated above it is submitted that it is not. If it did, this anomalous result would follow, that directors and others who have had nothing whatever to do with the issue of a prospectus would be liable under the section for certain statements therein, unless they were able to substantiate one of the three alternative defences contained in the latter part of sub-sect. 1, which it may be quite impossible for them to do.

D. What must the plaintiff prove in order to establish a *prima facie* case?

The plaintiff must prove:

1. That the defendant—

- (a) Was a director; or,
- (b) That with his authority he was named in the prospectus as a director, or as having agreed to become a director;

Who may sue under sect. 3?

Subscribers on faith of prospectus, &c.

Who are:

What to prove for *prima facie* case.

If a person so named subsequently acted as a director, that would be considered *prima facie* evidence of authority; and if he knew he was so named and did not disclaim, and perhaps took shares, these facts again would afford some evidence of authority.

- (c) Or that the defendant was a promoter of the company, and was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement;

It is not every promoter who is to be liable, but only those who meddle with the prospectus. See sub-sect. (1).

- (d) Or that the defendant authorized the issue of the prospectus

2. That there was an untrue statement

(a) In the prospectus;

b) Or in some report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith.

A misleading statement is an untrue statement. *Greenwood v. Leather Shod Wheel Co.*, (1900) 1 Ch. 421.

Where the statement is that the person making the statement believed, anticipated, hoped or intended so and so, or was of this or that opinion, it is not enough for the plaintiff to prove that the belief, &c. was not well founded; he must prove that the belief did not exist; but there being no reasonable ground for it is evidence that it did not exist.

3. That the plaintiff subscribed for shares, debentures, or debenture stock on the faith of the prospectus. See as to this, *supra*, pp. 193 *et seq.*

4. That the plaintiff has sustained loss or damage by reason of the untrue statement. *McConnell v. Wright*, (1903) 1 Ch. 546; *Stevens v. Hoare*, 20 T. L. R. 407.

This no doubt imports that the statement must be material, for otherwise the plaintiff cannot show loss or damage by reason of the untruth of that statement. As to what statements may be material, see *supra*, p. 190.

The expression "by reason of the untrue statement," appears to mean by reason of the plaintiff having been induced to part with his money on the faith of such untrue statement.

Damage is an essential factor in the right of action, and therefore misrepresentation without damage is not actionable." Per Collins, M. R., in *McConnell v. Wright*, *supra*. See also *Nash v. Calthorpe*, (1905) 2 Ch. 237, and *Macleay v. Tail*, (1906) A. C. 21

E. *What is the liability imposed by the section?*

What is the
liability
under the
section?

The liability is to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus, for the loss or damage they may have sustained "by reason of the untrue statement." This means by reason of the plaintiff's having been induced by the untrue statement to subscribe. See the judgment of Collins, M. R., in *McConnell v. Wright*, *supra*. The amount of the compensation—the measure of damages—is presumably the same as that in an action of deceit, namely: the difference between the amount paid by the plaintiff and the real value of the shares, debentures, or debenture stock at the date of allotment. *Peck v. Derry*, 37 C. D. 591; *Tugcross v. Grant*, 2 C. P. D. 469; *Broome v. Speak*, (1903) 1 Ch. 586; *Arnison v. Smith*, 41 Ch. D. 348, 363.

It is proper to direct an inquiry as to damages in the form in *Akewright v. Newbold*, 17 Ch. D. 301, 311; *McConnell v. Wright*, *supra*; per Lord Lindley in *Shepherd v. Broome*, (1904) A. C. at p. 348.

In *McConnell v. Wright*, *supra*, the misstatement complained of was that the company had acquired a valuable property, which it had not in fact acquired at the date when the prospectus was issued, and the principle on which the amount of compensation was to be ascertained was stated by Collins, M. R., as follows: "It is not an action for breach of contract, and, therefore, no damages, in respect of prospective gains which the person contracting was entitled by his contract to expect, come in, but it is an action of tort . . . and therefore, *prima facie*, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate, final, highest standard of his loss. But, in so far as he has got an equivalent for that money, that loss is diminished . . . So far as the assets are an equivalent, he is not damaged; so far as they fall short of being an equivalent, in that proportion he is damaged."

In such an action, if there be an untrue statement of a material character and damages sustained, it is no answer that the statement was made good soon after it was made and acted on. *McConnell v. Wright*, *supra*; and see *Peck v. Derry*, 37 Ch. D. 581; 14 App. Cas. 337.

F. *What must the defendant prove in order to escape liability for an untrue statement?*

What defen-
dant should
prove.

(1.) In the case of an untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, he must prove that he had reasonable ground to believe, and did up to the time of the allotment of the shares, debentures, or

debenture stock (as the case may be) believe that the statement was true. *Greenwood v. Leather Shod Wheel Co.*, (1900) 1 Ch. 421; *Shepherd v. Broome*, (1904) A. C. 342; and see *Derry v. Peek*, 14 App. Cas. 337.

(2.) In the case of an untrue statement purporting to be a statement by or contained in what purports to be a copy of, or extract from, a report or valuation of an engineer, valuer, accountant, or other expert, *i.e.*, any person whose profession gives authority to a statement made by him, he must prove that it fairly represented the statement made by the engineer, valuer, accountant, or other expert, or was a correct and fair copy of, or extract from, the report or valuation.

But this defence in respect of a misleading report is not sufficient if the plaintiff can prove affirmatively that, notwithstanding such untrue statement fairly represented the statement made by the expert, or was a correct and fair copy of, or an extract from, the report or valuation, such director, person named, promoter, or other person who authorized the issue of the prospectus or notice, as aforesaid, had no reasonable ground to believe that the expert was competent to make the statement, report, or valuation. See *Angus v. Clifford*, 39 W. R. 252; (1891) 2 Ch. 449, where the reports stated to be "prepared for the directors by eminent engineers" were in fact prepared for the agent of the vendor to the company.

(3.) In the case of every such untrue statement, purporting to be a statement made by an official person, or contained in what purports to be a copy of, or extract from, a public official document, he must prove that it was a correct and fair representation or copy of, or extract from, such document.

(4.) But in each of the above cases the following further defences will be open:—

- (a) In the case of a director, and of every person who has authorized the naming of him, and is named in the prospectus as a director, or as having agreed to become a director either immediately or after an interval of time, such person has a good defence if he can prove that, having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that the prospectus was issued without his authority or consent.
- (b) Any defendant, whether a director or otherwise, has a good defence if he can prove that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave reasonable public notice that it was issued without his knowledge or consent.

When a director, although aware that a prospectus was being issued inviting persons to take debentures, did not trouble to read it, abstained from inquiry as to its contents, and refrained from giving

any notice under the Act, Byrne, J., held that after action brought under the Act it was too late for him to repudiate the prospectus and that repudiation in a statement of defence was not "reasonable public notice." *Drineqbier v. Wood*, (1899) 1 Ch. 393.

Probably notice advertised in some of the principal newspapers in which the prospectus was advertised would be "reasonable public notice."

- (c) Any defendant, whether a director or otherwise, has also a good defence if he can prove that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and gave reasonable public notice [see above] of such withdrawal, and of the reason therefor.

Furthermore, the defendant might, no doubt, set up a release, or contract not to sue, or an estoppel, as against the plaintiff.

G. What are "reasonable grounds" for believing a statement to be true?

Reasonable grounds of defendant's belief.

A director or other person who may be held responsible under the section must bear in mind that, if at some future time a statement turns out to be untrue, he may be called on to prove that he had reasonable grounds for believing the statement to be true, and that it will then be for a jury or judge to decide, not whether the director considered the grounds reasonable, but whether such jury or judge consider that they were reasonable.

So, too, he must remember that a mistake by him as to the materiality of a contract required to be disclosed will not protect him from the consequences of non-disclosure if it should in fact be material; and it makes no difference that he has been advised that disclosure is not required. *Shepherd v. Broome*, (1904) A. C. 342.

Accordingly each statement should be considered in this view, and the following questions should be put, namely:—What are my grounds for believing the statement to be true? Do they seem to me, weighing them impartially, to be reasonable? What inquiries and advice should I make and take to ascertain whether others think them reasonable? Would they be likely to seem reasonable to a jury or judge? What evidence can I preserve to satisfy judge or jury of the reasonableness of my belief?

It may be well to give two or three examples:—

1. Suppose the prospectus to state that the company is formed to acquire a business, and that "the average annual profits of the business during the last five years have been 10,000*l*." The mere assertion of the vendor that this was the average could scarcely be considered reasonable grounds for believing the statement in the prospectus to

Examples.

be true. In order to justify the statement, special steps should be taken to test its truth by independent inquiry, *e.g.*, by the employment of a firm of chartered accountants to investigate the books and report in writing thereon.

2. Again: Suppose it to be stated that the business to be acquired is a paper mill, and that there is a plentiful supply of water. This is a statement obviously material which, in the absence of personal knowledge, should not be made without independent expert evidence.
3. Suppose a fact is stated which is true to the knowledge of only one or two of the directors, but those persons of probity, it would seem that this might be held to afford reasonable ground on which the others might concur with them in making the statement.

What are reasonable grounds for believing that an engineer, valuer, accountant, or other expert is competent (*i.e.*, qualified or fit) to make a statement, report, or valuation? This must depend on the circumstances of the case. There are some men whose competency and credit is beyond dispute, men who are at the head or in the front rank of their profession; others may hold a recognized diploma or certificate; but where a man is not in this position, it may be necessary to obtain some collateral evidence of his competency. Thus it may be well to obtain references to some leading member or members of the profession to which the expert belongs, or to some persons of position who have employed him and can speak as to his competency.

Where the expert is a foreigner, and there is no time to communicate, otherwise than by telegraph, with persons in the locality to which he belongs, it will be proper to communicate, by telegraph, with some banker or other person who can be trusted in the locality, and such person should be requested to inquire as to the competency of the expert, and if he reports by telegram favourably in regard thereto, it is conceived that such inquiry and report would be held to afford reasonable grounds for believing that the expert was competent.

The necessity of obtaining and preserving written evidence that reasonable grounds existed cannot be too strongly impressed on those who may be called on to defend their statements in a prospectus.

As to the defendant giving particulars, see *Alman v. Oppert*, (1901) 2 K. B. 576.

Who is an expert?

H. Who is an expert?

Sub-sect. (1) of sect. 84 uses the expression "expert," and by sub-sect. (5) "the expression 'expert' includes engineer, valuer,

accountant, and any other 'person' whose profession gives authority to a statement made by him."

It is to be observed that the word used is "*profession*," not "*business*" or "*occupation*," and although the meaning of the word is stated in Johnson and elsewhere to be "*vocation, known employment*," it may be doubted whether it will be given by the Court quite so wide a construction. It is not easy to draw the line accurately. It probably means anyone who holds himself out to the public as specially qualified in any line by knowledge or skill. However construed it must include surveyors, architects, lawyers, and doctors. Surely, too, in banking matters a banker is to be considered an expert within the definition, a brewer in brewing matters, a general manager of a railway in railway matters, and a lawyer when stating his opinion on a title.

I. *What is the period of limitation for bringing an action under the Act?*

Period of
limitation.

In *Thorn v. Lord Clunmorris*, (1900) 1 Ch. 718, it was argued that the period of limitation was governed by sect. 3 of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), which prescribes that in the case of "actions for penalties, damages, or sums of money given to the party grieved by any statute now in force or hereafter to be in force," the period shall be two years after the cause of action. But the Court of Appeal held that these words did not cover the case, and appeared inclined to hold that the period was six years. This decision, however, has not escaped criticism, and it must be admitted that it is not altogether satisfactory.

Prima facie, the words of the Act of 1833, above referred to, appear to point in the clearest way to such an action as may now be brought under sect. 84 of the Companies Act, 1908 (replacing the Directors' Liability Act, 1890).

It cannot be maintained that the Act of 1833 should not be held to apply because the section was not then in force, for sect. 3 of the Act of 1833 is not confined to statutes then in force; it expressly says "given by any statute now in force or hereafter to be in force."

Nor can it be denied that a plaintiff in such an action, if his claim be well founded, is a person or party "grieved." "The expression is not a technical expression: the words are ordinary English words, which are to have the ordinary meaning put upon them." Per Bramwell, L. J., *Robinson v. Currey*, 7 Q. B. D. 470. And beyond doubt the expression aptly describes a person who has been induced by untrue statements in a prospectus to subscribe for shares, debentures, or debenture stock, and has thereby sustained damage. Again, the compensation recoverable in the action falls clearly within the words "penalties, damages, or sums of money" given by the section to the party grieved. No doubt, the compensation given is not a

penalty, but the words "damages or sums of money" must have their due effect.

Compensation for loss or damage is the precise equivalent of the legal term "damages." As Lord Coke says, "Damages is the recompense that is given by the jury to the plaintiff for the wrong the defendant hath done unto him." Co. Litt. 2, 257a. Here sect. 84, in giving compensation gives damages. Indeed, Lind M. R., in the case under discussion was constrained to admit this, and in *McConnell v. Wright*, (1903) 1 Ch. 538, all the judgments refer to the "damages" which the plaintiff in an action under the Act of 1890 (now sect. 84 of 1908) had incurred.

Suppose, however, that by some extreme refinement compensation under the section is not to be considered damages—a view which cannot survive *McConnell v. Wright*—still it surely comes within the words "or sums of money." These words are as general as they can be. It may be that the *ejusdem generis* rule of construction should be applied; but assuming it should, and that the words "or other sums" are to be read as meaning "or other sums of a like kind," those words would none the less accurately describe and cover compensation payable under the section, for such compensation is indistinguishable from damages. Why, then, is not the Act of 1833 to have full effect in accordance with the plain and *prima facie* meaning of the words? "The rule of law I take it," said Alderson, in *Attorney-General v. Lockwood*, 9 M. & W. 378, "upon the construction of all statutes . . . is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity."

In *Thomson v. Lord Clanmorris*, *supra*, the judges of the Court of Appeal, in disregard of this rule, have refused to give full effect to the words of the Act of 1833, on the ground that the law intended by the Legislature to refer exclusively to actions for penalties. This, it is submitted, is a merely conjectural conclusion. The words of the statute are plain and the Court is not entitled to cut down or deny operation to those words merely because it surmises that the Legislature could not have intended them to be so set.

No incongruity or absurdity would result from doing so. On the contrary, six years being the period of limitation in regard to an action on the case for fraudulent misrepresentation, it seems reasonable enough, indeed, only just, that two years should be the period in an action in respect of what may be a perfectly innocent misrepresentation—although in such a case, in which the defendant has not only to prove that what he stated to be true, but that he had reasonable grounds for believing. Time soon obliterates the memory of what was once thought or believed, and the Legislature, in passing the Act of 1890, having in mind, as it must

have had the Act of 1833, may well have thought that the onerous obligation imposed on directors and others by the Act of 1890 justified a short period of limitation; for how few people after a lapse of two years can recollect or reaffirm the grounds on which they

signed any particular statement in a prospectus issued by them?

The Court of Appeal, in *Thomson v. Lord Clanmorris*, 1909 1 Ch. 8, appears to have followed the unfortunate precedent set in *Wain v. Solomon*, (1896) 2 Ch. 237, in which the Court of Appeal considered that it was entitled to deny efficacy to the words of a statute from a preconception as to the intention of the framers, but the House of Lords unanimously reversed the decision. Lord Chatterfield repudiated such a notion. Lord Chatterfield said: "I can only find the true intention of the framers of the Act from the Act itself."

As the law stands, however, it must be taken (a *Thomson v. Lord Clanmorris*, *supra*, is law) that the period of limitation is not two years as apparently suggested by sect. 3 of the Limitation Act, 1833, but—so that *Thomson v. Lord Clanmorris* seemed disposed to think by 21 James 1, c. 16, that is, six years. There is a difficulty for sect. 3 of the Limitation Act, 1833, provides that in the case of all "actions on any bond or other specialty" the period of limitation is to be twenty years. In the case of actions on a statute there is no doubt that sect. 84 placing the Act of 1890) is to the party grieved the right to bring an action of debt upon the statute. See *Tilson v. Warwick*, 825, 4 B. & C. 962, in which it was held that where an Act of Parliament provided that the costs of obtaining it should be paid out of the money subscribed, the attorneys who obtained the Act might maintain an action of debt founded upon the statute for the costs.

And further, the action under sect. 84 is on a specialty, for it is settled law that an action on a statute is an action on a specialty. *Cork & Brandon Rail. Co. v. Gode*, 13 C. B. 827. "A declaration on a statute is a declaration on a specialty." Per Maule, J., in the case just referred to, and see Williams' Saunders, 1871 edition, vol. 1, 191.

These considerations add to the inconvenience of the construction adopted in *Thomson v. Lord Clanmorris*.

As to the time when the cause of action arises, it would seem that the cause arises when the plaintiff sustains damage. *Bonomi v. Backhouse*, 9 H. M. C. 463; *Darley Main Co. v. Mitchell*, 11 A. C. 127; *Read v. Brown*, 22 Q. B. D. 128, that is, when he parts with his money. *Trinity v. Smith*, 41 Ch. D. 366, for damage is one of the constituents of the cause of action, but according to *Thomson v. Lord Clanmorris*, *supra*, the Act is to be read as imposing on the directors by implication "a new statutory duty of accuracy," and time runs from the breach of that duty. The amount of damages is the

as in the case of an action of deceit. *McConnell v. Wright*, (1903) 1 Ch. 558. See *supra*.

Effect of
death or
bankruptcy.

J. *What effect have death and bankruptcy?*

a) *In case of aggrieved party.* If a person entitled under the section to compensation dies or becomes bankrupt, the right of action under it will pass to his legal personal representative or trustee in bankruptcy, as the case may be, as a chose in action forming part of his estate.

(b) *In case of director.*—In the seventh edition of this work the opinion was expressed that “if a person liable under the Act (Directors’ Liability Act) to pay compensation dies, his heirs, executors, or administrators will be liable to the extent of the estate of the deceased in the due course of administration. As the action is not one of tort, the maxim, *Actio personalis moritur cum personâ*, would not seem to apply.” *Tygeros v. Grant*, 4 C. P. Div. 40; *Phillips v. Homfray*, 24 C. D. 439. But the point is not yet settled. And in a case decided in 1900, Lindley, M. R., and Romer, L. J., agreed in thinking that the point was still open, and the former would not commit himself to saying whether executors of a deceased director were or were not liable under the Directors’ Liability Act (now sect. 84, Companies (Consolidation) Act, 1908). The Master of the Rolls added: “It may be that there is a statutory liability to which the maxim ‘*Actio personalis*,’ &c., does not apply in which case they would be liable just as the other directors who are alive, but of course out of the assets of their testator.” *Frankenburg v. Great Horseless Carriage Co.*, (1900) 1 Q. B. 504, 510; and see *Davoren v. Woolton*, (1900) 1 I. R. 273.

Apparently a liability under the section may be proved in bankruptcy, unless it comes within the exception of a “demand in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust,” under sect. 37 (1) of the Bankruptcy Act, 1883 (*supra*, p. 207), when it would be excluded from proof. *Greenwood v. Humber & Co. (Portugal)*, W. N. (1898) 162. The discharge of the bankrupt, where the liability is proveable, releases him from any claim under the section, unless the liability was incurred by fraud or fraudulent breach of trust. See *supra*, p. 207, as to the Bankruptcy Act; and *Re Newman*, 3 C. D. 494; and *Ex parte Coker*, 10 Ch. 652.

What pre-
cautions
directors,
promoters,
&c., to take.

K *What precautions directors, promoters, and others should take.*

1. As regards any statement—

- (1) In the prospectus;
- (2) In any report or memorandum appearing on the face thereof;
- (3) In any report or memorandum referred to therein;
- (4) In any report or memorandum issued therewith;

and (in cases (2), (3), (4)) *not* purporting to be made on the authority of an expert, or by a public official document or statement, take care that the statement is not made unless each director has reasonable ground to believe, and does believe, that the statement is true.

The following are examples of statements purporting to be made on the authority of an expert:—

- (a) Mr. A., or an engineer, has examined the reef, and states that it is rich in gold.
- (b) Mr. A. has made the following report. [*Set it out.*]
- (c) The following extracts from the report which has been made by Mr. A. show the value of the property. [*Set them out.*]
- (d) The statements in paragraphs of this prospectus are made on the authority of Messrs. , the well-known accountants, who have examined the books.
- (e) According to the report of his Majesty's Consul of , published in the Board of Trade Journal of the of , the exports from, &c.

2. As regards every statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an engineer, valuer, accountant, or other expert, take care (a) that it fairly represents the statement made by such engineer, valuer, accountant, or other expert, or is a correct and fair copy of, or extract from, the report or valuation; (b) that there is evidence that the person making the statement, report, or valuation was competent to make it.

3. As regards every statement purporting to be a statement made by an official person, or contained in what purports to be a copy of or extract from a public official document, take care that it is a correct and fair representation of such statement, copy of or extract from such document.

4. Carefully avoid stating as matters of fact what the directors do not *know* to be true. Where it is desirable to state facts which the directors do not know to be true, let such facts be embodied in a report by some competent expert, and then set out that report, or extracts from it, in the prospectus.

5. When a report of an expert cannot be obtained, let the statement be qualified, *e.g.*, "From inquiries which the directors have made, they believe that so and so."

6. If it is desired to make use of a statement made by some person who is not an expert, *e.g.*, by a vendor, let it be stated thus:—"The vendor states that the supply of water is ample." This avoids the risk involved in stating "the supply of water is ample."

7. Bear in mind that expressions such as that "the directors hope, anticipate, propose, or intend" are statements within the section, and that if they are made when the directors do not hope, anticipate, propose, or intend, the directors will be in danger of misstating a fact.

But a statement in this form is much less dangerous than an ordinary statement of fact because less easy of refutation. For example, if the statement is that the property is rich in gold, and it turns out not to be true, the directors, if sued, will have to prove that they believed, and had reasonable grounds to believe, the statement to be true; whereas, if the statement is that the directors believe that the property is rich in gold, the plaintiff will have the difficult task of proving that they did not believe. Of course, however, an honest man will not say that he believes unless he has good grounds for that belief. *Derry v. Peek*, 14 App. Cas. 375; and see *Aaron's Reefs v. Twiss*, (1896) A. C. 273; but sanguine temperaments too easily believe what they wish to believe. Hence the necessity for care.

As to recording grounds of belief.

8 Looking to the stringent provisions of the section, it would seem expedient that any director, or other person who may be held responsible under the section for untrue statements in a prospectus, should record in writing—

- (1) The fact that he believed the statements to be true when the prospectus was issued and up to allotment;
- (2) The grounds of his belief;
- (3) The grounds on which he believes in the competency of any expert who made any report or memorandum set out or referred to in, or issued with, the prospectus.

As to (8) the onus will be on the plaintiff in an action to prove that the defendant had not reasonable grounds to believe in the competency. Still it seems wiser to preserve the evidence, for the plaintiff will be entitled to ask the defendant, "What were your grounds of belief?" and if the defendant thus challenged could not remember what they were, this, taken with other circumstances, might enable the plaintiff to discharge the onus and recover compensation.

The object, of course, of the record is that the person who make it may, if the occasion arise, be able to refresh his memory in the witness box by referring to such record.

In the absence of such record, it may (after a lapse, perhaps, of years) be a matter of great difficulty for a director, or other person sued, to prove his belief, still more to prove the grounds of belief. The rules as to refreshing memory by referring to such a record are stated in Stephen's Law of Evidence, p. 79, as follows:—

"A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory.

"The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct."

A delay of some weeks in writing or reading the record might render it inadmissible. See Taylor on Evidence, sect. 1406.

One mode of making the record will be for the director to take a copy of the prospectus, and himself make the record thereon, or on a sheet of paper annexed thereto, and place such copy and record in safe custody.

Another mode will be to consider the prospectus and other documents at a board meeting, before they are issued, to take the statements *seriatim*, and as to each to state the ground of belief and the fact that all the directors believe it true. Let the minutes made by the secretary record all this in detail, and within the next few days let the formal minutes be read and initialled by all the directors: let a copy be furnished to each of the directors, and let each forthwith compare his copy with the original, and make and initial and date a memorandum thereunder to the effect that: "I compared this copy with the original minutes, and found it correct." In this way the formal minutes may be referred to, and if they should be lost, the director will probably be allowed to refer to the copy. Taylor, sect. 1408.

9. Lastly, it is lawful, subject to sect. 81 (4) of the Companies Act, 1908, for a subscriber to contract himself out of some of the rights secured to him by sect. 84; and there may be cases in which it will be desirable, under proper advice, to arrange for such a contract or waiver. See *infra*, pp. 231, 232 *et seq.*; and *Brazilian Rubber Plantations* (No. 1), (1911) 1 Ch. 425.

As to sub-sect. (3) of sect. 84 of the Act (replacing sect. 4 of the *Directors' Liability Act*). This sub-section is supplementary. It gives to innocent parties sued a right to indemnity against damages, costs, charges and expenses in certain cases, but only where there is no cause of action under the section (84) against the party claiming the indemnity.

Indemnity of
innocent
defendants.

Persons entitled to such indemnity are the following:

- (1) A person who has been named as a director in a prospectus without his consent, and without his having authorized the issue of the prospectus.
- (2) A director of the company who withdraws his consent to be a director before the issue of the prospectus, and has not authorized or consented to the issue thereof.
- (3) A person who is named as having agreed to become a director, and has withdrawn his consent before the issue of the prospectus or notice, and has not authorized or consented to the issue thereof.

Each of these persons would have a good defence to an action under sub-sect. (i) of sect. 84; but even if he succeeded in defending himself, he might not recover all his costs from the defeated plaintiff, and accordingly sub-sect. (4) enables him to claim indemnity elsewhere.

Indemnity
against
company.

It would seem that a director who without fraud or negligence incurs liability under the section is entitled to indemnity as against the company; for he is an agent, and an agent is entitled to indemnity from his principal—in this case the company—in the absence of fraud or misconduct. Story on Agency, sect. 339; *Betts v. Gibbins*, 2 A. & E. 57.

Sect. 5 of Act.
Right of
contribution.

As to sub-sect. (4) (*sect. 5 of the Directors' Liability Act*).—Sub-sect. (4) of sect. 84 gives a right of contribution to a director or person named as a director, or to a person who has authorized the issue of the prospectus against his co-directors, where such director, &c. has become liable to make a payment under the section. So one of two promoters liable under the section is entitled to contribution from his co-promoter, even in a case of fraud where compensation is obtained under the section. *Gerson v. Simpson*, (1903) 2 K. B. (C. A.) 197. This is an important alteration of the law. It displaces the old rule which disallowed contribution between tortfeasors, and in substitution treats the relation of the delinquent co-directors or co-promoters as a contractual one.

Section 38 of the Companies Act, 1867.

Sect. 38 of the
Act of 1867.

Sect. 38 of the Companies Act, 1867, was repealed as from the 1st January, 1901, by the Companies Act, 1900. See sects. 33, 35.

It had, therefore, no application to any prospectus issued after December 31st, 1900. But the repeal is, by virtue of sect. 38 of the Interpretation Act, 1889, without prejudice to any right of action or liability incurred under the repealed enactment, and accordingly questions as to its effect may still for some time arise with reference to prospectuses issued before January 1st, 1901, and, in fact, they have frequently done so. The decisions on these cases under sect. 38 often throw light on the probable attitude of the Courts towards sect. 81 of the Companies Act, 1908, more especially as regards material contracts, which by para. (k) of sub-sect. 1 of that section are required to be disclosed, and for that reason deserve attention.

The section is as follows:

Terms of
sect. 38.

38. Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice whether subject to adoption by the directors or the company, or otherwise: and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract.

Meaning of
the section.

Much difference of opinion at one time existed as to what contracts, having regard to this enactment, had to be specified in a prospectus.

See *Gover's case*, 1 C. D. 182; *Twyeross v. Grant*, 2 C. P. D. 469. The section says "any," i.e., every "contract," but in 1880 the question was very fully considered in *Sullivan v. Mitcalfe*, 5 C. P. D. 455, and the judgments clearly pointed to the conclusion that it was only necessary to specify every *material* contract made by the company or the directors or promoters thereof, meaning by "material contract" every contract which might reasonably be expected to influence the judgment of a person reading the prospectus as to whether he should or should not apply for shares; and it is now well settled, as appears below, that this is the true construction of the section. Sect. 81 (1) (k) of the Companies (Consolidation) Act, 1908, in terms limits the disclosure thus required to "material" contracts.

The following are examples of contracts which have been held to be material:—

Examples of
"material
contracts."

- (a) Contract by promoter to buy tramway concession, and subsequently re-sell to the company.
- (b) Contract by same promoter to give to another promoter remuneration for assisting in the promotion of the company. *Twyeross v. Grant*, 2 C. P. D. 469.
- (c) Contract under which promoter was to receive from the ostensible vendors to the company a portion of the proceeds of sale. *Greenwood v. Leather Shod Wheel Co.*, (1900) 1 Ch. 421.
- (d) Contract between promoters and K., the future chairman of the company, whereby the firm of which K. was a member was to receive a block of vendors' shares as commission for underwriting and for the use of the firm's name. *Cackett v. Keswick*, (1902) 2 Ch. 456.
- (e) Contracts by promoters to transfer to the company certain paid-up shares in another concern in consideration of a block of paid-up shares in the company. *McConnell v. Wright*, (1903) 1 Ch. 547; *Calthorpe v. Trechmann*, and *Macleay v. Tail*, (1906) A. C. 24 (H. L.).
- (f) Contract by company with its promoter for payment of a large sum to him for finding a deposit and other services.
- (g) Contract rescinding such contract with a promoter and providing that the promoter's claim to remuneration should be "honourably met." *Broome v. Speak*, (1903) 1 Ch. 586; affirmed by H. L. *sub nom. Shepherd v. Broome*, (1904) A. C. 342.
- (h) Contract with promoters by which a certain firm were to be commercial agents of the company, to receive 10,000 fully-paid shares, and a partner in the firm to be a director. *Cackett v. Keswick*, (1902) 2 Ch. 457; *Nash v. Calthorpe*, (1905) 2 Ch. 237; *Macleay v. Tail*, *supra*.

**Executory
and executed
contracts.**

This section was not limited to executory contracts; it extended to executed contracts also, that is to say, to contracts which have been carried into effect before the prospectus is issued. *Broome v. Speak*, *supra*.

**Oral
contracts.**

Nor was it possible to escape from the section by making the contract an oral one, for it was held that the section comprehended contracts oral as well as written. *Capel v. Sims Ship Composition Co.*, 36 W. R. 689; 58 L. T. 807; *Arkwright v. Newbold*, 17 C. D. 301; 25 W. R. 829.

**What is a
promoter.**

As to the meaning of the word "promoter," see *supra*, p. 125 *et seq.*; and *Twycross v. Grant*, 2 C. P. D. 469, 503; also, for the purposes of sect. 84 (directors' liability), sub-s. 5 of the section.

**"Knowingly
issuing."**

The meaning of the words "knowingly issuing" in sect. 38 have been considered in several cases. In *Twycross v. Grant*, 2 C. P. D. 542, Cockburn, C. J., was of opinion they meant issuing the prospectus with knowledge of the existence of contracts within the section, and intentionally omitting them from the prospectus. See also *Cockett v. Kenwick*, (1902) 2 Ch. 459, and *Hoole v. Speal*, (1904) 2 Ch. 732.

In *Broome v. Speak*, (1903) 1 Ch. 586, it was held that the defendants had "knowingly" issued the prospectus, they having been aware of the existence of the contracts and omitted them, though in doing so they had acted in good faith on legal advice.

**Ignorance of
the law.**

Ignorance of the law does not shelter a director or any other person included in the category mentioned in that section (sect. 38). If a man chooses to become a director of a company, he incurs certain statutory obligations; he may be liable for a statutory fraud without any moral obliquity whatever. That is his misfortune. The legislature deemed it right that this should be so, and though that section is now repealed, it still governs the present case. It is, therefore, idle to say that the defendant was not dishonest. We are not imputing any dishonesty to him except the statutory fraud which is created by sect. 38. He cannot shelter himself from that section under ignorance of the law, or even by saying that he invited the opinion of someone else as to the law, and did not act for himself. *Watts v. Bucknall*, (1903) 1 Ch. 766, 773.

**Ignorance of
existence of
contracts.**

The matter was further considered in *Tait v. Macleay*, (1904) 2 Ch. 631. In that case a director issued a prospectus which omitted to disclose a material contract, but at the meeting of directors at which the prospectus was approved, he passed it forgetting the existence of the contract in question, notwithstanding that the minutes of the previous meeting, at which that very contract was considered, were read and confirmed in his presence, and though he had himself approved of the contract. It was shown, however, that he had a general knowledge of the existence of contracts which might fall within the section, and he made no inquiry as to those contracts, but relied upon the assurance of the company's solicitor that the pro-

prospectus disclosed the contracts which sect. 38 required to be disclosed. It was held that he had knowingly issued the prospectus within the section. *Romer, L. J.*, in giving judgment, said that the section imposed upon a director who is settling and issuing a prospectus the duty of inquiring what contracts there are in existence which ought to be set out in the prospectus, and if a director knows generally that there are contracts in existence which may or may not fall within the section, and he does not inquire into those contracts so that he can truthfully say that he had no knowledge of any contracts in particular which ought to be set forth in the prospectus, he cannot excuse himself from liability under the section on the plea of ignorance if it afterwards turns out that some of the contracts of which he had a general knowledge were contracts which ought to have been set out, and which he would have ascertained if he had made proper inquiries. This case was reversed by the House of Lords, 15 Dec. 1905 (*Mackay v. Tail*, (1906) A. C. 24), but the view above set forth was approved. The ground of reversal was that it was established partly from the plaintiff's admissions and partly on other grounds that even had he known the real facts he would still have subscribed.

As to the remedy, it was long since held that where a person who has taken shares on the faith of a prospectus which is within, and offends against the section, his right course is to sue, not the company, but the promoters, directors or officers issuing the same for the damage he has sustained. See *Gorer's case*, 1 C. Div. 182, and cases above mentioned.

The remedy under the section.

As to the measure of damages, this is in substance the same as the measure of damages in an action of deceit. *Peck v. Derry*, 37 C. Div. 541. See *Twyeross v. Grant*, 2 C. P. D. 469; *Lockett v. Keswick*, (1902) 2 Ch. 456; *McConnell v. Wright*, (1903) 1 Ch. 516; and *Broome v. Speak*, (1903) 1 Ch. 586, affirmed by House of Lords *sub nom. Shepherd v. Broome*, (1904) A. C. 342. These cases, besides giving the measure of damages, show that in order to establish liability under the section it is unnecessary to prove fraudulent intention, for the law imputes it, and that a man may be liable although the omission to comply with the section arose merely from some forgetfulness or misunderstanding.

Measure of damages.

But the section is applicable only to a prospectus offering shares for subscription, and not to one offering bonds for subscription. *Cornell v. Hay*, L. R. 8 C. P. 328. Nor does it entitle the company to relief. *New Sanbrero Co.*, 3 App. Cas. 1218, or confer on the shareholder a right to repudiate his shares. *Gorer's case*, 1 C. D. 182. Conf. *Wimbledon Olympia, Limited*, (1910) 1 Ch. 630; *South of England Natural Gas Co.*, (1911) 1 Ch. 573.

Sect. 38 does not touch debenture holders.

An abridged prospectus is within the section even though such prospectus states where full prospectuses might be obtained. *White v. Hayman*, 1 Cab. & Ellis, 101; *Army, &c. Society v. Craig*, 8

Abridged prospectus.

T. L. R. 227. *Conf. Russell v. Burnham*, (1909) 1 Ch. 127, *supra*, p. 11. See also *infra*, pp. 259, 260.

What plaintiff must prove.

In order to obtain relief under sect. 38 the plaintiff must show that but for the omission to disclose the contract, he could not have subscribed. This essential condition was not fully appreciated until the House of Lords so decided in *Calthorpe v. Treckmann and Macleay v. Tail*, (1906) A. C. 24. Accordingly if it is shown from the evidence of the plaintiff, or otherwise, that he would still have taken the shares if the omitted contract had been disclosed, or that he was induced to take the shares by matters altogether outside the receipt of the prospectus, he cannot show that he has been damaged, and cannot rely on the section.

Whether director liable by ratification.

A director of a company cannot be liable under sect. 38 for culpable omissions in a prospectus issued without his knowledge or authority. And in a recent case it was held that, even though he subsequently ratifies and derives advantage under the prospectus, he cannot by such ratification be made liable under the section. *Hoole v. Speak*, (1904) 2 Ch. 732. The learned judge said: "The statute speaks of directors 'knowingly issuing' the same, and therefore presupposes knowledge on the part of the directors, and it points to an offence being committed at the time of the issue. It appears to me that I should be contradicting the language of the statute entirely, and should be extending the operation of that rather harsh measure if I were to hold directors liable for a prospectus which they did not authorize, on the ground that they did afterwards adopt it, or had even derived some benefit from it."

"Notice" of contracts.

Notice of the contract not disclosed, "to disentitle the shareholder to claim relief." "Unless he shall have had notice of such contract," are the concluding words of the section. What does "notice" here mean? It means (i) notice not only of the existence of the contract, but also of its contents, as bearing upon the statements in the prospectus. *Watts v. Bucknall*, (1903) 1 Ch. 766. (ii) It does not mean constructive notice.

"Considering," said Lindley, M. R., in *Greenwood v. Leather Shod Wheel Co.*, *supra*, "the manifest object of this section, which is to compel the persons issuing the prospectus to afford to persons invited to take shares the information required by the section, it is obvious that the words 'unless he shall have had notice of such contract' mean a good deal more than 'unless he shall have some vague information which, if followed up, will lead to such notice.' Notice in the section means not what is called constructive notice, but actual notice; that is to say, which brings home to the mind of a reasonably intelligent and careful reader such knowledge as fairly and in a business sense amounts to notice of a contract. Any other construction would render the section perfectly useless." "There must," said Collins, L. J., in *Watts v. Bucknall*, (1903) 1 Ch. 776, "be a fair explanation by the persons who do know to the persons

who do not know of the nature of the contracts which are not disclosed."

Waiver Clauses.

1. In relation to sect. 81 (4) of the Act of 1908 (*Disclosure in Prospectus*).

Sub-sect. (4) of sect. 81 of the Companies (Consolidation) Act, 1908, provides that

"Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus shall be void." Accordingly it is useless to insert in any prospectus to which the section applies any waiver or provision for notice, and it would seem that the same rule applies to a condition in a form of application required by the prospectus to be used.

2. In relation to sect. 84 of the Companies (Consolidation) Act, 1908 (*reproducing the provisions of the Directors' Liability Act, 1890*) (*supra*, p. 208).

Here the case is different. The section merely imposes on the directors and others a statutory obligation to pay compensation to the injured subscribers. This obligation is inserted obviously for their benefit, and looking at the cases below referred to, it is apprehended that, beyond all doubt, the requirements of the section can be waived, and that a subscriber may legally contract himself out of certain liabilities under sub-sect. (1) of sect. 84 (sect. 3 of the said repealed Act). It would not, indeed, be proper, or indeed practicable, to make a contract to the effect that the subscriber shall not sue for compensation in respect of a *fraudulent* misrepresentation; but there would seem to be no impropriety in a contract to the effect that the subscriber will not sue in respect of a misstatement innocently made, and that such a misstatement shall not invalidate or render voidable the contract. *Tullis v. Jackson*, (1892) 3 Ch. 411. And see *Brazilian Rubber Plantations* (No. 1), (1911) 1 Ch. 425.

Waiver of
Directors'
Liability Act,
1890 (now
sect. 84 of
Act of 1908).

Such a contract, assuming the above view to be correct, might be made by deed or covenant with the directors, but that mode will rarely be practicable; and if there is to be such a contract it must, no doubt, be embodied in the prospectus or in the form of application for shares or debentures. But a contract so embodied will, as between the subscriber and the directors, be open to the objection that it is *res inter alios acta* (see 8th ed., p. 188), unless it is made with the company as trustee: *e.g.*,

By what
instrument.

And I agree with the company (as trustee for the directors and other persons liable) that I will not make any claim, or take any proceedings, under sect. 84

of the Companies (Consolidation) Act, 1900, for compensation in respect of any misstatement in the said prospectus, made by the directors in the belief that it was true, and that this my contract shall not be invalidated by reason of any such misstatement.

(Or the prospectus may state that:—

The statements herein set forth are based on information furnished by the vendor [or by A. B.], but applicants will be deemed to agree with the company (as trustee for the directors) that they will not make any claim under sect. 81 of the Companies (Consolidation) Act, 1900, on account of any incorrect statement in the said prospectus made by any director in the belief that it was correct, or claim to repudiate their contracts on that account.

3. As to sect. 38 of the Companies Act, 1867

Although this section was repealed by the Companies Act, 1900, the repeal is without prejudice to existing rights and liabilities, and accordingly it is well to bear in mind the relevant decision, such as they were, as to waiver of the rights conferred by it.

These decisions were considered at length in the 7th edition of this volume, and the proposition there contended for, namely, that it was in point of law allowable to waive compliance with sect. 38 of the Companies Act, 1867, is now generally recognized as correct. See *Bensusan v. Clarke*, Times, 12th November and 13th December, 1897; *Greenwood v. Leather Shod Wheel Co.*, (1900) 1 Ch. 421; *Cackett v. Kenrick*, (1902) 2 Ch. 456; *Macleay v. Tail*, (1906) A. C. 24.

But, as Farwell, J., said in *Cackett v. Kenrick*, "A man who desires to take advantage of a waiver clause must state the facts fairly." If he misdescribes the character of the contracts, or if he states that there "may" be contracts, when he knows that there *are*, he cannot rely on the clause to protect him. See the above decision. So also if the clause purports to affect the applicant with notice of contracts which are improperly concealed, it is ineffective.

The introduction of a stipulation that an applicant for shares is to be deemed to have notice of what is in fact concealed from him, is simply part of the trick had recourse to in order to evade the consequences of the improper concealment. Such a stipulation in a tricky waiver clause like the one before us affords no protection to the person who seeks protection from it. The principle of refusing to give effect to parts of documents so as to prevent successful deception by means of them is quite familiar in its application to general words in releases and to catching conditions of sale (e.g., *Broad v. Manton*, 12 Q. B. D. 181). The refusal is based on ordinary principles of honesty, and is as applicable to tricky waiver clauses as to other tricky documents." Per Lindley, M. R., *Greenwood v. Leather Shod Wheel Co.*, *supra*.

But, subject to these reservations, a waiver clause properly framed and honestly used is, in the opinion of the House of Lords, legitimate and binding. *Macleay v. Tail*, (1906) A. C. 24.

Criminal Liability in respect of Prospectuses.

Sect. 84 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), provides ^{Criminal liability.} that.

Whoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating or publishing, *any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof,* shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned.

The punishments referred to were: "To be kept in penal servitude for any term not exceeding seven years and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement" *Ibid.* sect. 75; and see Chitty's Statutes, 5th ed. vol. 3, pp. 221, 248, under tit. "Criminal Law."

A prospectus is a "written statement" within the meaning of this enactment, and accordingly if a prospectus is issued containing fraudulent misrepresentations, the directors issuing it will be liable to prosecution under the Act; they may also be prosecuted for conspiracy to commit the statutory offence. Moreover any person, whether a director or not, who issues or takes part in the issue of a prospectus containing fraudulent misrepresentations, may be prosecuted for conspiracy to defraud. But of course such persons cannot be convicted, unless it can be proved that they knew the representations to be false, and, acting upon that knowledge and with the intention to deceive and defraud, issued the prospectus. Per Cockburn, C. J., in *The Queen v. Gurney and others*, Finlayson's Report, p. 254.

In the case last mentioned the prosecution was under sect. 84 of the Larceny Act, 1862, and for conspiracy to commit the statutory offence; and Cockburn, C. J., in his charge to the jury, said that "the sum and substance of the charge was that the business of Overend, Gurney & Co. being hopelessly insolvent and worthless, these defendants, knowing that fact, conspired to induce persons to take shares in the new company to which that business should be transferred with a view of defrauding and cheating the persons so taking and paying for their shares of the price which they would have to pay. That is the sum and substance of the charge. If you shall believe in the end that such a conspiracy did in fact exist . . . there can be no possible doubt that they have committed an offence against the law.

For not only does the Act of Parliament to which I have called your attention make, whether the result of a conspiracy or not, the publishing of statements known to be false, in order to induce persons to take shares, an offence, but there can be no doubt upon the general law of the land that a conspiracy to defraud and cheat by means of false pretences is an offence, and an offence of a very serious nature. It is not the less an offence because it is directed against society at large, and because the machinations of the conspirators may not have been directed against particular individuals. If a number of persons combine and confederate to cheat a particular individual there can be no doubt that it is a criminal conspiracy at law. It is not less so because the persons to be caught and to be deceived are not individually in the eye and contemplation of the conspirators. That was settled long ago in the case to which the learned counsel for the prosecution referred, the case of *The King v. De Berenger and others*; and whatever remarks Mr. Solicitor-General may have made—and I do not at all controvert what he says—to show that the verdict in that case was unsatisfactory, yet there can be no doubt that when the Court of King's Bench came to consider the law upon the subject their decision was founded on sound and wise principles, and that it has since been received and ought to be received as law, namely, that it is not because a conspiracy to defraud is directed against the general public, it is the less an offence by reason that you have not in your eye a particular individual who is to be defrauded. Independently of which it is quite plain that any conspiracy having for its purpose to defraud those individuals of the general public who may be caught by it, is a continuing conspiracy until it shall have arrived at the accomplishment of its purpose. As soon as the particular individual is brought into contact with the conspirators, the conspiracy, which before was general, becomes in his case, if I may use the expression, individualised and fixed, and that which was a conspiracy to deceive and defraud the general public becomes a conspiracy to deceive and defraud the particular individual. . . . The guilty mind what we lawyers call *mens rea*—is essential to constitute a crime in the eye of the law. Misrepresentations or concealment may, as I have told you, afford matter of civil action and remedy. But you must have more than that—you must have the guilty mind to constitute the offence with which the defendants are charged. No doubt every man must be taken, *prima facie* at least, to have intended what are the natural and necessary consequences of his acts; but if you find that there was misrepresentation, and that it has ended in defrauding the parties to whom it was addressed, the fair and legitimate inference is that the intention was that the act done should carry with it the consequences that have followed from it. But this presumption may be rebutted by the other circumstances of the case, and where intention enters so largely into the consideration of the question of guilt or innocence, as it does in a charge of conspiracy and fraud,

it becomes most important to look to see what motive could have operated upon the mind of the party charged to induce him to commit the offence"; and see Archbold's *Crim. Pr.*, 23rd ed., p. 1284.

As to Criminal Liability for Disobeying Section 81 of the Companies Act, 1908

Sect. 81 of the Companies Act, 1908, is positive in its terms. It says that "every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of a company, *must state*" certain things thereafter enumerated. Then sub-sect. 6 says that "in the event of non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance if he proves that—

- a) as regards the matter not disclosed he was not cognisant thereof;
- b) the non-compliance arose from an honest mistake of fact on his part";

or in the case of a non-disclosed interest in the directors it is proved against him that he had knowledge of the matters not disclosed. This section does not in terms impose any penalty for breach of the duties imposed by it. An opinion has already been expressed that subscribers have an *implied* right of civil action for damages sustained by a breach of the statutory duty (see *Wimbledon Olympia, Ltd.*, (1910) 1 Ch. 630; and *South of England Natural Gas Co.*, (1911) 1 Ch. 573, and p. 175, *supra*), though that implied right, or the remedy in respect of it, is not expressly given by the statute. But over and above the civil remedy, it is a *well-known principle* that a man who disobeys an Act of Parliament which prescribes no other remedy, is liable to indictment for misdemeanour. *Reg. v. Price*, 11 A. & E. 17; *Reg. v. Hall*, (1891) 1 Q. B. 747, 767; *Reg. v. Tylor*, (1891) 1 Q. B. 591.

The question whether the omission to comply with the requirements of sect. 81 of the Act of 1908 entails any criminal liability on the directors or other persons responsible for the prospectus has not yet been settled.

The argument for criminal liability may be put thus. The section clearly imposes a duty on the directors and other persons responsible for the issue, and this duty concerns the public, the object of the section being to protect the public or those who subscribe from being deceived, and although the section contemplates a civil liability on the part of the directors and other persons responsible for the breach, there is nothing sufficient to show that an action for damages is the only remedy open. Therefore, a person

who omits to perform his statutory duty may be committing a criminal offence.

The rule is thus tersely expressed in Article 124 of Stephen's Digest of Criminal Law. "Everyone commits a misdemeanour who wilfully disobeys any statute of the realm by doing any act which it forbids or omitting to do any act which it requires to be done, and which concerns the public or any part of the public, unless it appears from the statute that it was the intention of the Legislature to provide some other penalty for disobedience."

The rule is very clearly explained by Bowen, L. J., in *The Queen v. Tyler*, (1891) 2 Q. B. 588. In that case a duty to make annual returns was imposed by the Act of 1862 (sect. 26) on a company, and a penalty was (by sect. 27) provided for breach of the duty, not only against the company but against the directors and others

knowingly and wilfully "authorizing or permitting default." It was held that a breach of the section was a criminal offence

"Now," said Lord Justice Bowen in that case, "if sect. 26 stood alone, it could not be doubted that it created a duty in the company, and that if the company did not comply with the directions of the section, the company would commit a breach of duty. There would be in such a case a disobedience of the law. It was first contended on behalf of the appellant that no criminal proceedings can be taken against a company, and it becomes necessary therefore in order to make the steps of our reasoning clear, that we should examine that proposition and see if there is anything in it. It would seem contrary to sound sense and reason if such a technical objection could succeed. When, for instance, a statute creates a duty upon individual persons, it would be a strange result if the duty could be evaded by those persons forming themselves into a joint stock company. The point becomes still more incapable of argument where the statute prescribes the duty in the company itself. How can disobedience to the enactment by the company be otherwise dealt with? The directors or officers of the company who are really responsible for the neglect of the company to comply with the statutory requirements might not be struck at by the statute, and there would be no way of enforcing the law against a disobedient company, unless there were in such cases a remedy by indictment."

It was then said that a section in an Act of Parliament which directs an act to be done does not necessarily make the disobedience an offence if the Act proceeds to impose a penalty as the only result of non-compliance with the directions of the section. Now, it is true that there are statutes which do not create an imperative and positive duty to the public, but which only impose as the result of non-compliance with the directions of the statute a pecuniary loss on the individual who does not comply. In such a case, it is not the intention of the Legislature to make the disobedience of the law a misdemeanour; it is only the intention to provide that if the person does not comply with the directions of the statute, he must submit to a penalty. In each case it is a question of the construction of the Act, to see if that is what is meant. We must, therefore, examine sect. 27 before we can decide whether the true view is that this Act merely states certain matters which are to be performed by a company with the result only that if the company does not perform them, it may escape by paying the penalty; or whether the true view is not this, that a positive duty is imposed on the company and an appropriate remedy given—a remedy, however, which is intended to be enforced in

the interests of the public, and one which does not prevent the failure of the company to comply with the requirements of the section from being a disobedience to the law and a wrongful act. It seems to me that sect. 27 when it is looked at, so far from showing that the breach of the requirements by the company of sect. 26 is not a disobedience to the law, shows most clearly that it is; and that this does not belong to the class of cases in which the statute does not intend the breach of its provisions to be an offence, but merely intends such a breach to be a condition precedent to the recovery of a particular pecuniary compensation. Sect. 27, therefore, throws light on sect. 26, and shows that a breach of sect. 26 is an offence, and that a proceeding under sect. 27 is a criminal proceeding. It would indeed be a remarkable view for the Legislature to take, that the obligation imposed upon a company was of such nature that its breach by the company was not an offence, and yet that a director or manager of the company who stood by and acquiesced in the breach was guilty of an offence. . . . The directors are to be punished if they stand by and permit the company to be in default. . . . The Act says that a company shall do certain things, and a company which neglects to do those things is a criminal offender."

By a fair analogy it may be argued that directors who fail to perform the statutory duty imposed on them by sect. 81 are criminal offenders.

Sub-sect. (9) of the section favours this view. See *supra*, p. 179.

On the other hand it is difficult to believe, looking to the Act as a whole, that Parliament intended to attach criminal consequences to the neglect by persons to comply with the requirements of sect. 81, still less to leave such criminal liability to be a matter of inference from the indefinite language of the section.

(1) To begin with, the words of the section are that "the prospectus must state," not that "every prospectus issued shall state," and the word "must" may well, in the circumstances, be read as directory only. See *Vickers v. Siddell*, 15 App. Cas. 596.

(2) In the next place the comparison of sect. 81 with sect. 84 is against the idea of criminal liability. Sect. 84 gives a qualified right of action for compensation or damages against directors and others in respect of every untrue statement in a prospectus, but it imposes no criminal liability, and it would be a strange thing if, under that section, there should be no criminal liability for positive misstatements, whilst under sect. 81 there should be a criminal liability for the much more venial offence of omitting to disclose some fact amongst the multitude of particulars which may or may not be material.

(3) Finally, there is sect. 281 of the Act, by which any person making any return, report, certificate, balance-sheet, or other document required by or for the purposes of the provisions of the Act specified in the Fifth Schedule thereto, wilfully makes a statement false in any material particular knowing it to be false, is to be guilty of a misdemeanour and to be liable to conviction on indictment (to punishment accordingly).

It is significant that a prospectus is, it would seem, designedly omitted from the operation of the section.

Weighing these arguments against one another the balance seems in favour of the view that a breach of sect. 81 is not a criminal offence, but the question is still an open one, and this fact emphasizes the importance of duly complying with the provisions of the section.

As to proceedings for Obtaining Money by False Pretences.

A person commits a misdemeanour and is liable on conviction thereof to five years' penal servitude as a maximum punishment who by any false pretences obtains from any other person any chattel, moneys, or valuable security with intent to defraud. See sect. 88 of the Larceny Act, 1861 (24 & 25 Vict. c. 96). "To support a charge of obtaining money, &c. by false pretences, it is necessary to show and therefore allege that the prisoner with a wicked and criminal mind stated something which if true would be an existing fact, that he did so with intent to procure the possession of money, &c. that he knew his statement was—that is to say, that so far as his mind was concerned, he intended that his statement should be false; that by the statement he did so act on the mind of the prosecutor as that he did thereby obtain money, &c.; that the statement was in fact untrue in the sense of being incorrect." Per Brett, L. J., *Queen v. Aspinall*, 2 Q. B. D. 38, approved in *Queen v. Silverlock*, (1894) 2 Q. B. 766. In the last mentioned case it appeared that the defendant had published an advertisement making certain untrue statements, and that the prosecutor had acted thereon and had been induced to part with money thereby, and it was held that the defendant was rightly convicted. "There is no doubt," said Lord Russell, C. J., "as to what are the essentials of the offence of obtaining money by false pretences. There must be a false pretence made to a definite person, it must be proved that such person on the faith of the false pretence parted with his money or goods. These essentials must be stated in the count charging the offence, and the question here is whether the second count complies with these conditions. . . . The advertisement is addressed to all persons whose knowledge it may come, and who may desire to act on it, and if a particular person after seeing or hearing of it acts upon it and goes to the person from whom it proceeds, and upon the faith of it parts with his money or goods, it becomes a fraud on that particular person, who is one of the class of persons for whom it was intended." And see Archbold's Cr. Pr., 23rd ed., pp. 585–594.

As to criminal prosecutions directed by the Court in winding-up compulsory or voluntary, see Companies Act, 1908, s. 217, and Winding-up Pr., Pt. II.

How Disclosures should be made.

The mode in which disclosures should be made by promoters, directors, and others, to the company and to persons invited to become shareholders, must of course depend on the circumstances of the case, but there are some established principles which should be borne in mind, and in particular the following:

How disclosures should be made.

- 1 That any condition requiring or binding any applicant for shares or debentures to waive compliance with *any requirement* of sect. 81 of the Act of 1908 or purporting to affect an applicant for shares or debentures "with notice of any contract, document or matter not specifically referred to in the prospectus shall be void." Sect. 81 (5) of the Companies Act, 1908.
- 2 That the prospectus, though purporting to be issued by the company, may, it appears, be regarded as a notice to the company of anything stated in it. "The prospectus conveyed to those who became shareholders in the company, and conveyed therefore to the company, notice of some facts with regard to this contract which appear to me to be of great importance. The company was informed . . ." Per Lord Cairns, L. C., *Erlanger v. New Sombrero Co.* 3 App. Cas. 1218, 1239.
- 3 That disclosure to the company is not necessarily the disclosure which is required to be made to the persons to whom the prospectus is issued: e.g., the intending shareholders. "The corporate entity towards which the duty" of disclosure "exists is a thing apart from the several individuals who for the time being are the only corporators, and the question whether disclosure to them will suffice or not will depend on whether the constitution of the company is really such that they can be in fact contemplated as *exhausting* all the persons whom the company is intended to embrace. Where . . . the very pith and marrow of the whole adventure is that cash . . . shall be subscribed by the public for the benefit of the promoters and directors, the duty extends to all the persons who are to be contemplated as about to become shareholders." Per Collins, L. J., in *Olympia, Ltd.* (1898) 2 Ch. 153, 157.
- 1 That apart from the Act of 1908, every member of a company is deemed to have notice of the contents of the memorandum and articles of association, and of any contracts therein set out. *Central Rail Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99, 123; *Ernest v. Nicholls*, 6 H. L. Cas. 401; *Ex parte Williams*, 2 Eq. 218; *Bank of Turkey v. Ottoman Co.*, 2 Eq. 300; *Peck's case*, 2 Ch. 674; *Growth v. Paget*, 6 C. D. 511.

17, *County of Gloucester Bank v. Rudry, &c. Co.*, (1895) 1 Ch. 629; *Owen and Ashworth's claim*, (1901) 1 Ch. 115.

"All the shareholders of the company must have imputed to them knowledge of the Acts of Parliament, and also of their own memorandum and articles of association." Per Lord Selborne, L. C., *Campbell's case*, 9 Ch. 1.

But this rule clearly does not apply where there is fraud, for "the statute only meant to bind those who had actually become members. Any one who had without fraud taken shares could not allege ignorance of anything contained in the memorandum of association or in the articles of association, merely because he had not signed or sealed them; but if he never actually signed or sealed them, nor had notice of what they contained, the statute cannot be taken to impute to him knowledge of their contents, so as to protect those who, by a fraud had induced him to do so, that which, in the absence of fraud, would have prevented him from saying he was ignorant of their contents." Per Lord Cranworth, *Central Rail. Co. of Venezuela v. Kisch*, 1 R. 2 H. L. 123.

The authors of the prospectus cannot say to the defrauded person: "You might have known the truth by proper inquiry." The rule would be: "Your representation put me off my guard." Per Lord Chelmsford, *New Brunswick Rail. Co. v. Campbell*, 9 H. L. C. 742.

In *Central Rail. Co. of Venezuela v. Kisch* (who suppresses the prospectus contained misrepresentations; but it must not therefore be assumed that the rule will always apply in the absence of misrepresentation, for where there is a duty to disclose, it would seem that non-disclosure *suppressio veri* may be deemed fraud. See Lord Blackburn's judgment in *Brownlie v. Campbell* 5 App. Cas. 130 and *Pick v. Hayry*, 37 C. D. 541. And see *Aaron's Reefs v. Trevelyan*, 1896 A. C. 273. The rule would certainly not be applied where the Court or jury was satisfied that the intention was fraudulent, nor would it absolve those who issue a prospectus omitting to comply with the requirements of sect. 81 (1) (a) of the Act of 1908 with reference to the contents of the memorandum or articles of association.

5. That, subject to sect. 81 of the Act of 1908, every person who takes shares on the footing of a particular prospectus is deemed to have notice of the contents of any contract or other document offered for inspection by the prospectus, at any rate so far as the same are not inconsistent with the facts stated or implied by the prospectus. *New Sombrero Phosphate Co. v. Erlanger*, 5 C. Div. 73, 111; S. C., 3 App. Cas. 1262; *Anderson's case*, 7 C. Div. 75, 102; and see *Aaron's Reefs v. Trevelyan*, 1896 A. C. 273.

Thus, where the prospectus offered a contract for inspection, Jessel M. R. said: "If the shareholders had gone to see it (and I think in

a Court of Justice they cannot complain that they did not see it, but must be treated as having notice of its contents) they would have found a recital of the contract from C. to E. omitting the price. . . ."
New Sombrero Co. v. Erlanger, 5 C. Div. 111.

And in the House of Lords, in the same case (3 App. Cas. 1280), Lord Blackburn said: "I think each allottee was fixed with the knowledge, which he would have had if he had read it, that E. had purchased from C. so recently as 30th August, not quite three weeks before he sold to the company."

But if there is misrepresentation, the case is altered and the rule does not apply; "for when men issue a prospectus in which they make false statements of the contracts made before the formation of a company, and then say that the contracts themselves may be inspected at the offices of the solicitors, it has always been held that those who accepted those false statements as true were not deprived of their remedy merely because they neglected to go and look at the contracts." Per Jessel, M. R., *Redgrave v. Hurd*, 20 C. Div. 14.

And the same learned judge added (*Smith v. Chadwick*, 20 Ch. D. 7). "It has always been held, and, I think, rightly held, that if a man in a prospectus falsely states the contents of a written document he cannot escape from such false statement by saying: 'I offered to show you the document.' But if he make an incomplete statement, altogether true but imperfect I take it he can."

Id fortiori, where fraudulent intent is established, coupled with actual misrepresentation, offering a contract for inspection does not amount to notice. *Aaron's Reefs v. Twiss*, *supra*. And a statement deliberately intended to mislead subscribers, and to conceal the truth from them, brings the case within the same rule, although there may be no downright falsehood. (*Gluckstein v. Barnes*, (1900) A. C. 240, 241, 242.)

Disclosure, *e.g.* by a promoter of the profit he is making must be to the shareholders as a body. Disclosure to a select circle of the promoter's own nominees will not avail, *ibid*.

Offering inspection of a material contract will not afford protection to persons issuing prospectuses after 31st December, 1900, where the dates and parties are not stated in accordance with sect. 81, subsect. 1 (k) of the Act of 1908; and no waiver clause can cure this defect. Sect. 81 (4).

Accordingly, when promoters intend to obtain a profit, or there are other facts which ought to be disclosed, it is expedient to disclose them by the prospectus and also by the articles. See sect. 81 (1) (f) of the Companies Act, 1908. If it is impossible to state them fully in the prospectus, they should be disclosed in the articles, or at any rate in some contract therein referred to and offered by the prospectus for inspection. And it may also be expedient, both in the prospectus and articles, to state that applicants are to be deemed to have notice of the contents of the contract. But each case must be separately

considered, subject to this general observation, that having regard to the manifold dangers of non-disclosure, it is well to be on the safe side, and to be over-candid rather than not to be candid enough.

Care requisite
in framing
prospectus.

The foregoing observations are sufficient to show the extreme importance of framing the prospectus with the utmost care. Some little colouring may, perhaps, be used without danger; but if a scheme or undertaking is a promising one, with real merits, a moderate tone is generally found to be the most attractive. Exaggeration begets suspicion with the sober-minded and defeats itself.

Statement of
objects.

Sect. 80 of the Act of 1908, and the preliminary words of sect. 81, seem to show that both these sections apply to prospectuses issued before the company is registered, and if this is the correct construction the objects of the company must be stated in the prospectus. See sect. 81, sub-sect. (1) (a). But, independently of the Act of 1908, where the prospectus is issued before the company has been registered, great care should be taken in stating the objects of the proposed company: for if the objects of the company when registered exceed or differ materially from those stated in the prospectus applicants may be able to refuse an allotment, or to repudiate their shares after allotment, provided they are not guilty of undue delay (*Downes v. Ship*, L. R. 3 H. L. 343; *Stewart's case*, 1 Ch. 574; *Peel's case*, 2 Ch. 674, 684; *Lawrence's case*, 2 Ch. 412; *Karberg's case*, (1892) 3 Ch. 1); to avoid any risk of this, the objects should be finally settled before the prospectus is issued, and applicants should be given an opportunity of inspecting the draft memorandum and articles of association.

But, as already mentioned *supra*, p. 161], the almost invariable practice at the present day is to issue the prospectus *after* the formation of the company, and where the prospectus is not issued until *after* the formation of the company, sect. 81 (1) (a) of the Act of 1908 requires that "the contents of the memorandum of association, which states the objects of the company, shall be set forth in the prospectus."

Inspection of
documents.

The prospectus should state where copies of the memorandum and articles of association and of any contracts (see sect. 81, sub-sect. (1) (k)) and other documents *infra*, p. 255, mentioned in the prospectus, can be inspected.

As to Stock
Exchange
rules.

Whether it is or is not intended to apply to the Stock Exchange for a settlement or quotation of the shares offered for subscription in the prospectus, it is necessary to include in the prospectus a copy of the memorandum of association of the company. It has been usually, and may still be, printed within the fold of the prospectus (Companies (Consolidation) Act, 1908, s. 81, sub-s. (1) (a)). When there are founders' or management shares, the requirements of the clause last referred to must be observed. For extract from the rules of the Stock Exchange, see *infra*, p. 265.

Review by a
director of

In considering a prospectus which it is proposed to issue, the Director

whose name is to appear therein should have before him the following ^{proposed} prospectus questions.

- (1) Have the requirements of sect. 81 of the Companies Act, 1908, been complied with, and have you been advised by competent persons that this is so?
- (2) Are all the statements in the prospectus true to your own knowledge? Have you seen the mine or property? Have you examined the books, &c.?
- (3) As regards those statements which are not true to your own knowledge, what evidence do you rely on as justifying the statements? Do you believe the statements to be true, and if so, what are the grounds of your belief? Are they reasonable? Would they seem so to impartial persons?
- (4) If you rely on some third party, are you satisfied to take the risk of adopting his statements and making them your own? Would it not be wiser to avoid this responsibility? See *supra*, p. 195.
- (5) If the prospectus contains extracts from any reports or other documents, are the extracts correct? and is there anything in the context which ought in fairness to be stated? Sometimes an extract without the context is misleading.
- (6) Does the prospectus state that so much is to be paid for the property when (to your knowledge) a large part of the price is going to the promoters? If so, the statement may amount to a misrepresentation, independently of sect. 10, sub-sect. (1) (j) of the Act of 1908.
- (7) Are any of the directors interested as vendors, or as having any agreement with the vendors or promoters or otherwise, and, if so, does the prospectus disclose the fact? And see sect. 81, sub-sect. (1) of the Act of 1908.
- (8) Are there any material contracts which are not specified? See sect. 81, sub-sect. (1) (k).
- (9) Have you any such contract in the case of your company? Do you draw a distinction between a binding contract and a mere understanding which you could not enforce, but have no doubt will be carried into effect? The Courts are not always prepared to draw such fine distinctions.
- (10) Is there any fact or circumstance within your knowledge which you think it essential to keep out of the prospectus as likely to deter or damp the ardour of investors? If so, you may incur risk in doing so.
- (11) Do you understand that if there is any untrue statement in the prospectus, or in any report or memorandum embodied therein or issued therewith, you may hereafter be sued in respect thereof by any number of persons who have taken shares on the faith of the prospectus, and may be held liable in each action to pay compensation unless you can establish

one of the defences above referred to (pp. 194, 195), and that if sect. 81 of the Act of 1908 is not complied with, you may be liable in an action, and possibly liable to be indicted for a *misdeemeanour*?

- (12) Have you made a record of your grounds of belief of any statements, as suggested at p. 224, *supra*? If not, will you be able, (say) five years hence, to remember your grounds of belief?

Circular disclosing Misrepresentation.

Circular sent
to amend
prospectus.

Lastly, where, as occasionally happens, a prospectus has been issued which is open to objection as containing material statements which are untrue or which may be misleading, or otherwise, and the facts are not discovered until after allotment, it may, in the interest of all parties, be desirable to bring the matter to the notice of the shareholders with all convenient speed.

As before the Act of 1909, so now, the principal object of such a disclosure is to do what is fair and honest. But having regard to the right of rescission, it is expedient to limit the time within which the allottees can repudiate their shares; and there is no unfairness in doing so, for, as we have seen, an allottee who has a right to rescind must, in justice to his co-adventurers and to those dealing with the company, rescind promptly on becoming cognisant of the facts, otherwise he loses the right to rescind. *Supra*, p. 197.

Apart, therefore, from sect. 81 of the Act of 1908, if, after receipt of such a circular, the recipient abstains, even for a limited time, from rescinding, he will be treated as having elected to affirm, and will be bound irrevocably.

It will, of course, be the more easy to do this without detriment where the prospects of the company are good and the misrepresentation or suppression not very serious. The requisite disclosure may be made by means of a circular stating the facts, and either pointing out the right to rescind or leaving it to shareholders to find that out for themselves.

In order that the circular may afford a defence to a common law action of deceit, or to an action for compensation under sect. 84 of the Act of 1908, reproducing the provisions of the Directors' Liability Act, 1890, it seems necessary that it should not merely state the facts, and admit frankly that there has been a misrepresentation, but should also contain an offer to rescind the contract and refund the money paid. *Arnison v. Smith*, 41 C. Div. 348.

"It has been contended," said Lord Halsbury, L. C., in that case, "that the misrepresentation in the prospectus was undone by a clear and correct explanation in the circular. I do not wish to commit myself to a concluded opinion upon anything which does not arise in the present case. If the directors had sent to each of the plaintiffs

a notice to this effect, 'We have deceived you, and if you like you can have your money back,' the case would have stood very differently, and I reserve my opinion as to what would then have been the right course for the Court to take. It may be that in such a case it would be held not reasonable for the plaintiffs to go on with their eyes open and incur further damage. It is needless to give any opinion on that case; in my opinion that state of things does not exist. I do not agree that the circular put any one in the position of knowing the true facts of the case. Before referring to the document, I will observe that, assuming a fraud to have been committed, it obviously rests on those who relied on a subsequent explanation to show that such explanation was quite clear. If the directors had repented of what they had done, and had been desirous of making reparation, they would have called the attention of the plaintiffs to the fact that there was a serious error in the prospectus. . . . But look at the circular as a whole. . . . No admission of mistake is made, but the information is given, so to say, incidentally in the midst of a number of other matters. . . . Is that the way in which the effect of a fraudulent misstatement is to be got rid of? The prospectus appears to me to have been drawn up with the aim of conveying a wrong impression under words sufficiently near the truth to escape being treated as a misrepresentation; and I think that the circular was framed with a similar view, to avoid bringing to the minds of the plaintiffs the real facts of the case, whilst stating enough to enable the defendants to say that the plaintiffs were informed of those facts. I think, therefore, that the circular does not alter the case, and that the appeal must be dismissed."

The Act of 1908, s. 81, presents some further difficulties in the way of curing defects in prospectuses through non-compliance with its provisions.

It is of great importance to obtain some acknowledgment on the part of the shareholder of the receipt of the circular, for, in order to bind him, knowledge of the facts must be brought home to him. If, however, it can be proved by his admission or otherwise that the circular reached him, he will be presumed to have read it. *Scholey v. Central Rail. Co. of Venezuela*, 9 Eq. 266, n.

But it is not enough, so Pearson, J., held in *London and Staffordshire Co.*, 24 C. D. 149, to prove that the document disclosing the facts was posted, and then to rely on the provision in the articles that it is to be deemed to have been served in due course: actual receipt must be proved. Meantime the contract as obtained by misrepresentation is, according to the law settled in *Oakes v. Turquand*, voidable, and the shareholder cannot be deprived of his right to rescind it until after knowledge of the true facts has been brought home to him. Assuming *London and Staffordshire Co.* to have been well decided, it shows the great importance of procuring evidence of the receipt by the shareholder of the notice. This may often be effected by sending

with the circular some form (referring to the circular) to be signed and returned. When an inaccuracy in the prospectus is discovered before allotment, the allotment letters may contain a statement correcting it. By this means notice is certainly established as against the allottee who pays his allotment money, but although, unless the error is very serious, the number of allottees who will repudiate may be small, it seems very doubtful whether the statement is not a condition requiring an applicant to waive compliance with sect. 81 within the prohibition of sub-sect. (4), and as such void

PRECEDENTS.

The subscription list will open on --- day the --- day of --- and **Form 8.**
close on or before --- day the --- day of **Skeleton**
prospectus - a)

A, B, C. & Co., Limtd

Incorporated under the Cos Acts, 1862 to 1900

Capital £---, divided into

o p.c. Cumulative Preference Shares of £--- each - -
Ordinary Shares of £--- each - - - -
Management Shares of £--- each - - - -

£

The preference shares carry a fixed cumulative preferential dividend at the rate of --- p.c.p.a. on the capital for the time being paid up thereon, and rank, both as regards dividend and capital, in

What is a Prospectus.—Unless the context of the Act of 1908 otherwise requires, "the expression 'prospectus' means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company"; and "the expression 'debenture' includes debenture stock." (Sect. 28 of the Act, and p. 167, *supra*.)

The above form of prospectus is framed with a view to illustrating the practical operation of sect. 81 of the Act, which applies to "every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company." (Sect. 81, sub-sect. 1.)

See also sect. 81, sub-sect. (7), which provides "This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or debentures, whether with or without the right to renounce in favour of other persons, but, subject as aforesaid this section shall apply to any prospectus whether issued on or with reference to the formation of a company or subsequently."

Note, also, that by sub-sect. (8) certain requirements of this section are dispensed with or qualified in particular cases. (See pp. 171, 173.)

Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void. (Sect. 81 (4) of the Act.)

See as to this, *supra*, p. 174, and sub-sect. (6), *supra*, p. 175.



Form 8. priority to the ordinary shares, but without any further right to participate in the profits or assets.

(b) The founders' [or management] shares carry the right [*state the rights either directly or by inserting extracts from the memorandum or articles of association. State also who is to get the shares. e.g., the founders' [or management] shares have been subscribed by the vendors and the principal employes in the business, and will be pd up in cash.*]

Of the above shares, — ordinary shares and — preference shares equal to £— are to be issued and credited as pd up, and as below mentioned the remaining shares are now offered for public subscription, payable as follows:

- 10s. 0d. per share on application.
- 17. 10s. 0d. per share on allotment,
- 17. 10s. 0d. per share on the — of
- 17. 10s. 0d. per share on the — of

The shares may be pd up in full on allotment on or before the — day of —, interest at the rate of 5 p.c.p.a. being allowed in respect of the prepayment of instalments. Applications have already been received from the employes of the firm and relations of the late partners for — shares equal to £—.

The right of voting at general meetings is one vote for every two preference shares, and one vote for every ordinary share, and ten votes for every founders' share (c).

Directors (d).

Names, Addresses, and Descriptions.]

Bankers.

Names and Addresses.]

Auditors (d).

Names, Addresses, and Descriptions.]

(b) *Founders' Shares.*—The prospectus must state the number of founders' or management shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company. (Sect. 81 (1) (a).) As to founders' shares, see pp. 587, 819.

(c) *The Right of Voting.*—Where there are several classes of shares the prospectus must state the right of voting conferred by the shares of such class. (Sect. 81 (1) (n) of the Act of 1908.)

(d) *Directors and Auditors.*—The prospectus must state the names, descriptions, and addresses of the directors or proposed directors, and the names and addresses of the auditors (if any). (Sect. 81 (1) (c) and (l) of the Act of 1908.)

But it must be borne in mind that, having regard to sect. 72 of the Act of 1908 (subject to the following proviso), a person is not to be named as a director

Solicitors.

Form 8.

[*Names and Addresses.*]

Brokers.

[*Names and Addresses*]

Secretary in office.

[*Name, Address, and Description.*]

PROSPECTUS.

The well-known business of A., B. and C., —, manufacturers of which this coy has been formed to acquire and carry on, was founded upwards of sixty years ago by the predecessors of the present vendors, and has continually grown until it has reached its present magnitude. The business, which comprises both wholesale and retail departments, is carried on upon extensive, well-built, and commodious leasehold premises situate at —, comprising, &c., the whole forming a compact block of warehouses, factories, shops and offices, held at very low rents amounting in the aggregate to £— per annum. Large sums have been spent on these premises to adapt them to the purposes of the business.

The leases, with trifling and unimportant exceptions, have still upwards of — years to run.

The remarkable developments of the last five years have so largely increased the magnitude of the undertaking that the vendors consider the time has arrived for converting the business into a joint stock coy.

The employés of the business number about —, and the customers many thousands, the wholesale accounts alone on the books of the firm amounting to upwards of £—. It is proposed to make a liberal allotment of shares to applicants connected with or contributing to the business.

The business will be taken over by the coy as a going concern as from the — day —, the date of the last annual stock-taking, and the coy will have the benefit of all profits realized from that date after allowing interest on purchase-money down to the time of the completion of the purchase at the rate of 5 p.c.p.a.

or proposed director in any prospectus unless he has signed by himself or by his agent authorized in writing—

- (i.) signed and filed with the registrar of companies a consent in writing to act as such director; and
- (ii.) either signed the memorandum of association for a number of shares not less than his qualification (if any), or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any).

Provided that these conditions are not applicable where the prospectus is issued one year after the date at which the company is entitled to commence business. (See pp. 8, 9.)

Form 8. The property to be transferred to the coy will comprise, in addition to the goodwill (e) of the business, the following items, constituting the whole capital of the business at the above-mentioned date:—

	£
Stock at cost or under - - - -	
Book debts (wholesale) - - - £	
Less trade discounts, —per cent. £	
Books debts (retail) after allowing for bad and doubtful - - - -	
Cash in hand and at bank, and bills not discounted - - - -	
Advances on security, &c. - - - -	
Goodwill - - - -	
Leasehold premises - - - -	
Buildings, fixtures, fittings, furniture, plant, horses, vans, carts, &c. - - - -	
	£
Less trade liabilities - - - -	
	£

The stock was taken strictly at cost price or under, and the vendors are satisfied that it has been realised at the usual trade profit. The greater proportion of the book debts has already been got in, and the vendors guarantee that those outstanding, plus what has been so got in, will produce the amount above stated.

As regards working capital, it is considered that the working capital in the business, together with a sum of £—— to be provided out of the proceeds of the shares now offered for subscription, will amply suffice for the company's wants.

The books of the firm have for the past — years been audited by Messrs. —, of —, Chartered Accountants, who have recently made a special investigation of them, and have given the following certificate:—

Messrs. A., B. & C.

Gentlemen,

We have acted as your accountants for many years, and have recently made a special examination of your books, and we hereby certify that the net profits of your business for

(e) *Goodwill*.—The amount payable for goodwill is to be specified. (Sect. 81 (1) (g) of the Act of 1908.)

the five years ending the — day of January, 1908, have been **Form 8.**
as follows:—

	£
Year ending January, 1904	- - -
Year ending January, 1905	- - -
Year ending January, 1906	- - -
Year ending January, 1907	- - -
Year ending January, 1908	- - -
Average for the five years	- - -

In arriving at these figures we have not debited profit and loss accounts with interest on borrowed capital, or loans, nor with income tax.

Sufficient provision has in our judgment been made for depreciation of the leasehold premises, fixtures, furniture, horses, vans, &c.

Yours faithfully,

(Chartered Accountants).

£

The average annual profits of the business
on the basis of the last five years is -
The annual dividend on £— 5 p.c. pre-
ference shares is - - -
A dividend of say — p.c. on present
ordinary shares would require £—
Leaving a surplus of - - -

It is proposed to continue the business without break or interruption upon the lines which have proved so successful in the past, retaining the services of the present managers and staff, who have so largely contributed to that success.

(f) The vendors, Mr. — and Mr. —, will act as managing directors for the period of five years, and during such period will retain an interest of at least £— in the capital of the company.

(g) The purchase price for the sale of the above property has been fixed by the vendors, who are the promoters of the company, at £—, of which £— is for the goodwill. Of this sum one-half will be pay-

(f) *Vendors' Names, &c.*—The names and addresses of the vendors must be stated. (Sect. 81 (1) (f) of the Act, 1908. See pp. 169, 170.)

(g) The prospectus must state the amount (if any) paid or payable as purchase-money in cash, shares, or debentures of any such property as aforesaid, specifying the amount payable for goodwill. (Sect. 81 (1) (g) of the Act; and pp. 170, 171, *supra*.)

See also sect. 81 (1) (f), *supra*, p. 169.

Form — able to Mr. —, and the other half to Mr. —. Each sum of £— will be paid and satisfied as follows:—that is to say, as to £— in cash, as to £— by debentures, and as to the balance of £— by the allotment of — ordinary shares credited as fully pd up.

The business will be taken over subject to all existing trade contracts. These are of the ordinary trade character.

The difference between the purchase price and the capital when paid up will also provide the company with nearly £— cash, the vendors discharging all liability and the whole of the expenses attending the formation of the company, the transfer of the properties, and issue of capital. A sum of £— ordinary shares is reserved for future issue if and when required.

(h) The minimum subscription on which the directors may proceed to allotment is — shares.

(h) *Minimum Subscription and Allotment.* The prospectus must state the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment, and the amount actually allotted, and the amount (if any) paid on such shares. (Sect. 81 (1) (d) of the Act; and p. 169, *supra*.)

In relation to the minimum subscription, sect. 85 of the Act must be borne in mind. That section provides as follows:

(1.) No allotment shall be made of any share capital of a company offered to the public for subscription, unless the following conditions have been complied with, namely—

- (a) the amount (if any) fixed by the memorandum or articles and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; or
- (b) if no amount is so fixed and named, then the whole amount of the share capital so offered for subscription,

has been subscribed, and the sum payable on application for the amount so fixed and named, or for the whole amount offered for subscription, has been paid to and received by the company.

(2.) The amount so fixed and named and the whole amount aforesaid shall be reckoned exclusively of any amount payable otherwise than in cash, and is in this Act referred to as the minimum subscription.

(3.) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

(4.) If the conditions aforesaid have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and, if any such money is not so repaid within forty-eight days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per centum per annum from the expiration of the forty-eighth day: Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

(5.) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6.) This section, except sub-sect. (3) thereof, shall not apply to any allot-

Form 8.

In addition to the shares and debentures which are to be issued to the vendors as above mentioned, the company is to issue to —

(i) — fully paid-up ordinary shares in the company, and £—— debentures, in consideration of his selling to the company the reversionary fee simple of the leasehold factory, No. —, — Street, E.C., expectant on the lease thereof to be acquired by the company from the vendors.

(j) The shares now offered for subscription have been underwritten for a commission at the rate of — per cent. on the amount thereof, and such commission is payable by the company.

(k) The vendors are to pay the preliminary expenses of and incident to the formation and floating of the company down to the time when it becomes entitled to commence business, exclusive of the underwriting commission above mentioned, and the estimated amount thereof is £——.

(l) The sum of £—— in cash is to be paid by the vendors to

ment of shares subsequent to the first allotment of shares offered to the public for subscription. (See pp. 9, 10, *supra*.)

(7.) [This sub-section deals with the minimum subscription in the case of a company which does not issue a prospectus, and is not a private company. (See *supra*, p. 10.)]

As to the effect of making an allotment in contravention of sect. 85, see sect. 86 of the Act; and p. 51, *supra*.

(i) *Fully Paid Shares, &c.*—The prospectus must state the number and amount of shares and debentures issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which such shares or debentures have been issued or are proposed or intended to be issued. (Sect. 81 (1) (e) of the Act; and p. 169, *supra*.)

(j) *Underwriting.*—The prospectus must state the amount (if any) paid or payable as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in the company, or the rate of any such commission. (See sect. 81 (1) (h) of the Act; see also sect. 89; and *supra*, p. 171.)

(k) *Preliminary Expenses.*—The prospectus must state the amount or estimated amount of preliminary expenses. (Sect. 81 (1) (i) of the Act; and p. 171, *supra*.)

(l) *Promoters and Vendors.*—The prospectus must state the amount paid or intended to be paid to any promoter, and the consideration for any such payment. (Sect. 81 (1) (j) of the Act; and p. 171, *supra*.)

It must also state full particulars of the nature and extent of the interest (if any) of every director in the promotion of or in the property proposed to be acquired by the company, with a statement of all sums paid, or agreed to be paid, to him in cash or shares by any person, either to qualify him as a director or otherwise for services rendered by him in connection with the formation of the company. (Sect. 81 (1) (m) of the Companies (Consolidation) Act, 1908; and p. 173, *supra*.)

The prospectus must state the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the

Form 8.

Mr. — for his services to them in the promotion of the coy, and Mr. —, who has joined the directorate at the request of the vendors, is to receive from them a sum sufficient to enable him to pay for his qualification shares.

(m) The contract for the sale of the business is dated the — day of —, and made between A., B. and C. of the one part, and the coy of the other part. The contract includes certain ppty situate at —, which has recently been purchased by the sd A., B. and C. under contract dated the — day of —, and made between the — Syndicate and A., B. and C. The following contracts have also been made [specify them].

(n) The arts of asson provide that the qualification of a director is to be the holding of — shares in the coy, and that the remuneration of the directors is to be £— per annum, and such further sum as

issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of the issue of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor. Provided that where the vendors or any of them are a firm the members of the firm shall not be treated as separate vendors. (Sect. 81 (1) (f) of the Act.) As to the meaning of "sub-purchaser" see *Brooke v. Hansen*, (1906) 2 Ch. 129, and pp. 169, 170, *supra*.

For the purposes of this section (81) every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

- (a) the purchase-money is not fully paid at the date of publication of the prospectus; or
- (b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or
- (c) the contract depends for its validity or fulfilment on the result of such issue. (Sect. 81 (2) of the Act.)

Where any of the property to be acquired by the company is to be taken on lease, this section shall apply as if the expression "vendor" included the lessor, and the expression "purchase-money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee. (Sect. 81 (3) of the same Act.)

(m) *Contracts*.—The prospectus must also state the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract entered into more than two years before the date of issue of the prospectus. (Sect. 81 (1) (k) of the Act; and p. 171, *supra*.)

A company shall not previously to the statutory meeting vary the terms of a contract referred to in the prospectus, or statement in lieu of prospectus, except subject to the approval of the statutory meeting. (Sect. 83 of Act; and p. 332.)

(n) *Qualification and Remuneration of Directors*.—The prospectus must state the number of shares (if any) fixed by the articles of association as the qualification of a director, and any provision in the articles of association as to the remuneration of the directors. (Sect. 81 (1) (b). See p. 168, *supra*.)

Form 8.

the coy in general meeting may grant, and that such remuneration is to be divided among them in such proportions as the directors may determine. And further *state as to remuneration of managing directors, infra, p. 739, and as to extra remuneration, infra, p. 744*].

The directors are interested as follows [*state full particulars as required by sect. 81 (1) (m)*].

The certificate of Messrs. —, and copies of the memorandum and articles of association of the coy and of the above contracts can be inspected at the office of the solicitors to the coy at any time during business hours.

(o) A copy of the coy's memorandum of association is printed in the fold of the prospectus [*or at the foot*], and forms part of it.

Application will be made to the Committee of the London Stock Exchange in due course for a settlement and quotation for both classes of shares.

Application for shares should be made upon the form accompanying the prospectus, and sent to — Bank, Limited, E.C., or to one of the bankers — with a remittance of the amount of the deposit.

Where no allotment is made, the deposit will be returned in full, and where the number of shares allotted is less than the number applied for, the balance of the deposit will be applied towards the remaining payments.

Failure to pay any future instalment on shares allotted when due will render previous payments liable to forfeiture.

Prospectuses and forms of application can be obtained at the office of the coy, or from the solicitors or brokers, London.

This prospectus has been duly filed with the Registrar of Cos.

Dated, —

Here add in the case of the copy to be filed the signatures of Directors [(p)].

(o) *Memorandum of Association*.—The prospectus must state the contents of the memorandum of association, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively. (Sect. 81 (1) (a) of the Act. See *supra*, p. 167.)

(p) *Signing and Filing*.—Under sect. 80 of the Act

- (1) Every prospectus issued by or on behalf of a coy or in relation to any intended coy shall be dated, and that date shall, unless the contrary be proved, be taken to be the date of the publication of the prospectus.
- (2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the coy, or by his agent authorised in writing, shall be filed for registration with the registrar of companies, on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

How far Act applies.

The application of sect. 81 of the Act of 1908 is enforced and qualified by the following sub-sections dealing with (1) waiver, (2) advertisement, (3) existing members, (4) prospectus issued more than a year after starting.

(4) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus shall be void.

(5) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum or the signatories thereto and the number of shares subscribed for by them.

(7) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or debentures, whether with or without the right to renounce in favour of other persons, but, subject as aforesaid, this section shall apply to any prospectus whether issued on or with reference to the formation of a company or subsequently.

(8) The requirements of this section as to the memorandum, and the qualification, remuneration, and interest of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus published more than one year after the date at which the company is entitled to commence business; in the case of a prospectus published more than one year after the date at which the company is entitled to commence business, the obligation to disclose all material contract shall be limited to a period of two years immediately preceding the publication of the prospectus.

The obligation of disclosure in a prospectus attaches none the less that the prospectus is published in an abridged translation for circulation in a foreign country. *Roussell v. Burnham*, (1909) 1 Ch. 127. See further as to an abridged prospectus, *supra*, pp. 175, 229.

Note the definition of prospectus in sect. 285 of the Act of 1908, by which the expression "prospectus" means any prospectus, notice, circular, advertisement or other invitation offering to the public for subscription or purchase any shares or debentures or debenture stock of a company.

(3) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed in manner required by this section.

(4) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section. (See p. 179, *supra*.)

The form of application for shares is usually annexed to the prospectus. It may be as follows:—

Form 9.

Application
for shares.

FORM OF APPLICATION FOR SHARES

To the Directors of The — Coy, Limtd.

GENTLEMEN,

Having paid to the coy's bankers, Messrs. —, the sum of £—, being a deposit of £— per share on — shares in the above-named coy, I request you to allot me that number of shares upon the terms of the coy's prospectus, dated the — of —, and I hereby agree to accept the same or any smaller number that may be allotted to me, and to pay the balance of £— per share on allotment, as provided by the said prospectus; and I authorize you to register me as the holder of the said shares.

Name in full.

Address.

Description.

Date.

Signature.

As to conditional applications, see *Elkington's case*, 2 Ch. 511; *Pellatt's case*, 2 Ch. 527; *Simpson's case*, 4 Ch. 184; *Wallace's case*, (1900) 2 Ch. 671; *Fisher's case* and *Sherington's case* (1885), 31 Ch. D. 120.

As to waiver clauses, see p. 231, *supra*.

Annexed to the form of application will be a form of receipt, as follows:—

THE — COY, LIMTD.

Form 10.

Bankers' Receipt (to be retained by the applicant).

Bankers'
receipt.

Received this — day of — of Mr. —, the sum of £—, being a deposit of £— per share upon — shares in the above-named coy.

For the — Bank.

To be signed by the bankers or secretary, and retained by the applicant.]

An applicant for shares is bound from the time when notice of allotment is given or posted. *Houshold Fire, &c. Co. v. Grant*, 4 Ex. Div. 216; *Henthorn v. Fraser*, (1892) 2 Ch. 27. Until notice of allotment is given or posted there is no contract, and the applicant may withdraw. *Wallace's case*, (1900) 2 Ch. 671. As to what is posting, see *London and Northern Bank, Exp. Jones*, (1900) 2 Ch. 289; *Pellatt's case*, 2 Ch. 527. The withdrawal may be oral. *Truman's case*, (1894) 3 Ch. 272. But if the withdrawal of his application does not reach the company until after the notice of allotment has been posted, it is

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ineffectual. *Harris's case*, 7 Ch. 587; *Stevenson v. McLean*, 5 Q. B. D. 346; *Byrne v. Van Tienhoven*, 5 C. B. 344. An unstamped allotment letter may be sufficient. *Whitley Partners, Steel's case*, 28 W. R. 241; 19 L. J. Ch. 176; 12 L. T. 11; *Henthorn v. Fraser*, *supra*.

Where notice of allotment is duly posted, the applicant is bound, even though the notice never reaches him. *Household Fire, &c. Co. v. Grant*, *ubi supra*; *Henthorn v. Fraser*, *supra*.

If no allotment is made, the company is bound to repay the deposit, but the deposit is not a trust fund. *Moseley v. Cressey's Co.*, 1 Eq. 406; 14 W. R. 246.

Where the company does not go to allotment owing to non-subscription of the minimum, the application money must be returned within forty-eight days. See sects. 85, 86, Companies Act, 1908; and *Burton v. Bevan*, (1908) 2 Ch. 240; and *Re National Motor Co.*, (1908) 2 Ch. 228; also pp. 16, 17.

Where A. applies on behalf of B., but without authority, and B. repudiates the allotment, A. is liable in damages to the company, and the measure may be the par value of the shares. *National Coffee Palace Co.*, 24 C. D. 367.

For letters of allotment, see *infra*, Chap. XII.

An application addressed to a company not yet registered is effective, and if an allotment is made within a reasonable time, and before withdrawal, the allottee is bound. *Downes v. Ship*, L. R. 3 H. L. 343; *Lawrence's case*, 2 Ch. 412; *Boyle's case*, 33 W. R. 450; *Karberg's case*, (1892) 3 Ch. 1.

See further as to membership, p. 45, *supra*.

Form 11.

Advertisement as to prospectus.

THE — COY, LIMTD.

Notice is hereby given that the above-named coy is issuing a prospectus dated the — day of —, a copy of which has been filed with the Registrar of Companies] inviting subscriptions at par for 5 per cent. cumulative preference shares of £— each, and ordinary shares of £5. The said prospectus states, among other things, that [here give extracts].

Copies of the full prospectus and form of application can be obtained at the office of the coy or from the coy's solrs or brokers.

This notice is not to be regarded as an invitation to the public to subscribe for shares, and application will only be received on the footing of the full prospectus and in the form issued therewith.

Dated —.

No. —, — Street, E.C.

See *supra*, p. 175, note to sub-sect. (5) of sect. 81.

Sect. 285 of the Act of 1908 defines a prospectus thus:—"Prospectus means any prospectus, notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any shares or debentures of the company." And sect. 81 of the Act provides that "a prospectus" [this is a prospectus defined as above] issued by or behalf of a company, &c. must contain certain items of information. See *supra*, p. 167 *et seq.*

Sub-sect. (5) of sect. 81 runs thus:—

(5) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to

specify the contents of the memorandum or the signatories thereto or the number of shares subscribed for by them.

The question is whether an advertisement framed as above (Form II) is a "prospectus" within the above definition. It would seem that it is not, seeing that it does not invite the public to subscribe.

It merely states what is the fact, namely, that a prospectus is being issued, and it gives some supplemental information. In many cases the earlier words, "notice is hereby given that," are omitted, but it would seem that this does not alter the character of the form. Different considerations apply to what is called "an abridged prospectus." Such a document, if it expressly or impliedly invites the public to subscribe, must comply with the requirement of sect. 81 of the Act, save so far as sub-sect. (5) otherwise provides.

But very commonly an abridged prospectus does not comply fully with sect. 81, *e.g.*, omits to disclose material contracts and particulars of directors' interests, though it may end with the words "full prospectuses (upon the terms of which application will alone be received) and forms of application may be obtained from the [cos bankers] and from [the cos brokers]." An abridged prospectus in this form, though sailing near to the wind, does not appear to be a prospectus inviting the public to subscribe. Not uncommonly, however, an advertised abridged prospectus, which does not comply with sect. 81, subjoins a form of application which states on its face that "this form may be torn out and used."

Such an abridged prospectus appears to be a perilous mode of inviting subscription. It clearly comes within the definition of a prospectus in sect. 285 of the Act, *supra*, p. 258, n., and also within the mischief sought to be remedied by sect. 81 of the Act. It is, however, a somewhat favourite expedient with unscrupulous promoters who find the requirements of sect. 81 inconvenient. Where directors authorize the publication of such an abridged prospectus, and allot shares in response thereto without taking care that the allottee has in fact seen the full prospectus complying with the Act, they must be prepared to find themselves in a position of great difficulty if the company should go wrong and they should be sued for damages by an allottee who has subscribed on the abridged prospectus. They could not in defence be heard to say that the allottee ought to have obtained and read the full prospectus, or ought to be bound with constructive notice of the contents thereof, for sub-sect. (4) of sect. 81 is against such a defence. Moreover, the allottee who subscribes on the faith of a prospectus is entitled to say, "This is the prospectus on the faith of which I applied: it is defective, and it is nothing to me that you issued another prospectus which complied with the statute." *Drineghier v. Wood*, (1899) 1 Ch. 393, 405; *Rousell v. Burnham*, (1909) 1 Ch. 127. Sometimes the abridged prospectus does not include a form of application, but even in such cases, if allotment is made on an application which refers to the full prospectus by date being the same as the date of the abridged prospectus, the directors cannot with safety assume that the applicant was aware of the contents of the full prospectus (see the case last mentioned), though possibly if the form of application states that the application is made on the terms of the full prospectus, "which I have read, and not of the abridged prospectus," the applicant would be estopped from saying that he had not read the full prospectus, unless indeed it should be held that these words were put into his mouth by the directors, and constituted a trap or device. The mere fact that an advertisement is called "an abridged

prospectus" does not protect those who issue it, for an applicant is entitled to assume that being a "prospectus" the directors have complied with the statutory requirements. If the advertisement sets out a form of application, whether it contains words to the effect that "this form may be used" or not, it appears to be hopeless to contend that the advertisement is not an invitation to the public to subscribe, yet promoters not uncommonly say that the addition of the form of application is the vital part of such an advertisement, for that they want to induce the reader to sign at once the form, and so commit himself—whereas, if he has to apply for a prospectus he may change his mind.

In regard to "abridged prospectuses" it is well to bear in mind the decision in *White v. Haymen and others*, 1 Cab. & Ell. 101, 1883, 25th June. In that case a so-called "abridged prospectus" not containing the date or names of the parties to a contract for the sale of a patent to be worked by the company was held to be fraudulent under sect. 38 of the Companies Act, 1867 (*supra*, p. 232), although it stated where full prospectuses could be obtained. The learned judge, Mathew, L. J. (then J.), considered the case to be within the mischief intended to be met by sect. 38. "The abridged prospectus," said the learned judge, "is clearly a prospectus within the meaning of the Act, which applies to every prospectus. The defendants further rely on the concluding words of the section, but I do not think they assist them. If the doctrine of constructive notice were applicable the object of the section would be defeated; for that object is to avoid the necessity of being put upon that inquiry which is involved in the doctrine of constructive notice. There must be judgment for the plaintiff." It cannot be maintained that this case was not properly argued, for Finlay, Q.C., and Moulton were for the plaintiffs, and Jelf, Q.C., and E. S. Ford for the defendants. See also the *Army, Navy and Civil Service Co-operative Society of India, Limited v. Craig*, 10 T. L. R. 227 (1892), before Charles, J. There the plaintiff company sued the defendant for calls, and the defendant pleaded that he was induced to apply for the shares on the faith of a prospectus knowingly issued by the directors and officers of the plaintiff company, which omitted to comply with the provisions of sect. 38 of the Act of 1867. During the hearing of the case a compromise was arrived at, the plaintiff being relieved of his shares. In the course of the case it was stated that it could not be too widely known that an abridged prospectus (as this was) inserted in the *Financial News* came within sect. 38 of the Act, as proved by *White v. Haymen*, *supra*, and his Lordship fully assented to this proposition, and to the proposed compromise.

Those who consider that an abridged prospectus may safely be used as an instrument for obtaining subscriptions must of course treat sub-sect. (4) of sect. 81 (1) of the Companies (Consolidation) Act, 1908, as a nullity, for otherwise that sub-section in providing that it should not be necessary in the advertisement [of a prospectus] to specify the contents of the memorandum or the signatories thereto, and the number of shares subscribed for by them, clearly implies that these are the only parts of the prospectus which it shall not be necessary to specify in an advertised prospectus.

Form 12.

Resolution to
sign and file
prospectus.

That the form of prospectus submitted to this meeting, and dated the — day of —, by which — shares of £ — each in the capital of the coy are to be offered to the public for subscription, be and the same is hereby approved, and that the copy of such prospectus also submitted to this meeting be forthwith signed by all the directors

and filed with the Registrar of Companies, as required by sect. 80 of the Cos (Consolidation) Act, 1908. **Form 12.**

See the stringent provisions of sect. 80, *supra*, pp. 179, 180.

To — Coy, Limtd, and the Directors thof.

Form 12a.

GENTLEMEN,

Notice avoid-
ing allotment
in contraven-
tion of sect. 86
of the Act of
1908.

Take notice that I, the undersigned, do hereby avoid, pursuant to sect. 86 of the Cos (Consolidation) Act, 1908, the allotment of — shares of £—— each in your capital made to me in the month of — 1900, and request you to remove my name from the register of members in respect of such shares, and to repay to me the sums amounting to £——, paid by me in respect of such shares, with interest at the rate of *four per cent. per annum* thence as from the *time when I paid the same reply to you*. And take notice, that unless within seven days from the date hereof you notify to me your assent to such avoidance and comply with my request aforesaid, I shall take such proceedings against you as I may be advised.

Dated the — day of —.

Signature of allottee —.

Name in full —.

Address —.

Description —.

Sect. 86 (1) of the Companies Act, 1908, provides that "an allotment made by a company to an applicant in contravention of the foregoing provisions of the last foregoing section of this Act shall be voidable at the instance of the applicant *within one month* after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up." See *Re National Motor Co.*, (1908) 2 Ch. 228; *Burton v. Bevan*, (1908) 2 Ch. 240, and pp. 16, 51, *supra*; *Rousselle v. Burnham*, (1909) 1 Ch. 127.

STATEMENT IN LIEU OF PROSPECTUS.

The obligations, at once onerous and indefinite, as to disclosure imposed on directors and promoters by sect. 10 of the Companies Act, 1900, and the serious consequences attaching to a neglect of them had the effect of checking to a large extent the use of the prospectus for purposes of company promotion, and augmenting the number of companies floated by other less perilous methods, *e.g.*, by obtaining subscriptions on forms of application on the faith of oral statements, by selling the company's shares in the stock market through financial agents, brokers and others, or through the medium of a pooling syndicate. The law's over-strictness defeated itself, as so often happens. To remedy this undesirable result the Legislature, in

Statement in
lieu of
prospectus.

sect. 1 of the Act of 1908 (replacing sect. 1 of the Act of 1907) has required, where a prospectus is not issued [and the company is not a private company, sect. 82 (2)], the filing of a "statement in lieu of prospectus." The section runs thus:—

82.—(1.) A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures [or debenture stock] unless before the first allotment of either shares or debentures [or debenture stock] there has been filed with the registrar of companies a statement in lieu of prospectus, signed by every person who is named therein as a director or a proposed director of the company or by his agent authorized in writing, in the form and containing the particulars set out in the second schedule to this Act.

(2.) This section shall not apply to a private company or to a company which has allotted any shares or debentures [or debenture stock] before the first day of July nineteen hundred and eight.

"Prospectus" in this section means, as provided by sect. 285, any prospectus, notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any share or debentures [or debenture stock] of a company.

The statement in lieu of prospectus is to be framed in accordance with the form set forth in the second schedule to the Act (see *infra*, p. 264), and on referring to that form it will be seen that the disclosure required is almost as extensive as that required in the case of a prospectus inviting subscriptions for shares in a new company.

Accordingly, in filling up the form of statement the observations made in the preceding part of the chapter as to the drafting of a prospectus may be referred to in illustration and explanation. The statement is to be signed by every person who is named in it as a director or a proposed director of the company, or by his agent authorized in writing.

The statement is, amongst other things, to state the "minimum subscription (if any) fixed by the memorandum or articles of association on which the company may proceed to allotment." These words refer to sect. 85, which provides, in para. (7), that—

"(7.) In the case of the first allotment of share capital, payable in cash, of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription, that is to say,

"(a) The amount (if any) fixed by the memorandum or articles, and named in the statement in lieu of prospectus, as the minimum subscription upon which the directors may proceed to allotment; or

"(b) If no amount is so fixed and named, then the whole amount of the share capital other than that issued, or agreed to be issued, as fully or partly paid up otherwise than in cash.

has been subscribed, and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

"This sub-section shall not apply to a private company, or to a company which has allotted any shares or debentures [or debenture stock] before the 1st day of July, 1908."

In following the analogy of a prospectus, sect. 86 in effect provides that an allotment made by a company to an applicant in contravention of the above sub-section, sect. 85 (7), shall be voidable, and the directors liable to compensate the company and the allottee, while sect. 87 prohibits the company from commencing business, or exercising its borrowing powers, until the conditions specified in the statement have been complied with. Sect. 83, which prohibits a company from varying, before the statutory meeting, any contract referred to in that company's prospectus, except subject to the approval of the statutory meeting, applies equally to the contracts referred to in a statement in lieu of prospectus.

Again, the statement in lieu of prospectus is clearly a document required by or for the purposes of the Act, specified in the fifth schedule, *i.e.*, a document required to comply with sect. 82, and accordingly if any person wilfully makes in it a statement false in any material particular, knowing it to be false, he is guilty of a misdemeanour, and liable on indictment to imprisonment for a term not exceeding two years with or without hard labour, and on summary conviction to imprisonment for a term not exceeding four months with or without hard labour, and in either case to a fine (not exceeding 100*l.*) in lieu of or in addition to such imprisonment. See sect. 281.)

Nor is the liability a criminal one only. It would seem that untrue statements or material omissions in a statement in lieu of prospectus may give to anyone who acts on the faith of such statements being true and complete a right of action against those who signed the statement in lieu of prospectus. Sect. 82, it will be observed, provides that the statement in lieu of prospectus is to be signed by every person who is named therein as a director or a proposed director of the company or by his agent authorized in writing, and the obvious design of this requirement is to impose on the signatories a statutory duty of disclosure for the benefit of the persons who may deal with the company, and this statutory duty includes the duty (see sect. 281) to see that the statements contained in the statement in lieu of prospectus are true and complete, in accordance with the statutory form. If this statutory duty is not performed, it follows, on the principles above referred to (pp. 175 *et seq.*), that those persons who show that they have been prejudiced by the breach of duty have a right of action against those who are responsible for the breach. See the cases cited above, pp. 175 *et seq.* The liability thus incurred is even more onerous than the liability of those who issue a prospectus; for in the case of a prospectus the persons making incorrect statements are, by paragraph (6) of sect. 81 of the Act, relieved from liability if they

can prove that they have contravened the section in ignorance or mistake, but no such defence is available to an action under sect. 82 of the Act, for, *primâ facie*, ignorance or mistake is no answer to a claim for damages for breach of a statutory duty. *Couch v. Steel*, 3 E. & B. 402; *Groves v. Wimborne*, (1898) 2 Q. B. 402. Accordingly the signatories of a statement in lieu of prospectus seem to occupy a more perilous position than the authors of a prospectus, and it behoves them therefore to make sure that the statement is correct and complete.

THE COMPANIES (CONSOLIDATION) ACT, 1908.

The —, Limited.

Statement in lieu of Prospectus, filed by —, pursuant to sect. 82 of the above Act. Presented for filing by —.

The nominal share capital of the company	£—.
Divided into - - - - -	Shares of £— each.
	" " "
	" " "
Names, descriptions, and addresses of directors or proposed directors.	
Minimum subscription (if any) fixed by the memorandum or articles of association on which the company may proceed to allotment.	
Number and amount of shares and debentures agreed to be issued as fully or partly paid-up otherwise than in cash.	1. — shares of £—, fully paid.
The consideration for the intended issue of those shares and debentures.	2. — shares upon which £— per share credited as paid.
	3. — debenture — £—.
	4. Consideration.
Names and addresses of (a) vendors of property purchased or acquired, or proposed to be (b) purchased or acquired by the company.	
Amount (in cash, shares, or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill.	Total purchase price £—
	Cash . . . £—
	Shares . . . £—
	Debentures . . £—
	Goodwill . . . £—
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company, or	Amount paid.
	" payable.

(a) For definition of vendor, see sect. 81 (2) of the Companies (Consolidation) Act, 1908; and pp. 173, 174.

(b) See sect. 81 (3) of the Companies (Consolidation) Act, 1908.

Rate of the commission - - - -	Rate per cent.
Estimated amount of preliminary expenses	£—.
Amount paid or intended to be paid to any promoter.	Name of promoter.
Consideration for the payment.	Amount £—.
	Consideration :—

Dates of, and parties to, every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than two years before the filing of this statement).

Time and place at which the contracts or copies thereof may be inspected.

Names and addresses of the auditors of the company (if any).

Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.

Whether the articles contain any provisions precluding holders of shares or debentures receiving and inspecting balance-sheets or reports of the auditors or other reports.

Nature of the provisions.

(Signatures of the persons above-named as directors or proposed directors, or of their agents authorised in writing.) —.

EXTRACTS FROM THE RULES OF THE STOCK EXCHANGE (LONDON).

January, 1912.

SPECIAL SETTLEMENTS AND OFFICIAL QUOTATIONS.

149. The secretary of the share and loan department shall give three days' public notice of any application for a special settling day in the scrip or bond of a new loan previously to its being submitted to the committee, who will appoint a special settling day provided that sufficient scrip or bonds are ready for delivery and are in reasonable amounts (*vide* Appendix 35). Special settling day. Loans.

150.—(1) The secretary of the share and loan department shall give three days' public notice of any application for a special settling day in the shares or other securities of a new company previously to such application being sub- Special settling day.

Companies.	mitted to the committee, who will appoint a special settling day provided that sufficient certificates or scrip are ready for delivery.
Vendor's shares.	(2) The committee will not fix a special settling day for bargains in shares or securities issued to the vendors, credited as fully or partly paid, until six months after the date fixed for the special settlement in the shares or securities of the same class subscribed for by the public, but this does not necessarily apply to reorganisations or amalgamations of existing companies, or to cases where no public shares are issued or to cases where the vendors take the whole of the shares issued for cash (<i>vide</i> Appendix 35).
Official quotations.	151.—(1) The committee may order the quotation in the official list of any security of sufficient magnitude and importance.
Applications.	(2) Applications for quotation must be made to the secretary of the share and loan department, and must comply with such conditions and requirements as may be ordered from time to time by the committee (<i>vide</i> Appendix 36).
Notice.	(3) Three days' public notice must be given of every application.
Broker.	(4) A broker, a member of the Stock Exchange, must be authorised to give the committee full information as to the security, and to furnish them with all the particulars they may require.
Quotation of vendor's securities.	152. Securities issued to vendors credited as fully or partly paid shall not be quoted until six months after the date fixed for the special settlement of the securities of the same class subscribed for by the public nor unless a quotation for the latter is also granted.

35. *Special Settlements.*

The following documents and particulars should be sent to the secretary of the Share and Loan Department when application is made for a special settlement:—

(*Rules 149 and 150.*)

A. Scrip or Bonds of New Loans.

A specimen of the scrip or bond.

A copy of the prospectus, circular or advertisement relating to the issue.

A statutory declaration, stating—

1. The amount allotted
 - (a) to the public.
 - (b) to others.
2. The distinctive numbers and denomination of each class of scrip or bond.
3. The amount paid up thereon.
4. That the scrip or bonds are ready to be delivered.

B. Shares of New Companies.

The certificate of incorporation.

A specimen of the share certificate.

A copy of the prospectus, the statement in lieu of prospectus as filed with the Registrar of Companies, circular or advertisement relating to the issue.

A specimen call letter.

Certified printed copies of contracts relating to the issue of shares credited as fully or partly paid.

A letter from the secretary of the company stating—

1. That the share certificates are ready to be issued.
2. The distinctive numbers of the shares allotted
 - (a) to the public.
 - (b) to the vendors.

3. The particulars of the company's capital.
4. The nominal amount of each share, and the amount paid in cash or credited as paid on each share.
5. In cases where the whole of the capital has not been issued at the time the application is made, whether the unissued shares are vendors' shares or are held in reserve for future issue.

C. Stock or Debenture Stock of New Companies.

A specimen of the scrip or stock certificate.

A copy of the prospectus, the statement in lieu of prospectus as filed with the Registrar of Companies, circular or advertisement relating to the issue.

A letter from the secretary of the company stating—

1. The amount allotted
 - (a) to the public.
 - (b) to others.
2. The amount paid in cash per 100*l.* stock.
3. That the scrip or stock is ready to be issued.

36. *Official Quotations.*

A. Conditions precedent to an Application for Official Quotation.

1. That the prospectus—

Shall have been publicly advertised;

Agrees substantially with the Act of Parliament or articles of association;

Provides for the issue of not less than one half of the authorised capital and for the payment of 10 per cent. upon the amount subscribed;

If offering debentures or debenture stock states fully the terms of redemption;

In cases where a company has sold an issue of debentures or debenture stock which is subsequently offered for public subscription either by the company or any subsequent purchaser, states the authority for the issue and all conditions of sale.

2. That two thirds of the amount proposed to be issued of any class of shares or securities, whether such issue be the whole or a part of the authorised amount, shall have been applied for by and unconditionally allotted to the public, shares or securities granted in lieu of money payments not being considered to form part of such public allotment.

3. That the articles of association and the trust deed where such is required contain the provisions specified hereafter.

4. That the certificate or bond is in the form approved.

B. Articles of Association.

Articles of association should contain the following provisions:—

1. That none of the funds of the company shall be employed in the purchase of or in loans upon the security of its own shares;
2. That directors must hold a share qualification;
3. That the borrowing powers of the board are limited;
4. That the non-forfeiture of dividends is secured;
5. That the common form of transfer shall be used;
6. That all share and stock certificates shall be issued under the common seal of the company, and shall bear the signatures of one or more directors and the secretary.

7. That fully-paid shares shall be free from all lien;
8. That the interest of a director in any contract shall be disclosed before execution, and that such director shall not vote in respect thereof.
9. That the directors shall have power at any time and from time to time to appoint any other qualified person as a director either to fill a casual vacancy, or as an addition to the board, but so that the total number of directors shall not at any time exceed the maximum number fixed; but that any director so appointed shall hold office only until the next following ordinary general meeting of the company, and shall then be eligible for re-election;
10. That a printed copy of the report, accompanied by the balance-sheet and statement of accounts, shall, at least seven days previous to the general meeting, be delivered or sent by post to the registered address of every member, and that two copies of each of these documents shall at the same time be forwarded to the secretary of the Share and Loan Department, The Stock Exchange, London;
11. That the charge for a new share certificate, issued to replace one that has been worn out, lost, or destroyed, shall not exceed one shilling.

C. Trust Deeds.

Trust deeds should contain the following provisions:—

1. Where provision is made that the security shall be repayable at a premium, either at a fixed date or at any time upon notice having been given, the trust deed must further provide that should the company go into voluntary liquidation for the purpose of amalgamation or reconstruction the security shall not be repayable at a lower price.
2. The following clause should be inserted in all deeds:—
 “The statutory power of appointing new trustees hereof shall be vested in the company, but a trustee so appointed must, in the first place, be approved of by a resolution of the debenture (or debenture stock) holders passed in the manner specified in the schedule hereto. A corporation or company may be appointed a trustee of these presents.”
3. In the clause regulating the convening of meetings of the debenture (or debenture stock) holders the following words should be inserted:—
 “And the trustee or trustees shall do so upon a requisition in writing signed by holders of at least one-tenth of the nominal amount of debentures (or debenture stock) for the time being outstanding.”
4. The clause defining an “extraordinary resolution” must provide that “the expression ‘extraordinary resolution’ means a resolution passed at a meeting of the debenture (or debenture stock) holders duly convened and held at which a clear majority in value of the whole of the debenture (or debenture stock) holders is present in person or by proxy and carried by a majority consisting of not less than three-fourths of the persons voting thereat upon a show of hands, and if a poll is demanded, then by a majority consisting of not less than three-fourths in value of the votes given on such poll.”
5. Should debentures or debenture stock be entitled “first mortgage,” provision must be made for the creation of a specific first mortgage in favour of the debenture or debenture stock holders.

D. Share and Stock Certificates.

All certificates should state on their face the authority under which the company is constituted and the amount of the authorised capital of the company.

All certificates should bear a footnote to the effect that no transfer of any portion of the holding can be registered without the production of the certificate.

Where the capital of a company consists of more than one class of shares of the same denomination, the distinctive numbers of the shares of each class must be printed on the face of the share certificates.

All preference share certificates should bear on their face a statement of the company's capital and the conditions both as to capital and dividends under which the shares are issued.

Debentures and debenture stock certificates should, in addition to legal requirements, state on their face the authority under which the company is constituted, the nominal capital of the company, the dates when the interest on the debentures or debenture stock is payable, and the authority under which the issue is made (i.e., articles of association and resolutions); and on their back the conditions of issue, redemption and transfer.

E. Bonds.

Bonds must specify the amount and conditions of the loan, the powers under which it has been contracted, and the numbers and denominations of the bonds issued, and in the case of a loan issued either wholly or partly in London, those issued in London must bear the autographic signature of the London agents or contractors.

F. New Companies.

Before the application form can be issued for signature there must be supplied:

A copy of the prospectus.

Two copies of the articles of association.

In the case of debentures or debenture stock the trust deed [*where possible before execution*].

After the application form has been signed there must also be supplied in the case of:

Shares.

The certificate of incorporation, and the certificate that the company is entitled to commence business.

Two certified copies of the prospectus, endorsed with the date when first advertised.

Two certified copies of the memorandum and articles of association.

The original letters of application.

The allotment book containing a list of applicants, the number applied for by each, and the result of each application, with a summary signed by the chairman and secretary.

Should the allotment have taken place at an interval of six months or more before the date of the application, a certified list of present shareholders will also be required.

A copy of the letter of allotment, and the date when posted.

A specimen of the share certificate.

The bankers' pass book, accompanied by a certificate on a special form from the company's bankers, stating the amount of deposits received by them, and the number of shares on which such deposits (*i.e.*, application money only, being £ per share) were paid.

Authenticated copies of all concessions and similar documents with notarially certified printed translations and certified printed copies of all contracts and agreements.

A statutory declaration by the chairman and secretary stating the following particulars:

1. That the prospectus complies with the provisions of the Companies (Consolidation) Act, 1908.
2. That all documents required by the Companies (Consolidation) Act, 1908, have been duly filed with the Registrar of Companies and the dates of filing.
3. The number of shares applied for by the public.
4. The number of shares allotted unconditionally to the public (Nos. to), and the amount per share paid thereon in cash.
5. The number of shares allotted for a consideration other than cash (being Nos. to).
6. The amount of deposits paid and that such deposits are absolutely free from any lien.
7. That the share certificates are ready for delivery, that the purchase of the properties has been completed and the purchase-money paid and that no impediment exists to the settlement of the account.
8. The total number of the allottees, and the largest number of shares (a) applied for by, and (b) allotted to, any one applicant.

H. After the application form has been signed there must be supplied in the case of:—

Debentures and Debenture Stock.

The certificate of incorporation or Act of Parliament and the certificate that the company is entitled to commence business.

A certified printed copy of the mortgage deed or other similar document, and the official certificate of the registration of the mortgage or charge.

Certified copies of the articles of association, resolutions or other authority for the present issue.

Two certified copies of the prospectus.

The original letters of application.

The allotment book containing a list of applicants, the amount applied for by each, and the result of each application, with a summary of the whole, signed by the chairman and secretary.

Should the allotment have taken place at an interval of six months or more before the date of the application, a certified list of the present stockholders will also be required.

A copy of the allotment letter and the date when posted.

A specimen of the debenture or debenture stock certificate and of the scrip, where scrip is issued; certificates of debenture stock allotted to vendors in lieu of money payments being enfaced "issued to vendors."

A copy of the last published report and accounts.

The bankers' pass book, accompanied by a certificate on a special form from the company's bankers stating the amount of deposits received by them and the amount of debentures or debenture stock on which such deposits (*i.e.*, application money only, being £ per debenture) were paid.

A statutory declaration by the chairman and secretary stating:—

1. That the prospectus complies with the provisions of the Companies (Consolidation) Act, 1908, and that all documents required by that Act have been duly filed with the Registrar of Companies and the dates of filing.
2. The amount of stock applied for by the public.
3. The amount unconditionally allotted to the public (Nos. to).
4. The amount, viz.: £ per cent. paid thereon in cash.
5. The amount allotted for a consideration other than cash (Nos. to).
6. The total amount of deposits and that such deposits are absolutely free from any lien.
7. That the debentures or debenture stock certificates are ready for delivery, and that there is no impediment to the settlement of the account.
8. That a trust deed has been executed and completed if such be the case.
9. The effect of such trust deed and the nature of the charge created thereby in favour of the debenture holders.
10. The total number of allottees.
11. The largest number of debentures or debenture stock (a) applied for by and (b) allotted to any one applicant.

A statutory declaration by the chairman and secretary, stating:—

1. The total amount of the authorized capital of the company, and how constituted.
2. The number of shares allotted unconditionally to the public (Nos. to), and the amount paid on each share in cash.
3. The number of shares taken by concessionaires, owners of property, contractors, or other parties not included in the public allotment (being Nos. to).
4. That the share certificates have been delivered; that the purchase of the properties has been completed and the purchase-money paid.

I. Scrip.

In addition to the requirements made in the case of definitive stock or bonds, a specimen of the scrip certificate must be supplied.

K. After the application form has been signed, there must be supplied in the case of—

Further Issues.

A King's printers' copy of the Act of Parliament authorising, the resolutions, &c. creating, and the circular or prospectus offering, the new issue.

If shares have been issued credited as fully or partly paid, certified printed copies of the contracts relating thereto.

A copy of the allotment letter.

A copy of the last report and accounts.

A specimen of the share certificate.

The allotment book, unless the allotment is *pro rata*.

A statutory declaration by the secretary stating:—

1. That the prospectus or circular complies with the provisions of the Companies (Consolidation) Act, 1908;
2. That all documents required by the Companies (Consolidation) Act, 1908, have been duly filed with the Registrar of Companies, and the dates of filing.

3. That the shares (Nos. to) have been applied for by and unconditionally allotted to the shareholders or the public, or sold upon the market as the case may be;
4. The amount per share paid in cash;
5. The total number of allottees and the largest number of shares applied for by and allotted to any one applicant.
6. That certificates are ready to be issued, and that there is no impediment to the settlement of the account. It must also be stated whether or not the shares are in all respects identical with those already quoted in the official list.

The statement that shares are in all respects identical means that—

They are of the same nominal value, and that the same amount per share has been called up.

They carry the same rights as to unrestricted transfer, attendance and voting at meetings and in all other respects.

They are entitled to dividend at the same rate and for the same period, so that at the next ensuing distribution the dividend payable on each share will amount to exactly the same sum.

The statement that stock is in all respects identical means that—

All the stock is entitled to the same rights as to unrestricted transfer and in all other respects.

All the stock is entitled to dividend at the same rate and for the same period, so that at the next ensuing distribution the dividend payable on each 100*l.* of the stock will amount to exactly the same sum.

L. After the application form has been signed there must be supplied in the case of:—

Vendor's Shares.

A certified list of the present holders of the vendor's shares.

A certified copy of the last published report and accounts of the company.

A specimen of the share certificate.

A statutory declaration by the secretary stating:—

1. That the vendor's shares (Nos. to) have all been issued and certificates delivered.
2. That the shares are in all respects identical with those already quoted in the official list.

M. After the application form has been signed there must be supplied in the case of:

Old Companies.

The certificate of incorporation or Act of Parliament and the certificate that the company is entitled to commence business.

Authenticated copies of all concessions and similar documents with notarially certified printed translations.

Certified copies of all prospectuses, original or otherwise, endorsed with the date when first advertised.

Two certified copies of the memorandum and articles of association.

A specimen of the share certificate and of the allotment letter.

A certified copy of present register of shareholders.

Certified printed copies of contracts, agreements, &c., together with copies of all contracts relating to the issue of shares credited as fully or partly paid.

A certified copy of the company's last published report and accounts.

A short history of the company, setting forth its origin, progress, dividends, &c., the number of transfers registered during the last twelve months and the number of shares represented by such transfers.

Statutory declaration by the chairman and secretary stating the following particulars:—

1. That the prospectus complied with the provisions of the Companies (Consolidation) Act, 1908.
2. That all documents required by the Companies (Consolidation) Act, 1908, have been duly filed with the Registrar of Companies and the dates of filing.
3. The number of shares applied for by the public.
4. The number of shares allotted unconditionally to the public (Nos. to) and the amount per share paid thereon in cash.
5. The number of shares allotted for a consideration other than cash (being Nos. to).
6. That the share certificates have been delivered; that the purchase of the properties has been completed and the purchase-money paid.

N. After the application form has been signed there must be supplied in the case of:

Colonial and Foreign Companies.

The certificate of incorporation or Act of Parliament or other similar document.

Two copies of the statutes or articles of association or notarial translations of the same.

A certified list of present shareholders.

A specimen of the share certificate.

Copies of all agreements, concessions, deeds, &c., or notarially certified printed translations of the same.

A certified copy of last published report and accounts or translation of the same.

Official evidence of quotation in the country to which they belong or where the issue has been made.

A short history of the establishment and progress of the company from its incorporation to the present time, including particulars as to the issue of the capital.

A declaration stating:—

1. The number of shares allotted;
2. The amount per share paid in cash;
3. That the shares are ready for delivery, and that no impediment exists to the settlement of the account.

O. After the application form has been signed there must be supplied in the case of:

Reconstructed Companies.

The certificate of incorporation and the certificate that the company is entitled to commence business.

A statement of the plan of reconstruction together with certified copies of all resolutions passed and circulars issued in connection with the reconstruction.

The allotment book with a summary signed by the chairman and secretary.

The allotment letter and the date when posted.

A specimen of the share certificate.

Two certified copies of the memorandum and articles of association.

P.

T

Certified printed copies of all contracts, agreements, &c.

Copies of all contracts relating to the issue of fully or partly paid shares.

A statutory declaration by the chairman and secretary stating:—

1. That all documents required by the Companies (Consolidation) Act, 1908, have been duly filed with the Registrar of Companies, and dates of filing.
2. The authorized capital of the company.
3. The number of shares to which shareholders in the old company were entitled; the number and distinctive numbers of shares unconditionally allotted to such shareholders, and the amount per share (a) paid thereon in cash, and (b) credited as paid up.
4. The number and distinctive numbers of shares applied for by and allotted unconditionally to the public, and the amount per share (a) credited as paid up, and (b) paid thereon in cash.
5. That the share certificates have been, or are ready to be delivered, and that there is no impediment to the settlement of the account.

P. After the application form has been signed the following documents must be supplied in the case of:—

Loans.

Details of the creation of the loan and the authority under which it is issued, including authenticated copies of concessions, &c. with notarially certified translations.

The authority to the agents or contractors to receive subscriptions.

A certified copy of the prospectus.

Evidence that all bonds issued and payable abroad bear the signature of some properly authorised person.

A specimen bond, together with a bond duly executed or scrip certificate if issued.

Statutory declaration by the agents stating:—

1. The amount allotted unconditionally to the public.
2. That the required amount, viz., £ per cent., has been paid thereon in cash.
3. That the bonds are ready for delivery, and that there is no impediment to the settlement of the account.
4. The numbers and denominations of those bonds which bear the autographic signature of the London agents or contractors.

Q. After the application form has been signed, the following documents must be supplied in the case of:—

Bonds quoted abroad.

Official evidence of quotation in the country to which they belong, or where the issue has been made.

Notarially certified printed translations of all prospectuses and of the laws creating and authorising the loan.

A specimen bond, together with a bond duly executed.

An official certificate setting forth:—

1. The authorized and issued amounts of the loan and the terms of issue.
2. The distinctive numbers and denominations of the bonds.
3. Evidence that all bonds bear the signature of some properly authorized person.

UNDERWRITING.

CHAPTER IV.

INTRODUCTORY NOTES.

It has for many years past been a common practice to have shares or debentures or debenture stock underwritten before offering the same for public subscription.

What is underwriting?

To "underwrite," as the expression is used in company matters, is a well-known business term signifying the entering into a contract by which a person (known as "the underwriter") agrees (usually for a commission) that if the shares, debentures, or debenture stock about to be offered for subscription, or some specified proportion thereof, are not within a specified time taken up by the public, or by that section of the public to which they are to be offered, he will himself take them up and pay for what the public do not take up, or some specified proportion thereof. *Licensed Victuallers' Assoc.*, 42 C. D. 1; *London, Paris, &c. Assoc.*, 13 T. L. R. 569; *Consort Deep, &c. Co.* (1897) 1 Ch. (C. A.) 575. Sometimes the contract binds the underwriter either to take up the shares, &c. or to find responsible persons to do so; it is none the less, in either case, called an underwriting contract. Occasionally one person, or firm, or company, underwrites the whole issue, but it is more common for the underwriting to be done by a number of persons, each of whom underwrites a specific amount, and stipulates that the public subscriptions are to go in relief of all the underwriters' liability rateably in proportion to the amounts underwritten by them respectively. When the underwriting is done by one person, firm, or company, the underwriter usually re-insures by making sub-underwriting contracts so as to reduce the risk. Underwriting and sub-underwriting of this kind is not confined to professional underwriters. Great numbers of business men and investors are, or in the past have been, content to "take a line" in the underwriting of a promising issue. If the thing "goes," they take their commission and stand free. If it does not and they are "landed," the commission is so much in reduction of the net price, and, at the worst, they can "pool" what they are landed

with, and gradually dispose of it to the general public. See Forms 6, 7.

Advantages
of.

By having a proposed issue underwritten in this way by responsible persons before the prospectus is published, the success of the issue is assured, and the company and others interested are relieved from the risk of loss and inconvenience likely to ensue if the public should not be disposed to subscribe. Thus—

- (a) Suppose that a company is registered to acquire a business, or to carry into effect a scheme which will require the provision of at least 50,000*l.* cash, and accordingly, that by the articles of association the minimum subscription on which (pursuant to sect. 85 of the Act of 1908) the directors may go to allotment is fixed at 50,000 shares of *1l.* each. If the public do not come in and take up the amount, and the shares have not been underwritten, the company will be unable to proceed to allotment or to commence business unless it can find people ready and willing to take up the minimum subscription. This, after the failure of the invitation to the public is known, it may be impossible to arrange, and in the result the preliminary costs and expenses may be thrown away; whereas if beforehand the minimum subscription is underwritten, this danger is averted. Accordingly, it is now very common to have at least the minimum subscription underwritten and so secure the company going to allotment.
- (b) Suppose, however, the amount of the minimum subscription fixed in the articles—a matter left to the discretion of the promoters—to be so small that the directors will themselves be prepared to subscribe it if the public do not come in, still it may be necessary to resort to underwriting if the scheme on which the company is started requires any considerable cash subscription.
- (c) Suppose A., B., and C. are converting their business into a company which is to offer its preference shares and debentures for public subscription. The business is well known and successful, but a large portion of the capital employed represents loans, deposits, and other capital left in the concern by a deceased partner; and the proceeds of the proposed issue are intended to clear off all these liabilities. In the circumstances it is essential, in the interests of A., B., and C., that the issue should be placed without fail; if they go to the public without any underwriting, there will be risk of failure by reason of some unforeseen contingency, *e.g.*, the contemporaneous announcement of some other or more attractive scheme, the appearance of a hostile letter in a newspaper, some great commercial failure, or some disturbance of the money market. Accordingly steps are taken to eliminate the risk by having the issue underwritten.

- d) A going company may desire to raise further funds by the issue of additional shares, or debentures, or debenture stock. To offer the new capital without success would involve risk to the company, indeed failure to obtain a subscription might prove disastrous. The company's advisers are of opinion that in the state of the market, or in the special circumstances of the case, the success of the issue is problematical. Accordingly, underwriting is almost a necessity.
- e) A financial or other company has become possessed of shares, stock, or securities issued by some other concern. It desires to dispose thereof to the public, and, in order to ensure the success of the issue and avoid the serious detriment which non-success would involve, underwriting is resorted to.

Sometimes, as above mentioned, it is considered sufficient to have only a portion of a proposed issue underwritten, *e.g.*, in the case of a new company, sufficient to provide the necessary working capital, and so much cash as the vendor absolutely requires; and where a going company wants further funds it may often be thought sufficient to have only a part of the proposed issue underwritten.

Underwriting
of part only
of issue.

Old Law as to Underwriting in force before the Companies Act, 1900 (now replaced by sect. 89 of the Companies (Consolidation) Act, 1908), came into operation.

Prior to the coming into operation of the Act of 1900, the underwriting of shares or debentures was attended with serious difficulties in consequence of the then existing law as to the payment of underwriting commissions. The law stood thus:—

- 1) It was extremely doubtful whether a company, even if authorized by its memorandum and articles of association, could legally pay out of its capital commission for underwriting shares in its own capital.

Company,
though autho-
rized by
memorandum,
could not
safely pay
commission
out of capital,
except small
brokerages
to brokers.

These doubts arose, if not before, at any rate with the decision of Kay, J., in *Faure Accumulator Co.*, 40 C. D. 141 (1888), and they were certainly not lessened by the decision of the Court of Appeal in *Lydney & Wigpool Co. v. Bird*, 33 C. D. 85, in which Lindley, L. J., in delivering the judgment of the Court, said, at p. 95: "It appears to me wholly wrong to make a company pay for the issue of its own shares. No part of the capital could be so applied"; or by the decision of the House of Lords in *Ooregum Co. v. Roper*, (1892) A. C. 125, in which case it was held that to issue shares of a company at a discount was *ultra vires*, from which it seemed to follow that to pay a commission to a subscriber for shares for subscribing was *ultra vires*. These doubts were emphasized, too, by the fact that some of

the most eminent lawyers at the Chancery Bar from time to time advised against the legality of payments *out of capital* for underwriting, although there were *dicta* in the Court of Appeal in *Licensed Victuallers' Association*, 42 C. D. 1, to the contrary, and although in *Metropolitan Coal Consumers' Association v. Scrimgeour*, (1895) 2 Q. B. 604, payment of a 2½ per cent. brokerage commission to the broker for his services as such was held legal. That decision was, however, strictly confined to the case of brokerage to a broker at a rate not exceeding 2½ per cent.

Otherwise as to profits of share premiums.

And could pay out of capital for placing debentures or other companies' shares.

A company could give underwriters right to call for shares.

Underwriting obligation could be attached to particular class of shares.

Illegal indirect payment of commission out of capital.

- (2) A company could out of profits, including premiums on shares carried to reserve and other assets not being capital, pay a commission for underwriting shares in its capital.
- (3) A company could pay out of capital, profits or other assets, for underwriting its debentures or debenture stock, or for underwriting shares in or securities of other companies, owned by it, and which it was entitled to dispose of.
- (4) A company could, as consideration for underwriting contracts with it, give to the underwriters the call at par or at a premium of shares in the company's capital, that is to say, the right to call for the allotment thereof on the footing that the allottee was to pay or be liable to pay the par value thereof to the company or some higher price.
- (5) The obligation to underwrite shares could validly be made a condition attaching to the ownership of shares of a particular class in the company; for example, the memorandum might provide that each allottee of founders' shares should be deemed to underwrite 100 ordinary shares.
- (6) It was not legal for a company indirectly to pay out of capital commission for underwriting shares in its capital, *e.g.*, by agreeing to purchase property at a price which a company through its directors knew was fixed so as to cover underwriting.

"There is no doubt that, if it cannot be done directly, it cannot be done indirectly," said Lord Chelmsford in *James v. Eve*, L. R. 6 H. L. 385, in relation to an *ultra vires* application of capital; and the same principle was recognized in *Mann v. Edinburgh Tramways*, (1893) A. C. 69.

Law and Practice since the Companies Act, 1900 (now amended and replaced by sect. 89 of the Companies (Consolidation) Act, 1908), which came into operation 1st January, 1901.

In certain cases underwriting may now be paid for out of capital.

The Act of 1900 materially altered the law as to the underwriting of shares, for it expressly allowed (sect. 8) a company, in certain cases and subject to certain conditions, to pay out of its capital for underwriting shares in its capital. "The Legislature," said Lord Davey in

Hilder v. Dexter, (1902) A. C. 474, 479, "was desirous of enabling remuneration to be paid for services rendered in placing or procuring subscriptions of the company's capital, and it appears to have hit upon what may be termed a compromise."

Sect. 8 of the Companies Act, 1900, was amended in some important particulars by sect. 8 of the Companies Act, 1907, and both sections, again, are now replaced by sect. 89 of the Companies (Consolidation) Act, 1908, which runs as follows:—

Commissions and Discounts.

89.—(1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is authorised by the articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorised, and if the amount or rate per cent. of the commission paid or agreed to be paid is—

Power to pay certain commissions, and prohibition of payment of all other commissions, discounts, &c.

(a) In the case of shares offered to the public for subscription, disclosed in the prospectus; or

(b) In the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar of companies, and, where a circular or notice, not being a prospectus, inviting subscription for the shares is issued, also disclosed in that circular or notice.

(2) Save as aforesaid, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawfully accustomed to pay for a company to pay, and a vendor to, promoter of, or other person gives payment in money or shares from, a company shall have and is deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

The section, it will be observed, goes far beyond authorizing payment of an underwriting commission, for it allows the payment of a commission to any person in consideration of his "subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company,"—words which enable a company in effect to issue its shares at

Gives unlimited scope for issuing shares at discount if subsect. 1 observed

a discount subject to the conditions imposed by sub-sect. 1. And sub-sect. 3 in effect allows a vendor or promoter to pay underwriting commission out of what he receives from the company, subject nevertheless to similar conditions.

In the first place, it is to be noted that the words—the governing words—with which the section in the Companies Act, 1900, began, "Upon any offer of shares to the public for subscription," disappear from the new section. This enables a company to pay an underwriting commission though there is no offer of shares to the public—a very important concession. For it had been held (*Burrows v. Malabale Gold Reefs*, (1901) 2 Ch. 23), that an offer by a company of further shares to its members was not an "offer of shares to the public"; nor was an offer of shares on a reconstruction by the new company to the shareholders of the old company through the medium of the liquidator (*Booth v. New Africander Gold Mining Co.*, 87 L. T. 509, C. A.); nor was an offer made by a promoter to a few of his friends (*Sleigh v. Glasgow and Transvaal Options G. F.*, 420 Ct. of Sess.); and in all these cases therefore it was not competent to a company to pay a commission. Now it is so for a private company as well as a public company (*Dominion of Canada General Trading Syndicate v. Brigstoke*, (1911) 2 K. B. 648), and the question when shares are offered to the public for subscription is only material for the purpose of determining whether the commission is to be disclosed in the prospectus.

"Lawful for a company to pay a commission to any person."

It has not yet been settled whether the word "pay" here means pay in money only, or in money or money's worth.

Sub-sects. 2 and 3 tend to show that the word "pay" is used in the wider sense, for, save as aforesaid, that sub-section prohibits the *application* by the company of any of its *shares* or capital money in payment of any commission, and thus appears to recognize the word "payment" as an apt description of an application of shares in a company in payment of a commission.

Moreover, the word "pay" is used in some other places in the Act of 1908 in this, the wider sense. See sects. 65, 81, 85, and 87.

Shares are constantly spoken of as being "paid" for otherwise than in cash, *e.g.*, in sect. 88.

The section impliedly allows of the payment of a lump sum or of a rate by way of commission, but it is of course, controlled by the company's articles, and if the articles only allow payment of a commission at a rate not exceeding so much as the directors determine, a lump sum cannot be paid. *Booth v. New Africander Gold Mining Co.*, (1903) 1 Ch. 295. The section does not in terms limit the amount of the commission, and it is difficult to imply any limit, except such as the directors may deem expedient.

The Legislature no doubt thought that companies might safely be trusted not to damage their own credit by paying and disclosing an extravagant commission.

In effect, by allowing the payment of a commission, the section allows of the issue of the shares at a discount: for instance, a 10*l.* share may be allotted on the footing that the allottee is to be paid a commission of 5*l.* on the share; in which case the financial result is the same as if the 10*l.* had been issued at a discount of 50 per cent.; but as a matter of form the transaction is correct; the shares are fully paid up by the subscriber, and the commission is paid to him by the company out of its funds as part of its business expenditure.

"In consideration of his subscribing," &c. "Subscribing" here means, it is apprehended, taking from the company on the footing that the share is to be paid up in due course by the subscriber or his successors in title, either in cash or its equivalent. This is the popular meaning of the words. See *Arnison v. Smith*, 41 C. D. 318; *Ross v. Estates Investment Co.*, 3 Ch. 682; *Kent v. Freehold Lands Co.*, 3 Ch. 492. As to reconstruction, see Chap. XXI., *infra*.

Whether absolutely or conditionally. The word "conditionally" here used is no doubt introduced to cover the underwriter's contract, which has almost invariably conditions annexed to it. The words "whether absolutely or conditionally" appear amply sufficient to cover the case of a man who subscribes absolutely and the case of a man who only underwrites—that is, subscribes—conditionally.

If the payment of the commission is authorized by the articles. It follows that to comply with the section the amount or rate must be authorized by the articles of association, and the commission paid or agreed to be paid must not exceed the amount or rate so authorized. The "articles" here mean the articles as originally framed or as altered by special resolution (see sect. 285). Accordingly, any company which has not got in its articles a suitable provision can, by special resolution, alter its articles so as to introduce the provision, and this power can be used both where there is no provision at all and where the existing provision is found unworkable, e.g., when it provides for the payment of commission at too low a rate.

The articles may provide that a specified sum may be applied in paying commission, or that a sum not exceeding a specified amount may be so applied, or that a particular rate may be paid, or that a payment not exceeding a particular rate may be paid.

Does not exceed. The amount or rate of commission which the company may pay must *not exceed the amount or rate per cent.*

authorized by the articles of association and disclosed in the prospectus, but, subject to this condition, the amount or rate is left by the Legislature to the company to settle, it being considered, no doubt, that the matter might safely be left to the company's advisers, who would not be likely to sanction any extravagant sums being so expended, seeing that there would have to be public disclosure. In one case (*Keatinge v. Paranga Consolidated Mines*, (1902) W. N. 15) a learned judge seemed to think that a commission might be so large as to involve issuing the shares at a discount, but it is submitted that this can scarcely be treated as a reason for limiting the statutory discretion vested in a company by the section, for the section itself expressly authorizes the payment of a commission to a person in consideration of his subscribing for shares, and this is for financial purposes equivalent to issuing the shares at a discount.

And "disclosed in the prospectus."

The amount and rate per cent. of the commission must not only be authorized by the company's articles and keep within that limit, but it must be disclosed in the company's prospectus where old shares are offered to the public. If the company is one that does not issue a prospectus then the amount and rate must be disclosed in the statement in lieu of prospectus, or in the filed statement in the prescribed form. See para. (h) of sect. 8.

If a director pays money out of the company's funds by way of commission when the payment of such commission is not disclosed in the company's prospectus, the company may recover the amount from him in an action. *Dominion of Canada General Trading Syndicate v. Brigstoke*. (1911) 2 K. B. 648.

As to sub-sect. 2 of sect. 89:—

"Save as aforesaid no company shall apply any of its shares or capital money." These, the preliminary words of sub-sect. (2), leave a company at liberty to apply any of its profits in paying commissions in accordance with the practice above referred to as existing before the Act of 1900 (*Hilder v. Dexter*, (1902) A. C. 474), but they prohibit a company from applying any of its shares or capital money to the payment of commissions except in a case coming within sub-sects. 1 or 3. "Those words naturally mean apply its capital, either in the form of shares before issue, when they may be described as potential capital, or in the form of money derived from the issue of its shares." Per Lord Davey in *Hilder v. Dexter*, (1902) A. C. 474. They do not affect the company's power to grant to underwriters as the commission or part of the commission for underwriting, the option to take up shares at par or above par. *Hilder v. Dexter*, *supra*.

"Either directly or indirectly." What may be the exact meaning of these words has yet to be determined. The word "directly" is clear enough. It is apprehended that the word "indirectly" is intended to point to a transaction by which the company, by some device, contrives to bring about the prohibited payment, or, as Lord Davey said, in *Hilder v. Dexter, supra*, by "allotting the shares in some way with the intention that they shall ultimately find their way to such person or be applied in payment of his commission."

One of the most common ways of doing so was by making it one of the terms of the contract with the vendor that he should pay the required commission, or by entering into a contract to purchase property on the unexpressed understanding that the vendor was to pay the underwriting commission—in other words, when the purchase price payable by the company was loaded by adding the amount of the commission. Short of this a company might adopt or enter into an agreement for the purchase knowing that the vendor was going to pay for underwriting, and might therefore be assumed to have fixed the price with reference thereto, so that the company would be indirectly paying for such underwriting. (See *Mann v. Edinburgh Tramways*, (1893) A. C. 77, in which case Lord Herschell, L. C., said, "It is obvious that in estimating 93,000*l.*, which was to be paid by the Tramways Company to the Cable Corporation, 17,000*l.* of it was estimated as paid for the amount of these expenses, because the whole agreement was under negotiation at the same time;" and see *Great North-West Central Railway v. Charlebois*, (1898) A. C. 114.)

See *supra*.]

"Added to the purchase-money," &c. If, as a matter of fact, it can be proved that there has been an addition to the purchase-money or the contract price of any work to be executed for the company in order to cover the commission, the section will have been contravened.

"Or the money be paid." The words "or the money be paid," &c., probably point to a case in which it cannot be said that the amount has been added to the purchase-money, but in which the purchase-money has been fixed with reference to the fact that the vendor or contractor will pay such commission, and, so inflated, does, in fact, pay the same. *Mann v. Edinburgh Tramways Co.*, (1893) A. C. 69; *Booth v. New Africander Co.*, (1903) 1 Ch. 295; *Lydney and Wiggpool Iron Ore Co. v. Bird*, 33 Ch. D. 85.

The words "or otherwise," will probably be construed as *ejusdem generis* with the previous words, and accordingly as including any other like device under which the company, in substance, gives shares or capital money in payment of the commission.

"Vendors or promoters." This portion of the section qualifies the rule laid down in sub-sect. (2), and thus affords much-needed relief.

The concluding words of the sub-section are material, "the payment of which if made directly by the company would have been legal under the section." They show that a vendor or promoter has no free hand to pay commission. He may agree to pay a commission, but if he does so it must be seen to that the company could legally pay such commission; that is to say, that the articles allow it, and that the commission is duly disclosed as in (b) of sub-sect. (1) provided.

As to sub-sect. (3):—

Such brokerage." Sub-sect. (3) gives a statutory sanction to the decision of the Court of Appeal above referred to in *Metropolitan Coal Consumers' Association v. Scrimgeour*, (1895) 2 Q. B. 604. The brokerage, therefore, must be payable to a broker for his services as a broker, and must not, it would seem, exceed $2\frac{1}{2}$ per cent., or other the amount which would have been held reasonable prior to the Act.

As to giving the Call of Shares for Underwriting. It was at one time held on the above section that it was no longer open to a company to contract to give underwriters or subscribers, as a consideration or part consideration for underwriting or subscribing, the call of further shares at par or a premium, for that to do so was to apply the company's shares in payment of a commission, and therefore in contravention of paragraph 2 of the section. *Burrows v. Matabele Gold Reefs*, (1901) 2 Ch. 23. In that case the company was a going concern. It proposed to issue some of its unissued shares; it did not offer them to the public, but it did offer them to existing shareholders, and it entered into a contract with certain persons to underwrite the issue in consideration of an option to subscribe for some other unissued shares of the company at the price of 2*l.* 10*s.* per share, that is to say, at a premium of 1*l.* 10*s.* per share; this was less than the market price. It was held by Farwell, J., that the offer to the shareholders was not an offer to the public, and therefore that the company was not entitled to pay any commission for underwriting under sub-sect. (1) of the section, and that the contract to give an option to take the unissued shares was, in effect, an application of shares to the payment of commission within the meaning of the section, and therefore prohibited by sub-sect. (2). "It was said," observed the learned judge, "that the section was intended to prevent the vendor from giving part of his shares to underwriters, but assuming this to be so, I can see no reason why the words of the Act should not be applied to other

transactions which are fairly within the expressed intention of the Act and the mischief intended to be thereby prevented. It was urged that the premiums could not be capital, and that the consideration for the underwriting might be paid out of premiums, but this is not the case before me. The Act distinguishes between capital and shares, and forbids the application of either in payment of underwriting commission, and I have to consider only a dealing with shares, not with the money produced by those shares." The decision was affirmed on appeal. "How," said Rigby, L. J., "can you 'apply' shares more clearly than by allotting them? When you allot the shares you apply not their nominal value, but the shares, and that is what sub-sect. (2) prohibits." This decision was, however, overruled by the House of Lords in *Hilder v. Dexter* (1902) A. C. 474. In that case the company determined in 1901 to issue a portion of the shares in its capital, and it did so by offering the shares not to the public but to fourteen persons, of whom Hilder was one. He applied for and was allotted shares on the following terms, namely: "For each share allotted in accordance with this application a subscriber shall have the option, during the period of one year from the 3rd day of January, 1901, of taking up at par a further ordinary share of 1*l.* in the initial capital of the company, and in the event of such last-mentioned share being taken up under such option, a further option during the period of two years from and after the said 3rd day of January, 1901, of taking up at par a further ordinary share of 1*l.* in the initial capital of the company." Later on, the shares having gone to a premium, Hilder gave notice to the company that he elected to take up further shares under this agreement. It was held by Byrne, J., and by the Court of Appeal, that the bargain was invalid. The House of Lords reversed the decision. Lord Davey in his judgment, after pointing out the condition of the law at the time when the enactment was passed, proceeded thus:—

"The first words to be construed are 'apply any of its shares or capital money.' I think that those words naturally mean, apply its capital either in the form of shares before issue, when they may be described as potential capital or in the form of money derived from the issue of its shares. 'In payment of any commission, discount or allowance.' I think this means payment by the company. The words 'discount or allowance' seem to mean the same thing, namely, a rebate on what would justly be due from the subscriber on his shares. The advantage which the appellant will derive from the exercise of his option is certainly not a 'discount or allowance,' because he will have to pay 20*s.* in the pound for every share. Nor is it, in my opinion, a commission paid by the company, for the company will not part with any portion of its capital, which is received by it intact, or, indeed, with any moneys belonging to it. But the words relied on are 'either directly or indirectly,' and the argument seems to be that the company by engaging to allot shares at par to the shareholder at a future date is applying or using its shares in such a manner as to give him a possible benefit at the expense of the company in this sense, that it foregoes the

chance of issuing them at a premium. With regard to the latter point it may or may not be at the expense of the company. I am not aware of any law which obliges a company to issue its shares above par because they are saleable at a premium in the market. It depends on the circumstances of each case whether it will be prudent or even possible to do so, and it is a question for the directors to decide. But the point which, in my opinion, is alone material for the present purpose is, that the benefit to the shareholder from being able to sell his shares at a premium is not obtained by him at the expense of the company's capital. The prohibited application of the shares may be direct by allotting them as fully or partly paid up to the person underwriting the shares, or by allotting them in some other way with the intention that they shall ultimately find their way to such person or be applied in payment of his commission.

"My Lords, it may be that in some particular case a contract such as that which your Lordships have before you would be open to impeachment as improvident, or an abuse, or in excess of the powers of management committed to the directors. In this case the question is as to the powers of the company itself, and not as to the due exercise of the directors' powers. I have come to the conclusion from a consideration of the language of sect. 8, sub-sect. 2, that the prohibition therein contained extends only to the application direct or indirect of the company's capital in payment of a commission by the company, and the transaction impeached in this case is not within it."

Commission
out of profits.

Payment of Commission out of Profits. It is corollary from this decision that the section does not prohibit the payment of commission out of undivided profits of the company, whether standing to reserve or not, but of course if payment is to be made out of reserve, it must be seen that the reserve fund clause *infra*, p. 754] contains words, specific and general, sufficient to cover such a payment

As to Premiums on the Issue of Shares. Before the Act of 1900, where shares were to be issued at a premium it was not uncommon to procure underwriting on the footing that the commission for the same should be paid out of the premiums, and eminent lawyers had advised that the payment thereof was legal. There seems to be nothing in sect. 89 of the Act of 1908 to invalidate this practice. Apart from the section and from any special provisions in the articles of a company, premiums are usually carried to reserve or brought into the profit and loss account as part of the company's revenue; they are not capital—and to apply the same or part in payment of the expenses of earning such premiums is reasonable enough. But whether premiums can now be applied in paying commission is another matter; it involves different considerations from the application thereof in payment of dividend. To justify dividend thereof it must be shown that they are net profits. *Lubbock v. British Bank of* (1892) 2 Ch. 198; *Foster v. New Trinidad Co.*, (1901) 1 Ch.

Prohibited Transactions. What the Act then allows is a fully disclosed payment subject to the specified conditions; all other payments are prohibited by sub-sect. (2).

Hence it is not allowable to evade full disclosure by stating that the commission is to be "at varying rates not exceeding 5 per cent.," for this does not disclose the actual amount paid or agreed to be paid.

Nor is it sufficient to state that the rate is to be at the rate specified in a contract offered for inspection, for that affords only constructive disclosure.

The following is a summary of the law as it stands:

1. A company which has the requisite power in its articles, as originally framed or as altered by special resolution, may pay out of capital a commission for underwriting shares in its capital, provided that the conditions specified in sub-sect. (1) of sect. 89 of the Act of 1908 are complied with.
2. A company which validly agrees to pay a commission as aforesaid may, it is conceived, reserve power to satisfy the commission by the allotment of paid-up shares or debentures, and it may be that a company may agree that the payment of commission shall be satisfied in shares credited as paid up.
3. A vendor, promoter, or other person may, out of money coming from the company, pay a commission, provided the articles allow same and there is due disclosure.
4. A company may, out of undivided profits, pay a commission for underwriting shares in its capital, and that without complying with the conditions imposed by sect. 89 (1) of the Act of 1908.
5. A company may, out of capital or profits, pay for underwriting debentures or other securities of the company (as distinguished from its own shares) or shares in or securities of any other company owned by it.
6. A company may give an option to call for shares in its capital as the consideration for underwriting either shares or debentures, debenture stock, or other securities of the company.
7. Save as aforesaid, a company may not pay, directly or indirectly, any underwriting commissions in relation to the placing of its share capital.

As to the Practice since the Act of 1908 came into Operation.

The usual practice is for the company itself to enter into direct relations with the underwriters. Very commonly one or two persons make the underwriting contract with the company, and subsequently reduce their liability under the contract by procuring sub-underwriting contracts with other persons.

Sometimes the vendor in the contract of sale agrees to underwrite a portion of the company's shares, and then he sub-underwrites.

Sometimes the company reserves power in the purchase contract to rescind, unless a specified number of shares shall be subscribed within a specified period, and in that case the vendor commonly gets the number underwritten so as to ensure the carrying out of the contract.

As to Disclosure in a Prospectus as regards Underwriting. It is necessary to disclose the amount or rate of the commission paid, or agreed to be paid, where the same is to be paid out of capital. Sect. 81 (1) (h) of the Act of 1908, and p. 171.

Whether it is necessary to disclose the underwriting contracts is a moot point, but it is very common to disclose the dates of, and parties to, the contracts on the assumption that sub-sect. 1 (k) of sect. 81 requires such disclosure, and this is the safest course. It may well be considered that as para. (h) expressly requires disclosure of the commission, that is sufficient.

Where the underwriting commission is to be paid out of undivided profits, it may sometimes be necessary to disclose the contracts under sect. 81, sub-sect. 1 (k).

Reconstruction.

As to Underwriting upon a Reconstruction. Where it is proposed to reconstruct a company by transfer of the undertaking to a new company in consideration of shares credited as partly paid up—e.g., 1*l.* shares with 1*s.* per share credited—to be distributed among the members of the transferring company, it is very commonly desired to have such shares underwritten, so that the new company may start with sufficient capital resources.

The difficulty in the way of this arrangement was that under the original form of the power as contained in sect. 8 of the Companies Act, 1900, the underwriting commission could only be paid "upon any offer of shares to the public for subscription," and it was held in *Booth v. New Africander Gold Mining Co.*, (1903) 1 Ch. 295, that an offer of shares on a reconstruction by the new company to the shareholders of the old company through the medium of the liquidator was not an "offer of shares to the public." This difficulty is removed by the new form of the power in sect. 89 of the Companies Act, 1908, which does not contain the words "on any offer of shares to the public," and therefore permits payment of underwriting commission, whether the shares are offered to the public for subscription or not. A difficulty, however, still remains, having regard to the fact that payment is, by sub-sect. (1), only allowable for subscribing, or agreeing to subscribe, or procuring, or agreeing to procure subscriptions, and "subscription" is not, it has been suggested, a very appropriate term as applied to the taking up of a share, credited as partly paid up, which, under a contract of reconstruction, a shareholder is entitled to have allotted to him. In a sense, no doubt, the underwriter in such circumstances who agrees conditionally to take

up the shares not taken up by the shareholders in the reconstructing company may be said to have subscribed, for he agrees to take the shares from the new company and to become liable for a portion of the amount, the balance having been paid up in kind by the liquidator, but whether he technically "subscribes" within the meaning of the section remains for decision. It may also be said that the reconstructing company is not in a position to give title to the shares, seeing that by the reconstruction agreement they are to be placed at the disposal of the shareholders or of the liquidators, but neither of these points have much substance, and would probably yield to a liberal construction of the section as an enabling one. But see *Barrow v. Paringa*, (1909) 2 Ch. 658.

As to Framing Underwriting Contracts. Great care and circumspection are requisite for this purpose, inasmuch as astute underwriters, when called on to perform their perhaps onerous obligations, raise every possible objection, and in an ill-drawn underwriting contract they may easily find loop-holes for escape.

Framing of underwriting contracts.

Thus the underwriter may say: "I agreed to underwrite on the footing of a prospectus, to be prepared in accordance with a particular draft submitted to me, and that draft was altered without my consent. Therefore, I refuse to apply."

Or an underwriter may take this objection: "I find that the prospectus on the faith of which I agreed to underwrite contains a misrepresentation; therefore I refuse to apply" (*Karberg's case*, (1892) 3 Ch. 1); an underwriter, it may be observed, however, stands in a less favourable position, as regards obtaining relief on the ground of defects in a prospectus, than an ordinary applicant for shares. See *Baly v. Kenwick*, 85 L. T. 18. Or again he may neglect to apply, and, when sued for damages, may say: "I only undertook to apply if called on, and you never called on me to apply." *Ormerod's case*, (1894) 2 Ch. 475. Or, if the shares have been allotted to him, he may repudiate the allotment on the ground that A., who made the application on his behalf, had no authority, since he had not called on him to apply, and the authority was only to arise if he failed when called on to apply. See *Consort Deep Level Gold Mines*, (1897) 1 Ch. 575.

Even where the underwriter has actually applied pursuant to the contract, he sometimes, before allotment, serves the company with a notice that he withdraws his application, and, after allotment, he sometimes repudiates on the ground that he was misled by something said by those with whom he contracted, or by something stated in the prospectus; and in such a case it must be borne in mind that an underwriter who subscribes on the footing of a prospectus containing untrue statements may be entitled to repudiate an allotment, even though, at the time he subscribed, the company was not in existence. *Karberg's case*, (1892) 3 Ch. 1.

Occasionally an underwriter, without any show of legal justification, as in the above cases, seeing that an issue has not gone well, simply refuses to apply, and says: "Bring your action, I shall defend it, and you will suffer by the delay and publicity, so you had better compromise"; or, in the case of debentures, he used sometimes to say to the company: "I decline to take up the debentures underwritten by me. Bring your action if you like; but you cannot get specific performance of an agreement for a loan, or any substantial damages." *Western Wagon Co. v. West*, (1892) 1 Ch. 271; *South African Territories v. Wallington*, (1898) A. C. 309; *Bahamas Plantations v. Griffin*, 14 T. L. R. 139.

But this attitude of defiance will no longer avail him in the case of debentures or debenture stock now that the Court is empowered to specifically enforce a contract to take up and pay for debentures. See Companies Act, 1908, s. 105.

The above are only a few of the difficulties that may arise, but they serve as a sufficient warning to frame an underwriting contract so as specially to provide for the circumstances of the case, and, as far as practicable, to meet any dangers of repudiation or evasion.

For instance, such vague terms as "if shares" to a certain amount "are irrevocably applied for by persons resident in France" should not be used, being fruitful of controversy. *Paul Boyer, Ltd. v. Edwards*, 17 T. L. R. 16.

Underwriting
letter *prima*
facie an offer.

An underwriting letter generally operates as an offer, and the mere fact that the underwriter thereby purports to "agree" to do certain things makes no difference; but of course it may be framed as an acceptance, e.g., "I accept your offer to allow me to underwrite — shares on the terms following, viz., &c."

Withdrawal.

When the letter operates as an offer the usual rules apply. Accordingly the offer can be withdrawn at any time before acceptance (*Hebb's case*, 4 Eq. 9) and by word of mouth. *Truman's case*, (1894) 3 Ch. 272. The offer must be accepted, if at all, within the time specified in it, or, if no time is specified, then within a reasonable time (*Crawley's case*, 4 Ch. 323; *Hindley's case*, (1896) 2 Ch. 121, 134), and until accepted and notice of acceptance given there is no contract. *Consort, &c. Mines*, (1897) 1 Ch. 575. An oral acceptance is of course sufficient. *North Charterland Co.*, 13 T. L. R. 80. In one case it was held that notice of the acceptance of the offer contained in an underwriting letter might be inferred from the mere fact of the retention of the letter by the person to whom it was addressed (*Bultfontein Sun, &c. Mine*, 12 T. L. R. 461); but, in the absence of express words in the letter waiving notice of acceptance (see *Carlill v. Carbolic, &c. Co.*, (1893) 1 Q. B. 256), it is difficult to see how this decision can be supported. An underwriting letter is nothing more than an offer, and an offer, e.g., to sell land or to marry, is not regarded as accepted merely because it is retained unanswered. See the observations of Lindley, M. R., in *Consort, &c. Mines*, (1897) 1 Ch. 593.

In *Hindley's case*, *Hemp Cordage Co.*, (1896) 2 Ch. 121, Vaughan Williams, J., held that where the underwriting letter was not accepted until after the shares were offered to the public the acceptance was too late, and that the underwriter was entitled to repudiate his allotment, although when he repudiated he had been on the register for two years. But this decision was reversed on appeal, partly on the ground that on the true construction of the letter the offer thereby made was left open for acceptance for two months -- "this engagement is binding for two months"--and partly on the ground that the shares having been allotted to the underwriter, and he having acted as owner thereof, he was estopped from denying his membership. For the Court is not disposed to import into underwriting contracts implied conditions in derogation of the express terms of the contract. *Crown Lease Proprietors*, 14 T. L. R. 47.

An underwriting contract, like any other contract, is voidable at the option of the underwriters, where it is vitiated by material misrepresentation made by or on behalf of the person with whom it is made. Hence, it is important to see that the prospectus, or draft prospectus, or circular, on the basis of which the underwriting is done, is properly framed; and in some cases, before the Act of 1900, it was found desirable to provide expressly that the contract was not thus to be voidable, at any rate as regards innocent misrepresentation.

Voidability
for misrepresentation.

In the case of a company registered after December 31st, 1900, an underwriting contract (like any other contract) "made by a company before it is entitled to commence business" is "provisional only" and is "not binding on the company until that date, and on that date" is to "become binding." See Companies Act, 1908, s. 87 (3), (6), replacing Companies Act, 1900, s. 6, sub-ss. (3), (6).

Where contract provisional only.

As to when a company (other than a private company) is entitled to commence business, see sect. 87, sub-sect. (1), *supra*, p. 20.

One of the conditions of commencing business is that "the minimum subscription" must have been obtained, and thus the underwriting which secures such minimum subscription becomes necessary or expedient.

It is generally desirable in an underwriting letter to refer to the prospectus only in very general terms, or, at any rate, to provide for modifications. See Form 13, and last two notes at p. 256.

Reference to prospectus.

Where A. agrees with B. to underwrite so many shares, or debentures, or other securities, and A. refuses to perform such agreement, B. has, *prima facie*, no power to apply in A.'s name for an allotment to him, and accordingly, if A. makes default, B.'s only remedy is to bring an action for damages against A., a matter involving risk and delay. It is, however, competent to the parties to make it one of the terms of the agreement that, if A. makes default, B. may make the requisite application on his behalf; and it is usual so to provide, and such a provision is effective, and A. cannot revoke

Power to apply for shares in underwriter's name.

the authority thus given to B., for it is one of the terms of the contract between them that B. shall have this authority; and where there is a contract for valuable consideration giving to one of the parties to such contract an authority, the other party cannot put an end to the authority by repudiating that term of the contract.

This is the rule both at law and in equity. According to the common law view, the authority in such cases is not revocable, for it is "an authority coupled with an interest." *Gausson v. Morton*, 10 B. & C. 731. And, although a mere offer may be withdrawn before acceptance, if an authority to apply is contained in an actual agreement for valuable consideration, the authority may be irrevocable.

As to the equity view see *Carter v. White*, 25 C. D. 666. In that case, as part of a contract, authority was given by A. to fill up a blank in a bill of exchange, and it was held that this authority was not revoked by the death of A. "It is not," said Fry, L. J., "an authority, but a contract between the acceptor and the intended drawer that the drawer had a right to fill up the instrument and make it a complete bill. That is the nature of the transaction between them. You may call such a right an authority, but it is a right founded on a contract."

**Irrevocability
of power.**

*Carmichael's
case.*

That the authority to apply given by an underwriting contract is irrevocable, where the party to whom the authority is given has an interest, has been decided in several cases by the Court of Appeal. In *Carmichael's case*, (1896) 2 Ch. 643, Carmichael had signed an underwriting letter addressed to the promoter of a company, by which he agreed, in consideration of a commission, to subscribe for 1,000 shares in the company, the number to be reduced according to the number taken by the public. He further agreed that the agreement and application should be irrevocable, and, notwithstanding any repudiation by him, should be sufficient to authorize the promoter to apply on his behalf and the company to allot them. The promoter by letter accepted these terms. The company was then incorporated, and the subscription list was advertised to open on 27th March, and close on the 30th. On 27th March, Carmichael, who had applied for 1,000 shares, stopped the cheque for the deposit, and on the 30th wrote to the promoter and to the secretary of the company repudiating the agreement. The promoter on 2nd April applied, on behalf of Carmichael, for 980 shares, which, in the events which had happened, was the number he was bound to take, and the company allotted these shares to Carmichael, and put him on the register, and it was held that Carmichael was not entitled to have his name removed, for that the authority was an authority coupled with an interest, and therefore not revocable.

**Optensible
authority
given.**

Henry Bentley & Co., 69 L. T. 204, C. A., June, 1893, is another illustration of the rule. There A., at the request of N., signed an underwriting letter addressed to L. containing the following provision: "This agreement to be irrevocable on my part, and to be

sufficient in itself to authorize you, in the event of my not applying for shares as above mentioned, to apply for such shares in my name and on my behalf"—it was held that A. not having applied for any shares, an allotment to him in response to an application by L. was ineffective, although L. had never notified to A. his acceptance of the underwriting letter, and although A. had handed over the letter to N. on the distinct but private understanding that it was to be accepted "before 11.30 a.m. to-morrow morning, otherwise my underwriting is not to hold good."

The ground of this decision, as explained in *Ex parte Stark*, (1897) 1 Ch. 575, 591, was estoppel, namely, that the principal is bound by the acts of the agent which are within the apparent scope of his authority. See also *Duke of Beaufort v. Neeld* (1845), 12 Cl. & Fin. 218, and *Hambro v. Burnand*, (1904) 2 K. B. 10, which shows that where an agent, in contracting on behalf of his principal, has acted within the terms of a written authority given to him by the principal, but the existence of which was not known to the other party to the contract, the principal cannot, if the other party has acted *bonâ fide*, repudiate liability on the contract on the ground that the agent in making it acted in his own interests and not those of his principal.

In *Henry Bentley & Co., supra*, the underwriting letter was in terms an offer made by the underwriter, but that offer was not accepted by notice, so that there was not in reality any contract. The case, however, was not fought on that point, but on the private letter of instruction.

This is stated by Lindley, L. J., in the case next mentioned, *Consort Deep Level Gold Mines, supra*, pp. 289, 290. In that case there was an underwriting letter in the shape of an offer, and that offer was never accepted by the company to which it was addressed, and the Court held that the authority to apply given by the letter did not arise, and therefore that the allotment made to the underwriter was ineffective.

Sometimes the underwriter, on signing his underwriting letter, also signs and hands over at once an application for the full number of shares underwritten by him, together with a cheque for the application moneys. *Carmichael's case*, (1896) 2 Ch. 644. This plan is in some cases expedient, but the underwriting letter in such a case should bind the underwriter not to revoke the application, and as a general rule there is no special advantage to be obtained by adopting this mode of underwriting.

Where A. addressed an underwriting letter to B. agreeing "at any time within three months after the date hereof, if and as called upon by you, to subscribe or find responsible subscribers for any number of shares you may require, not exceeding 1,000," with an authority for B. to apply "in the event of my not subscribing or finding responsible subscribers," it was held that an allotment to A. in response to an application by B. was not effective, B. not having called on A.

Undertaking
only "if
called upon."

to subscribe. *Ormerod's case*, (1894) 2 Ch. 474. This case turned on the presence of the words, "If and as called upon by you," which made the authority to apply conditional on the underwriter being first called on, and thus given the opportunity of finding subscribers if unwilling himself to apply. See also to the same effect, *Brussels Palace, &c. v. Prockter*, 10 T. L. R. 72; *Sangster v. Netter*, 9 T. L. R. 441; and *Bultfontein San Diamond Mine*, 12 T. L. R. 461, where the words were "whenever called upon."

Where company bound to call for authority of underwriter's agent.

In all such cases the company, in dealing with the underwriter's agent, is bound to call for his authority, and is thus fixed with notice of the qualifications and conditions attached to such authority. Where, however, the application appears to accord with the authority contained in the underwriting contract, the company is not to be treated as having notice of private instructions given to the agent *Henry Bentley & Co.*, 69 L. T. 204, *supra*.

Derogatory conditions not usually to be implied in the contracts.

On the same principle the Court, as is evident from the decision of the Court of Appeal in *Crown Lease Proprietary Co.*, 11 T. L. R. 47, is not disposed to import into underwriting contracts implied conditions in derogation of the terms expressed. In that case A underwrote some shares, and gave B. authority to apply. B. applied after it had become clear that the scheme contemplated by the prospectus could not be carried out. It was held, nevertheless, that A was bound

Where commission payable, although underwriter defaulted, and no shares were applied for in his name.

Where A. signed an underwriting contract with B., but failed when called on by B. to apply for the shares, it was held that A. was entitled to his commission though he had made default and B. had not applied for him. This was decided on the ground that payment of the commission was not made conditional on A. duly applying, and that B. had no cause for complaint, as he might have applied on A.'s behalf. *Sangster v. Netter*, 9 T. L. R. 441.

Specific performance or damages. Debentures and shares distinguished.

The underwriting of debentures presented this difficulty, that the Court would not until the Companies Act, 1907, s. 16 (now replaced by sect. 105 of the Companies Act, 1908), specifically enforce an agreement to borrow or to lend money at the instance of either the intending lender or borrower. The remedy for breach of such a contract was by action for damages. Accordingly, an agreement with a company to take up debentures of the company, whether by underwriting or unconditionally subscribing for the same, differed essentially from an agreement to take shares. The Court would order specific performance of the latter agreement (p. 57), but not of the former. So, if a man subscribed for and became the allottee of shares, and made default in paying up the amount in due course, the company could and can recover the amount from him; but if he subscribed for debentures, and made default in paying the instalments, the company could not, prior to 1907, sue for the balance. It could only claim damages, and in most cases the damages given would be nominal. *South African Territories v. Wallington*, (1898)

A. C. 309; *Bahamas Plantations v. Griffin*, 14 T. L. R. 139. Hence, in the case of debentures, the real security for the payment of subsequent instalments was the amount, if any, actually paid on application and subsequently which was usually made liable to forfeiture for non-payment of the balance. In like manner, the Court would decline to compel specific performance of a contract to take up debenture stock payable at a fixed date, for the issue of such stock really amounts to a borrowing of money, though it may be that the rule did not apply to so-called perpetual debentures and debenture stock (the relationship there not being the ordinary one of borrower and lender, but in the nature of a contract to purchase a perpetual annuity, a contract of which the Court will grant specific performance). See further, Part III., 10th ed. 161.

Moreover, the rule did not apply when the underwriting contract was made, not with the company, but with a third party, *e.g.*, the vendor. He at any rate would be entitled to substantial damages. Nor did the rule apply to a contract with a company which is disposing of debentures of some other company, for in such case the transaction is in effect a contract of sale, not of loan, and therefore specific performance will be decreed.

In most cases the right to keep the amount previously paid afforded a sufficient guaranty that a subscriber would pay the balance; but sometimes, and especially when the instalments were spread over a lengthened period, it was deemed advisable to supplement this guaranty by inserting a provision empowering the company to authorize some person on the subscriber's behalf to accept the company's bill of exchange, payable on demand, for any instalment in relation to which the subscriber makes default. Such an authority being part of the contract was irrevocable, and the acceptor would have to pay the amount of the bill, and not mere damages. See Form 21.

All these nice distinctions and devices are now, however, rendered obsolete by the section above alluded to (Companies Act, 1908, s. 105), providing that "A contract with a company to take up and pay for any debentures (or debenture stock) of the company may be enforced by an order for specific performance": a long-needed reform bringing the law into line with good sense.

An underwriting contract under hand requires a 6*d.* stamp only; if under seal a 10*s.* stamp. The fact that it contains an authority to apply on the underwriter's behalf does not render a power of attorney stamp requisite (*Walker v. Remmett*, 15 L. J. Ch. 8, 174), for the authority is incidental to the other provisions; but an authority to apply, which is not part of a contract, may require a power of attorney stamp. 10*s.* *Ibid.*

Terminable
debenture
stock.

"Perpetual"
debentures or
debenture
stock.

Specific per-
formance, *q.v.*

Specific
performance
(*semble*) where
contract is
with third
party or as to
debentures of
another
company.

Forfeiture
of paid in-
stalments in
default.

Bill of ex-
change some-
times given.

PRECEDENTS.

Form 13.

THE A COMPANY, LIMITED.

Underwriter's
application.

Proposed issue of 100,000 shares of 1/ each, payable as follows:

To the above-named Company.

Gentlemen.

I request you to admit me as an underwriter at a commission of
p.c. of 100] of the above shares or any less number you think
fit, and upon the terms set forth in the within conditions. Be so good
as to notify me by post your acceptance hereof.

Yours, &c.

Date ---.

Name in full ---

Signature ---

Address ---

Occupation ---

An underwriting letter, if for a specified number of shares only, being an offer must, unless otherwise expressed therein, be accepted for the full number of shares. Hence the insertion of the words "or any less number you think fit." The conditions are sometimes referred to as set forth "below," or "within," or "indorsed hereon," or "at back," and sometimes they are embodied in the letter and referred to as "the conditions following."

I hereby acknowledge notice of your acceptance of the above for -
shares.

Signature of Underwriter

Cases frequently arise in which an underwriter alleges that he has not been given notice of acceptance, and it is therefore desirable to obtain an acknowledgment under his hand at the foot of the letter.

Conditions of Underwriting.

Underwriting
contract
(vendors or
promoters pay
commission).

1. Applicants are to be in the form accompanying or referred to in the prospectus relating to the above issue as finally settled and filed with Registrar of Companies.

Sometimes words are added thus—"And notwithstanding that the same departs from the draft prospectus previously submitted to the underwriters.

Sometimes this clause runs, "such prospectus to be framed substantially in accordance with the draft annexed hereto," or "framed on the general lines of the draft prospectus dated the --- day of ---, with such, if any, modifications therein as Messrs. A. and B. (below referred to as 'the vendors') may

Form 13

assent to, but so that no alteration be made as to the capital or as to the amounts made payable on application and allotment," or "framed in accordance with the draft as ultimately settled and approved by Messrs. —, the company's solicitors, but so that the amounts per share payable on application and allotment respectively shall not exceed £— and £—."

It is generally desirable to leave scope for alterations in the draft prospectus, for it very commonly happens that some alteration becomes necessary at the last moment, and, in the absence of authority to alter, it would be necessary to ask all the underwriters to consent. Occasionally a provision is added as to advertising, e.g., "and such prospectus is to be advertised and circulated to such extent as the company's brokers shall advise;" but it would not be safe to say that it should be "duly" or "fairly" or "widely" advertised, for then it would be open to each underwriter to object that the advertisement was not sufficient. Sometimes it is provided that the prospectus must specify the day for opening and closing the list of subscriptions.

2. Before three o'clock on the day on which the prospectus relating to the above issue is first advertised in the newspapers or on which the list of subscriptions is opened, as specified in the prospectus when published] each underwriter is to apply for the number of the shares underwritten by him, and every such application must be accompanied by a cheque in favour of the bankers of the coy for the required deposit on such shares.

It is a common plan to require the application to be made on the day on which the list is opened.

Sometimes the form runs, "signed by the underwriter or his nominee or nominees (approved by the company)," or "signed by the underwriter or some other responsible person or persons approved by the company."

A cautious underwriter sometimes adds a note to his application as follows:

"N.B.—I make this application as an underwriter, and on the footing that the public subscriptions are to go in relief, *pro rata*, of the underwriters' subscriptions."

Sometimes an underwriter guards against the danger by writing to the company a separate letter, referring to his application and informing the company that it is an underwriting application, and that it is made on the footing, &c.

Sometimes the underwriters are not required to subscribe until the closing of the lists. In such case substitute condition 3 for 2, and let the following clause be condition 3:—

3. If upon the closing of the list of subscriptions the whole of the shares offered shall not have been subscribed for by the public, each underwriter, upon the request of the coy, is to apply, in accordance with the prospectus, for his proportion of the shares not subscribed by the public."]

When such a condition is used, it is necessary to give to the underwriter notice stating how many shares he must apply for, and until that notice is given and default made by him he does not "fail" to apply within condition 4. *Consort, &c. Mines*, (1897) 1 Ch. 575; *Brussels Palace of Varieties v. Prockter*, 10 T. L. R. 72.

Form 13.

3. The public subscriptions for the shares received before the closing of the subscription list are to go in relief of the underwriters, in proportion to the amounts underwritten by them respy. Subscriptions by the public withdrawn before allotment, and subscriptions rejected by the directors as unsatisfactory, are not to be counted as public subscriptions.

Sometimes provision is made that applications initialled and sent in by an underwriter before the closing of the subscription list, and accepted by the company, are to go in further relief of such underwriter's obligation.

Sometimes the issue of a portion of the shares has been otherwise insured, and in such case it may be necessary to add a clause to the effect that "the vendors shall be deemed to underwrite — of the said shares on the footing of these conditions," and if so arranged it can be provided that the public subscriptions "shall go first in relief of the vendors' undertaking aforesaid, and any surplus shall go in relief of the underwriters."

4. Where any underwriter fails to put in his applicon on the day aforesaid, the coy is to be at liberty to nominate some person on behalf of such underwriter, to sign and put in such applicon, and to conclude an agreeemt with the coy for the allotment to such underwriter of the shares which ought to be taken up by him as aforesaid or any less number [and the authority conferred by this clause is irrevocable].

The authority thus to apply and contract, being one of the terms of the contract, cannot be revoked. *Carmichael's case*, (1896) 2 Ch. 643; *Carter v. White*, 25 Ch. D. 666, *supra*, p. 292. Hence the words in brackets can, if desired, be omitted.

If preferred, it can be provided that "the company may treat the underwriting letter as a sufficient application, and may allot accordingly." This is just as effective. *Licensed Victuallers' Association*, 42 C. D. 1.

Another plan is to get each underwriter to sign at once, in blank, a proper form of application for the shares, the vendors being empowered to fill up the blank for the proper proportions when ascertained.

5. Each underwriter is to be paid by the coy a commission at the rate of £—— p.c. on the amount underwritten by him, such commission to be paid within —— days after the coy becomes entitled to commence business.

Sometimes it is provided that the commission was to be paid out of some particular fund, *e.g.*, "out of the cash portion of the purchase-money payable by the company to the vendors, and the payment to be made within —— days after the first general allotment of the shares aforesaid, or within —— days after the completion of the purchase," or within —— days after the payment of the first instalment of the purchase-money payable by the company to the vendors. See now sect. 89 of the Companies Act, 1908, *supra*, p. 279.

When the commission is to be paid by the company out of premiums, provision should be made accordingly, *e.g.*, "is to be paid by the company out of the premiums received in respect of the above issue a commission at the rate of £—— per cent.," &c.

FORMS.

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As to payment out of premiums, see p. 286, *supra*.
Sometimes the company reserves power to satisfy the commission by the issue of paid-up shares.

Form 13.

6. The underwriters are to be relieved altogether, unless at least — of the sd shares are underwritten before the prospectus is published

Such a condition is sometimes inserted.

Sometimes a condition as follows is inserted:—

“Each underwriter is to be at liberty to determine his obligation to subscribe if before the — day of — the coy should, by reason of unforeseen circumstances, get into financial difficulties or discredit, or if before that date any war or political disturbances or panic should break out and seriously affect the English money market.”]

7. No underwriter is to effect any sale of shares in the coy, either directly or indirectly, until (at least fourteen days) after the first general allotment of shares has taken place

8. Any allotment to an underwriter as such must be made within weeks from the date of his applicon for admission as an underwriter.

9. Any notice to an underwriter may be given by sending the same through the post, addressed to him at the address stated in his form of applicon for admission as an underwriter, and shall be deemed to be served at the expiration of 24 hours after it is posted.

To —

Letter of
acceptance.

Sir,

With reference to your request of the — inst. we admit you as an underwriter of — ordinary shares in the above coy, at a commission of — p.c., upon the footing and subject to the conditions therein referred to.

Yours, &c.

In many cases the liability of an underwriter turns on the question whether his offer to underwrite has been accepted by the persons to whom it is addressed. Accordingly, a record of the posting of the acceptance should be kept, or, better still, let the underwriter sign on the letter an acknowledgment as below, p. 301.

Form 14.

Underwriting
letter with
signed appli-
cation and
deposit.

THE B COMPANY, LIMITED.

Capital £—, divided into — shares of 11. each.

The proposed issue of — shares of 11. each.

To the above-named Company

Gentlemen,

1. With reference to the draft prospectus, dated the — day of — and marked "draft subject to revision," which when finally settled you propose to issue, and for the reasons below mentd, I the undersigned hereby underwrite — of the above shares so to be offered, and I now hand you an applicon for the same together with cheque for £— for payment of the deposit of — per share payable on the shares underwritten by me which is to be applied accordingly.

It is now very common to require an underwriter to sign at once a formal application and pay over the application money, as the payment for is a guarantee of *bona fides*.

2. My subscription is to be on the terms of your prospectus as finally settled and filed with the Registrar of Companies, and you are at liberty to insert the date of such prospectus in my applicon.

3. If — [or the whole] of the said — shares in your capital shall be applied for by and allotted to the public, I am not to be allotted any shares in respect of my applicon; but if [the whole of] such — shares be not so applied for and allotted, then all applicons made by the public on which allotments are made are to be applied in relief of the underwriters, including myself, rateably in proportion to the amount of the shares underwritten by them resply. Provided that if any of the underwriters shall, under clause 4 of the underwriting letters, subscribe or procure subscriptions for amounts in excess of the amounts which they would but for this proviso have to take up, then the excess shall be applied in relief of the underwriters who have not completely relieved themselves under clause 4, and in proportion to the amounts underwritten by them resply.

4. All applicons initialled by me and approved by you, sent in by me prior to the time fixed by the prospectus for closing the list of subscribers, are to be applied primarily in relief of my obligation to subscribe hereunder and shall not be considered subscriptions by the public.

5. If I withdraw, or do not hand you the above-mentd applicon you are to be at liberty to authorize any one of your officers in my name or on my behalf to sign and put in an applicon in the form referred to in the prospectus as published for the number of shares

underwritten by me or any less number, and to take an allotment in respect thereof, and I will pay the (?) application and allotment money immediately after receiving notice of allotment

Form 14.

6. You are within — days after you shall have become entitled to commence business to pay me a commission of — p.c. in cash on the nominal amount of the shares underwritten by me, such commission to be paid whether I am required to accept an allotment of shares or not; but if an allotment be made to me no commission is to be payable until the (?) application and allotment moneys payable by me have been paid, and you may apply the commission in or towards payment of such moneys.

You are to have the option of satisfying the amount payable to me by allotting to me fully paid-up shares in your capital to be treated as of par value, and if you elect to exercise this option you are before allotment to enter into a contract with some person as trustee for me, providing for the making of such allotment in satisfaction.]

As further reason, I am to have the right, exercisable at any time before the — day of —, to call for the allotment at par of one 1/ share in your capital for every 1/ share underwritten by me. Every such call must be in writing under my hand served on you, and accompanied by the par value of the shares called for, and you are to allot the shares so called for to me or to my nominee as I may direct, and each call may comprise so many of the said shares as I choose.]

That a clause as above is valid, see *supra*, p. 284.

7. I am not to be bound to subscribe unless at least — of the said shares are underwritten prior to the publication of the prospectus, and any allotment to me must be made before the — day of —

8. My obligation hereunder is to hold good notwithstanding any variation between the draft prospectus submitted to me, as above referred to, and the prospectus as finally settled and published, provided that the amount of the capital of the co., namely, £— divided into — shares of 1/ each, is not altered.

9. Any notice to me may be served by sending the same by post addressed to me at the subjoined address, and shall be deemed to be served on the day following that on which it is posted

Be so good as to notify to me your acceptance of this proposal.

Dated this — day of —.

[Signature of Underwriter.]

Address.

I acknowledge notice of your acceptance of the above proposal for — shares.

Signature of Underwriter.]

Form 14a.

Acceptance of
underwriting
proposal.

To —, —
of —.

Sir,

With reference to your underwriting proposal of the — of —, a copy of which is set forth above, the coy hby accepts the same for shares and acknowledges the receipt of the cheque for £ —, being the deposit thereon.

Date —.

A. B. { Directors.
C. D. }

Form 15.

Sub-under-
writing letter.

THE — COMPANY, LIMITED.

Capital £—, divided into — shares of 1*l*. each.

Proposed issue of — shares.

To —, of —.

Sir,

Understanding as I do that you have, for a commission to be paid by the above-named coy, underwritten — of the above shares, I hereby propose to sub-underwrite — of the same shares, and now hand you an applicon for the same, together with cheque for £— for payment of the deposit of — per share payable on the shares sub-underwritten by me, which is to be applied accordingly.

My subscription is to be on the terms of the coy's prospectus as finally settled, and filed with the Registrar of Companies, and you are to be at liberty to insert the date of such prospectus in my applicon.

If the sd — shares in the coy's capital shall be applied for and allotted to the public within — days after the publication of the prospectus aforesd, I am not to be allotted any shares in respect of my applicon, but if the whole of the sd shares shall not be applied for and allotted within the period aforesd, then all applicons made by the public on which allotments are made are to be applied in relief of the sub-underwriters, including myself, rateably in proportion to the amount of the shares sub-underwritten by them respectively, and only my rateable proportion of the shares not so applied for by and allotted to the public shall be allotted to me.

All applicons initialled by me and approved by you sent in by me to the coy prior to the time fixed by the prospectus for closing the list of subscribers are to be applied in further relief of my obligation to subscribe hereunder, and shall not be considered subscriptions by the public.

If I withdraw or do not hand you the above-mentioned applicon, you are to be at liberty in my name and on my behalf to sign and put

in an applicon in the form referred to in the prospectus as published for the number sub-underwritten by me or any less number and take an allotment in respect thereof, and I will pay the applicon and allotment money immediately after receiving notice of allotment. **Form 15.**

You are, within — days after you shall have been paid your underwriting commission by the company, to pay me a commission of — per cent. in cash on the nominal amount of the shares sub-underwritten by me, such commission to be paid whether I am required to accept an allotment of shares or not, but if an allotment be made to me no commission is to be payable until the applicon and allotment moneys payable by me have been paid, and you may apply the commission in or towards payment of such moneys.

I am not to be bound, &c. [See Form 14.]

My obligation hereunder, &c. [See Form 14.]

Any notice to me may be served, &c. [See Form 14.]

Be so good as to notify to me your acceptance of this proposal.

Dated this — day of —.

Signature of Underwriter.]

Address.

I acknowledge notice of your acceptance of the above proposal for — shares.

Signature of Underwriter.]

It is extremely important to secure from the underwriter an acknowledgment in writing of the receipt of notice of acceptance of his underwriting proposal, for otherwise where the party to whom the letter is addressed, in exercise of the authority apparently conferred by the letter, proposes to sign an application for shares, the company may not improbably raise the question whether the offer has been accepted. The company has no right to presume the acceptance of the offer; and if the offer has not, in fact, been duly accepted, the application, pursuant thereto, will be ineffective. See *Connaught Deep Level Gold Mines, Ltd.* (1897) 1 Ch. 575.

THE D COMPANY, LIMITED.

(About to be registered.)

Proposed issue of 100,000 shares of 1*l.* each.

To A. B., of —, as trustee for the above-named coy.

Sometimes it is found desirable to make the underwriting contracts with a trustee for the proposed company, so that the underwriter may be secured from the expense of registration is incurred.

Sir,

With reference *as in Form 14*].

My subscription is to be on the terms of the coy's prospectus as finally settled and issued, and you, &c. [*as in Form 14*].

Form 16.

Underwriting
letter to
trustee for
company
about to be
formed.

Form 16.

If, &c. [*as in Form 14*].

All applicons, &c. [*as in Form 14*].

If I withdraw or do not hand you the above-mentioned applicon, you are to be at liberty in my name and on my behalf to sign, &c. [*as in Form 14*].

The coy is within — days after it has become entitled to commence business, &c. [*as in Form 14*].

I am not, &c. [*as in Form 14*].

My obligation hereunder, &c. [*as in Form 14*].

You are to be at liberty on my behalf to concur with the coy in making a contract under which the coy is to take your place for the purposes hereof, and if such contract is not duly made before the publication of the prospectus I am to stand free from all obligations hereunder.

[*The rest as in Form 14.*]

Except as allowed by sub-sect. 1 of sect. 89, commissions, discounts, &c., out of capital in relation to the taking of shares are prohibited; but the section is not to affect the power of the company to pay brokerage at the ordinary rate as heretofore.

Underwriting Letter.

TO THE — COMPANY, LIMITED.

Form 17.

Underwriting
letter where
application
not to be made
till list closed.

Proposed issue of 100,000 Ordinary Shares of 1*l.* each;

Payable as to — on applicon, and as to — on allotment, &c.

Gentlemen,

I agree, for the reason below stated, to underwrite — shares of 1*l.* each in the above-named coy.

My subscription is to be on the terms of the coy's prospectus as finally settled and published, and upon the form accompanying or referred to in such prospectus.

If upon the publication of the prospectus, the whole of the said 100,000 shares shall be taken up by the public, then no allotment is to be made to me; but if the whole shall not be so taken up, then I am to be bound to subscribe for and take up the residue.

The consideration for my entering into this agreement shall be, &c., &c.

Applicons procured by me and properly identified and approved by you, upon which allotments shall be made, shall go in reduction of my underwriting obligation, and shall not be counted as applicons by the public.

As soon as conveniently may be after the time fixed by the prospectus for the closing of the subscription list you are to inform me

the number of shares for which I am to subscribe as above, and unless within — hours from such notice being given I apply for the same you are to be at liberty to treat this letter as my application for the same, and I will pay the allotment money immediately after receiving notice of allotment. Your certificate in writing that I have so failed and as to the number of shares I am bound to take shall be conclusive.

Form 17.

I undertake not to effect any sale of shares in the coy, either directly or indirectly, until at least fourteen days after the first general allotment of shares has taken place.

Any allotment pursuant to this agreement must be made on or before the — day of — next.

Any notice to me may be sent through the post to the subjoined address, and shall be deemed to be served on the day following that on which it is posted.

Be so good as to notify to me your acceptance of this proposal.

Dated the — day of —.

[Signature and Address of Underwriter]

I acknowledge, &c., see *supra*, p. 301.

Sometimes the underwriting letters contain a provision that the shares, if any, taken up pursuant to the agreement are to be pooled, e.g.:

As regards any shares allotted to me pursuant hto, I am to pool the same by signing on my request the pooling agreement, a copy of which is indorsed hereon, and if I do not comply with such request within 24 hours after the making thereof you may sign the said pooling agreement on my behalf.

See Forms 6, 7, and 8.

THE — COMPANY, LIMITED.**Form 18**

Issue of 10,000 Preference Shares of 10*l.* each, at a premium of 2*l.* per share, payable as follows:—[state how].

Underwriting contract with the company

Conditions of Underwriting.

1. The above shares are to be offered in the first instance to the ordinary shareholders in the above coy in accordance with the articles of association, and those (if any) not taken up by them are to be offered for public subscription by a prospectus approved by the coy's brokers, Messrs. —, and on the footing that the issue price, 12*l.* per share, is to be paid up as above.

Where commission paid out of profit.

2. If any such prospectus is published, an underwriter, before 3 o'clock on the day on which the list of subscriptions is opened, as

Form 18. specified in such prospectus, is to apply, or procure responsible persons to apply, for, &c. [See Form 13, clause 2.]

3. The subscriptions by shareholders in response to the offer above referred to, and the public subscriptions received before the day of the subscription list, are to go in relief of the underwriters, *pro rata*, in proportion to the amounts underwritten by them resp'y, save that subscriptions by nominees of an underwriter, if initialled by him, are to go in his relief exclusively.

4. If any underwriter fails to put in his applicon on the day aforesaid the coy is to be at liberty to nominate any person to sign and put in such applicon on the underwriter's behalf, and an applicon signed by such nominee shall be effective, and is not to be revocable by the underwriter.

5. The coy is to pay to each underwriter a commission at the rate of — p.c. on the amount underwritten by him, and such commission is to be pd within — days after the notices of allotment are sent out [if so, add and is to be payable exclusively out of the undivided profits of the coy. See p. 286.]

6. No underwriter is to effect any sale. [See Form 13, clause 7.]

7. Any allotment. [Form 13, clause 8.]

8. Any notice. [Form 13, clause 9.]

To the above-named coy.

I hereby underwrite — shares of the above issue on the terms set forth in the above underwriting conditions, which are to be treated as embodied in this applicon.

Be so good as to notify to me your acceptance hereof.

Signature, date, &c., as above.]

Form 19.

Agreement
to procure
underwriting
for a lump
sum.

AGREEMENT TO PROCURE UNDERWRITERS.

AN AGREEMENT made the — day of — between The — Coy, Limtd, of — (hntfr called "the Coy"), of the one part, and A. B., of — (hntfr called "Mr. B."), of the other part: WHEREAS the capital of the coy is 120,000l., divided into 120,000 shares of 1l. each: AND WHEREAS the coy is about to offer 80,000 of the sd shares for public subscription, and such offer is to be made by a prospectus: AND WHEREAS a draft of such prospectus has been prepared, and is annexed hto, but it is contemplated that such draft may be altered in some respects before it is finally settled and filed with the Registrar of Companies: AND WHEREAS Mr. B. has offered to procure the placing of 40,000 of the shares so to be offered.

NOW THEREFORE IT IS AGREED as follows:—

1. Mr. B. shall procure 40,000 of the shares so to be offered as aforesaid to be underwritten by responsible underwriters within — days from the date hof.

2. The underwriting shall be effected by proper contracts in writing signed by the respective underwriters, and framed in the terms of the underwriting letter annexed hto, save that if Mr. B. shall himself underwrite pt [not exceeding — shares] of the sd shares the underwriting letter signed by him must be addressed to the coy, and the commission payable thereunder shall be treated as in pt payment of the sum of 15,000*l.* below mentd.

Form 19.

3. The underwriting letters, duly signed as aforesaid, must be delivered to the coy within — days from the date hof, and it shall rest with the coy on such delivery to declare whether it is or is not satisfied as to any of the underwriters, and if it so declares, Mr. B. shall forthwith substitute other responsible underwriters approved by the coy.

4. On delivery to the coy of the underwriting letters aforesaid, the coy is to be entitled to the full benefit thof, and to exercise all the rights thby conferred on Mr. B., and Mr. B. shall be bound to pay the commission payable under such underwriting letters, and the coy shall be at liberty, out of the sum of £—— below mentd, either to pay such commission on his behalf or to retain the requisite amount until he shall have satisfied the coy that he has pd the underwriting commission.

5. In conson of the premises the coy shall, within — days after it becomes entitled to commence business, pay to — the sum of £——, with full power for them to satisfy £—— part of the sd sum by the allotment of 3,000 fully pd-up shares in the coy.

AS WITNESS, &c.

SCHEDULE.**THE — COMPANY, LIMITED.**

Issue of 3,500,000*l.* 5 p.c. First Mortgage Debenture-

For the purpose of consolidating and converting the outstanding first and second 5½ p.c. mortgage debentures of the coy.

The new debentures will be redeemable at 103 p.c. in 20 years, by annual drawings, the first redemption to take place on 1st January, 1896.

The coy will reserve power to pay off any debentures at any time after the — of — at 105 p.c. on giving six calendar months' notice.

The new debentures will be secured by a trust deed in the terms of the draft already prepared by the coy's solors.

The holders of the present debentures will be given the option of converting their debentures into debentures of the new issue, the option to be exercised within 14 days from the first publication of the prospectus of the new issue.

Form 20.

Underwriting
of a debenture
issue.

Form 20.*Conditions of Underwriting the above Debentures.*

1. An underwriter is on the day of the publication of the prospectus relating to the above issue to deliver to Messrs. N. M. R. & Sons, at — Court, — Lane, London, an applicon in writing framed in accordance with the form referred to in such prospectus, and duly signed by such underwriter, for the amount of the debentures underwritten by him: but, regard being had to condition 6 hereof, the applicon need not be accompanied by the deposit mentd in the prospectus.

2. The coy is to be deemed to underwrite £ — of the debentures.

3. The public subscriptions for the debentures are to go as to the first £ — in relief of the coy's underwriting application afsd, and as to the surplus in relief of the underwriters, other than the coy, in proportion to the amounts underwritten by them resply; and accordingly, if the public subscriptions amount to 3,500,000*l.*, the underwriters are to be wholly relieved from their underwriting obligations.

4. For the purposes of the preceding clause, all subscriptions on the footing of the sd prospectus made before the closing of the subscription lists (other than those made pursuant to conditions 1 and 5) are to be considered public subscriptions, whether for cash or for conversion.

5. Where any underwriter fails to put in his applicon on the day afsd, the coy is to be at liberty to authorize any person to sign and put in such applicon on his behalf, and such authority shall be effective. An applicon made under this clause, or under clause 1, shall not be revocable.

6. Before entertaining any applicon for acceptance as an underwriter the coy must be satisfied that the applicant has pd in to the account of the coy, at Messrs. N. M. R. & Sons, a sum equal to 5 p.c. on the amount proposed to be underwritten by him, and the sum so pd in is to be treated as the deposit payable on applicon for the debentures underwritten by him.

7. Any allotment on an applicon made pursuant to these conditions must be made before the — day of —, otherwise the underwriter shall be relieved altogether. If at any time between the signing of this applicon and the publication of the prospectus, owing to grave political or financial disturbances, the price of British 2½ p.c. Consols fall to or below —, the underwriters are also to be relieved of their obligation.

8. The coy within — days after the closing of the subscription lists is to pay to each underwriter a commission at the rate of — p.c. on the amount of the debentures underwritten by him pursuant to these conditions.

9 Any notice to an underwriter may be given by sending the same through the post in a letter addressed to him at the address stated in his form of applicon for admission as an underwriter, and shall be deemed to be served at the expiration of twenty-four hours after it is posted.

London, May, 18—

Form 20.

Application for Admission as an Underwriter.

To the — Coy. Limtd.

Gentlemen,

Having pd to your bankers, Messrs. N. M. R. & Sons, — Court, — Lane, London, £—, being a deposit of 5 p.c. on £— debentures of the above issue, I hby request you to admit me as an underwriter of that amount of debentures of the sd issue, or any less amount specified in your acceptance hereof, subject to the conditions of underwriting annexed.

Date —.

Name in full .

Address

Description —.

Signature —

As to the underwriting of debentures, see pp. 294, 295, *supra*.
Such underwriting is not touched by sect. 89 of the Companies Act, 1908.

THE — COMPANY, LIMITED

Issue of £ — Debentures, &c.

To the above-named coy.

Form 21.

Another.

Gentlemen,

For the conson hnftr menud, I, the undersigned, agree with you that on the publication of the prospectus offering the above-mentioned debentures for public subscription, I will apply in the form referred to in such prospectus for £— of the sd debentures, and will pay thereon the amount payable on applicon, and will accept the allotment of and pay the allotment moneys and subsequent sums which become payable in respect of any debentures allotted to me in response to such applicon.

It is understood that to the extent to which applicons are received from the public before the closing of the subscription list, I, and all other underwriters, are to be relieved from our underwriting obligations rateably in proportion to the amount of the debentures of above issue underwritten by us resply.

Form 21.

If the full amount of the said debentures is within fourteen days after the first publication of the prospectus aforesaid allotted in respect of such public subscription, I am not to be liable to take up any of the debentures hereby underwritten. Applicants rejected by the directors, and applicants withdrawn before allotment, are not to be considered applicants from the public within the foregoing words.

If I do not put in such applicant at the time aforesaid you are to be at liberty in my name and on my behalf to put in such applicant, and I will pay the applicant and allotment money immediately after receiving notice of allotment.

In consonance of the premises I am to have the right, exerciseable at any time before the — day of —, to call for the allotment at par of one £1. share in your capital for every 2£. of debentures underwritten by me. Every such call must be in writing under my hand served on you and accompanied by the par value of the shares called for, and you are to allot the shares so called for to me or to my nominees as I may direct, and each call may comprise so many of the said shares as I choose.

If I make default in paying any sum payable by me in respect of the debentures allotted to me pursuant to this underwriting letter, you are to be at liberty to draw a bill on me for the amount payable to you or order at the expiration of seven days from the date thereof, and to authorize any person to accept such bill in my name and on my behalf and such acceptance shall be valid, and payment of such bill shall operate in satisfaction of the amount in default.

As to this clause, see *supra*, p. 295.

If I effect any sales of debentures of the company within fourteen days after the first general allotment I am to forfeit my right to call aforesaid, and my right to call aforesaid shall also be forfeited if I fail to pay the applicant or allotment moneys in respect of the debentures, if any, allotted to me pursuant to this letter.

Any allotment pursuant to this letter must be made within — days from the date hereof.

I assent to any modifications in the draft of the prospectus which has been shown to me before the publication thereof.

Any notice to me may be sent through the post to the subjoined address, and shall be deemed to be served on the day following that on which it is posted.

This agreement is signed in duplicate.

Dated this — day of —.

[Signature of Underwriter.]

The above-named company accepts and adopts and agrees to the above.

For the company.

A. B. }
C. D. } Directors.

Form 21.**Call of Shares.**

The reason for underwriting is not uncommonly the giving to the underwriter the call of shares in the coy exerciseable at any time within a specified period, and either at par or at a premium, and often it is arranged that this right of call shall be embodied in a certificate as below.

THE — COMPANY, LIMITED.

Registered office —.

No. —, Call Certificate. Number of Shares —.

This is to certify that for value received, —, of —, or other the registered holder for the time being hrof, is entitled on or at any time before the 1st day of June, 1912, to call for an allotment of — shares of 1l. each in the — Company, Limited, on payment in cash of 1l. 10s. per share, being the full amount of the share plus a premium of 10s. per share, and the following conditions shall apply:—

- (1) Any call hereunder may be made for the whole or part of the sd shares. Every call must be in writing (in the indorsed form) under the hand of the registered holder for the time being hrof, and must specify the number of shares called for, and the name and address of the person to whom the same are to be allotted, and must be accompanied by this certificate and by a remittance of the sum of 1l. 10s. per share called. If part only of the shares shall be called for the holder will be entitled to a fresh option certificate in respect of the balance.
- (2) A register of the call certificates issued by the company will be kept at the company's registered office, wherein there will be entered the names, addresses and descriptions of the registered holders and particulars of the certificates held by them respectively, and the registered holder may inspect such register.
- (3) The registered holder shall be regarded as exclusively entitled to the benefit of this certificate, and all persons may act accordingly, and this certificate shall be transferable, free from any equities, cross or other claim.
- (4) Every transfer of this certificate must be in writing under the hand of the registered holder, and the transfer must be delivered at the registered office of the coy duly stamped with a fee of 2s. 6d., and such evidence of title or identity as the coy may reasonably require, and thereupon the

Form 21a.

Certificate of
right to call
for allotment
of shares.

Form 21a.

transfer will be registered and the coy shall be entitled to retain the transfer.

(5) If and so far as the right of call hby given shall not be exercised before the commencement of a winding-up of the coy, it shall lapse.

(6) Any notice may be served by the coy on the holder for the time being of this certificate by sending it through the post in a prepaid letter addressed to such person at his registered address, and any notice so given shall be deemed to have been served at the expiration of 24 hours after it is posted.

Given under the common seal of the coy the — day of —

To be endorsed.]

To the — Company, Limited.

I, —, of —, the registered holder of the within certificate, hby call for an allotment of — 11. shares in the coy's capital, being the whole or part of the shares within referred to, and I hand you herewith cheque for £—, being 11. 10s. per share in respect of each share so called, and I direct the allotment of the sd shares to — of — [and I request you to issue to me a balance option certificate for — shares].

Dated this — day of —.

Signature of Registered Holder.

Form 22.

**Underwriting
clauses in
memorandum
of association.**

The subscribers of the founders' shares shall forthwith pay to the coy the full nominal amount of the founders' shares subscribed for by them resply. and shall, in proportion to the founders' shares subscribed for by them resply, pay all the preliminary expenses of forming and floating the coy down to the time when 100,000 ordinary shares in the capital thof shall have been taken up, and further, they guarantee that 100,000 of the ordinary shares in the capital of the coy shall be taken up within fourteen days after the publication of the coy's prospectus, and accordingly they shall be bound, in proportion to the founders' shares subscribed for by them resply, to accept an allotment of such of the sd 100,000 ordinary shares as shall not be taken up within the sd period, but so that no such subscriber shall be bound to accept an allotment of more than 500 of the sd 100,000 shares in respect of each founders' share subscribed for by him, and that any shares taken up by him before the expiration of such period shall be treated as in reduction *pro tanto* of his obligation to accept an allotment as aforesaid.

The underwriting used sometimes to be effected by making part of the initial capital a series of founders' shares, say 200 of 11. each, and conferring on the holders special rights and privileges, and imposing on the subscribers under-

writing obligations as above. And this plan is still available without compliance with sect. 89 of the Act of 1908, for the subscribers take the founders' shares by the constitution of the company, and they are entitled to them as of right and without allotment, paying, of course, their par value. Hence the company in such circumstances cannot be said to "apply" the founders' shares in payment of a commission, even though they be worth more than par. *Hilder v. Dexter*, (1902) A. C. 474.

Sometimes the clause enables the subscriber to have the ordinary shares allotted to him or his nominees.

Where this mode of underwriting is adopted, and it offers many advantages, it must be borne in mind that the subscriber need not subscribe the memorandum of association with his own hand; he can subscribe by the hand of an agent duly authorized, and the authority can be conferred either orally or by instrument in writing; but the latter is to be preferred, as if the authority is oral there may be a dispute as to whether it was, in fact, given. The authority may run as follows:—

To Mr. —, of —

I, the undersigned, hereby authorize and request you in my name and on my behalf to subscribe the memorandum and articles of association of the — Coy, Limited, now about to be registered, for — of the founders' shares in the capital of such company, or such lesser number as you may arrange on the terms of such memorandum and articles.

Where a subscription is made pursuant to an authority as aforesaid, the subscriber should subscribe the name of his principal thus "A. B., of —, justice of the peace, or as the case may be, by C. D., of —, his duly authorized agent in this behalf."

AN AGREEMENT made, &c., between A. on behalf of the several persons named in the schedule hto (hereafter called "the underwriters") of the one pt, and B. as trustee for the — Coy, Limited (now about to be incorporated and hereafter referred to as "the new coy"), of the other pt, whereby it is agreed as follows:—

1. Each of the underwriters shall underwrite the number of shares in the new coy set opposite his name in the schedule hto, and shall accordingly hand to the sd B. as such trustee as aforesaid an underwriting letter framed in the terms of the underwriting letter annexed hto with the blanks therein filled up for such number of shares.

2. The sd B. shall immediately on the incorporation of the new coy hand such underwriting letter to the new coy and use his best endeavours to obtain the acceptance by the new coy of the offer therein contained, and shall notify such acceptance to the underwriter.

A company can on incorporation accept an offer addressed to it though signed before it was incorporated, and in the result a contract will arise, though provisional, until the company is entitled to commence business. Sect. 87 (3). *Supra*, p. 258.

Form 22.

Form 23.

Authority to subscribe.

Form 24.

Agreement for underwriting shares: A. for underwriters, and B. for proposed company.

Form 24.

3. The underwriting letters shall not be revoked by the underwriters, and in the event of any revocation the sd B. shall be at liberty in the name and on behalf of the revoking underwriter to sign and make use of a new letter similar to that revoked or expressed to be revoked.

4. The sd B. shall use his best endeavours to procure the formation of the new coy within — weeks from the date hof, and unless it is so formed within — days from the date hof and accepts the underwriting letters afd this agreemt shall become void.

5. Any notice may be served on any of the underwriters by sending the same through the post addressed to the underwriter at his place and address below mentd, and a notice so served shall be deemed to have reached him on the day following that on which it is posted.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED

Here set out the names and addresses of the underwriters and the number of shares underwritten by them respectively.]

Annex copy of underwriting letter and other documents.

Form 25.

Agreement to
allot paid-up
shares in
satisfaction of
commission.

AN AGREEMENT made the — day of — between the — Coy. Ltd (hereafter called "the Coy") of the one pt. and A. B. of — as trustee for the several persons named in the schedule hto of the other part: WHEREAS the coy recently issued a prospectus offering 20,000 1/2 shares in its capital for public subscription at par, and such prospectus stated that the coy would pay to allottees in consonance of their subscribing a commission of 10s. in respect of each share allotted to them, and reserved the right to satisfy this commission wholly or in pt by the allotment of fully pd up shares in the coy, to be treated as of par value: AND WHEREAS the sd 20,000 shares were subscribed for and allotted to the several persons named in the schedule hto, the number allotted to each of them being set opposite to his or her name in the second column of the sd schedule: AND WHEREAS the coy — exercise of the right reserved as afd has determined to satisfy the commission afd by the allotment of fully pd up shares as aforesaid: AND WHEREAS the sd A. B. has agreed to act as trustee for the allottees for the purposes hof.

NOW THEREFORE IT IS AGREED as follows:

1. The coy shall forthwith allot to each of the allottees named in the first column of the schedule hto the number of fully pd up shares in the capital of the coy set opposite his or her name in the third column of the sd schedule.

2. The sd shares shall be numbered — to — inclusive and shall be issued and accepted in satisfaction of the commission.
As witness, &c

Form 25

THE SCHEDULE ABOVE REFERRED TO

Names and Addresses of Allottees

Number of the
shares in
the
20,000 shares
allotted to each.Number of the
shares in
satisfaction of the
commission to be
allotted to each.

N A DEED made this — day of —, 19—, between A. and B., both of —, and C. the vendors, of the one part, and D. and E., both of —, hitherto called the contractors, of the other part.

Form

Underwritten

WHEREAS a limited liability company, hitherto called the coy, is intended to be immediately formed and organised with the object (*inter alia*) of acquiring the business now carried on by the vendors at — a/sd; AND WHEREAS it is intended to make a public issue of 100,000 £ of the debenture stock of the — in the terms of the prospectus,

proof print of which is annexed hto; and that such stock is to be constituted and secured by a trust deed in the terms of the draft which has already been prepared by Mr. —, solicitor, and signed by him and by Messrs. — for identification; AND WHEREAS the vendors have agreed to the contractors to undertake the issue of and to — and secure the subscription of the stock a/sd upon the — conditions hitherto appearing: Now IT IS HEREBY AGREED that, that is to say:

— contractors will on or before the — day of —, 19—, on or day as shall be agreed between the parties hto, issue a — in the terms of the prospectus attached hto, with such — of and modifications in the details that as the coy and the contractors may approve, and will cause the same to be efficiently and thoroughly advertised in accordance as nearly as may be in the advertisement list annexed hto. The contractors will also — issue — circulate through the post at the least — copies of the sd prospectus addressed to the persons named in the lists already approved by the parties hto.

2. The vendors will enter into an agreement with the coy on the terms of the draft referred to in clause 3 of the coy's arts of assent

Form 28.

3. The vendors will procure N. of - and M. of - to accept office as trustees for and on behalf of the debenture stockholders. If either or both the said N. or M. shall refuse to accept office or die before the issue of the sd prospectus, the vendors will procure other responsible persons to agree to act as trustees for the debenture stockholders.

4. The vendors will, on or before the day prior to the day upon which the prospectus is under the agreement to be issued, cause the copy to be duly registered in accordance with the Companies (Consolidation) Act, 1908, and on or before the same date deliver to the contractors a printed duplicate of the copy prospectus required to be filed by the Act, duly signed and in all other respects complying with the sd section.

5. The contractors guarantee that within seven days after the publication of the prospectus the whole of the 100,000*l.* debenture stock aforesaid shall be subscribed for by responsible persons, and the application moneys paid thereon, and that all application and allotment moneys and instalments payable in respect of such applications for the sd debenture stock as shall be made by the contractors or their nominees shall be duly paid at the time at which they respectively become payable as mentioned in the prospectus.

6. If at the expiration of such seven days there shall be any part of the sd debenture stock which shall not have been so subscribed for, and the application moneys of 10 p.c. paid thereon, the contractors shall within three days thereafter subscribe and pay for the same in accordance with the sd prospectus, and if the contractors shall make default in so doing, the vendors may on behalf of the contractors apply for an allotment of such debenture stock to the contractors, and these presents shall be a sufficient authority for that purpose.

7. If within - days from the date hereof the whole of the sd debenture stock shall have been subscribed by responsible persons, and the amounts payable on application and allotment for such shall have been duly paid, the vendors shall pay to the contributors the sum of —; but this payment is conditional on the contractors performing all the obligations hereby imposed on them in conformity with the terms hereof.

8. The contractors will procure a broker or firm of brokers in London, being members of the London Stock Exchange, to act as brokers to the company, and will pay and discharge their fees and all other brokerage fees and commissions incurred by the contractors in connection with the subject-matter of this agreement. The vendors declare that they believe, and have reasonable grounds for believing, that all the statements contained in the sd prospectus are true in

substance and in fact, and that the same contains no mis-statement, misrepresentation, or suppression of fact which may in law amount to a mis-statement or misrepresentation.

Form 26

AS WITNESS, &c.

AN AGREEMENT made the _____ day of _____, between the _____ Company, Limited (hereafter called "the company"), of the one part, and _____, hereafter called Mr. N., of the other part.

Form 27.

Agreement to underwrite debenture stock.

WHEREAS the company is about to offer for public subscription £ _____ p.c. mortgage debenture stock which is to be constituted and secured by an indenture framed in accordance with the terms of the draft which has already been prepared, and for the purposes of identification subscribed by D., a solor of the Supreme Court: AND WHEREAS the company is desirous of insuring the placing of the said debenture stock: NOW THEREFORE it is agreed as follows:

1. The company is to offer for public subscription the said £ _____ debenture stock.

2. Such offer is to be made by a prospectus framed in accordance with the terms of the draft prospectus annexed hto, but with full power for the company, prior to the publication of such prospectus, to modify the same in such manner as the company shall think fit, provided that such modifications shall be approved by the said D.

3. Mr. N. shall take up and pay for at par the whole of the debenture stock aforesaid which shall not have been taken up and allotted to other persons within ten days after the first publication of the said prospectus, and that in consideration of the obligation so imposed on him he shall be entitled to _____, or to _____ p.c. of the premiums on the said £ _____ stock which shall be received by the company upon the issue of that portion which shall be subscribed for and allotted to persons other than the said Mr. N.

4. Mr. N. shall pay up the full nominal value of the debenture stock taken up by him as aforesaid by the instalments and at the times specified in the prospectus aforesaid, less, however, the amount of the premium according to the terms of the prospectus as issued payable in respect thereof.

5. It shall rest with Mr. N. to fix the premium on which the said debenture stock shall be offered for subscription by the said prospectus, and if he shall not within twenty-four hours after notice in writing from the company requiring him to specify the same comply with such request, then it shall rest with the new company to fix the premium.

6. If at any time between the date hereof and the publication of the prospectus owing to grave political or financial disturbances the price of 2½ p.c. British Consols shall fall to or below 100l., Mr. N. is to be at liberty by notice in writing to the company to rescind this agreement.

Form 27.

7. Any notice to Mr. N. may be given by sending the same through the post addressed to him at his above-mentd address, and a notice so sent shall be deemed to be served at the expiration of twelve hours after it is posted.

As witness, &c.

Form 28.

THE — COMPANY, LIMITED.

Notice to
underwriters.

To N., of —.

Sir,—With reference to your underwriting letter of the — of —, I am instructed by the directors of the above-named coy to inform you that £— of the debenture stock of the coy has been taken up and allotted, and to request that you will take up the balance, £—. I enclose form of application, and shall be obliged if you will return the same to me with a cheque for £—, the amount payable on application.

Yours, &c.

Heading for
draft pro-
spectus for
underwriting
purposes.

In order to obtain underwriting subscriptions it is generally found necessary to submit to the underwriters a draft of the proposed prospectus. In some cases this draft contains a number of blanks, and some of the statements are only inserted provisionally, and the completion of the prospectus must more or less depend on the future. In such cases it is sometimes deemed desirable to place a heading to the draft prospectus on the lines of the subjoined:

Form 29.

Heading for
draft
prospectus.

The subjoined draft prospectus indicates the general lines on which it is proposed to frame the prospectus of the under-mentd coy, and states what is anticipated will be the facts at the time of its issue, but the terms of the prospectus cannot, of course, be finally settled until after the registration of the coy, and until after the terms of the concession have been obtained from the — Government, and the terms thereof finally arranged, and until after the various contracts with or in relation to the coy have been made, and, generally, the prospectus will have to be framed so as to accord with the actual facts at the time it is filed, and to comply with the requirements as to disclosure of sect. 81 of the Companies (Consolidation) Act, 1908.

The following is another example:—

These debentures will be offered to the public for subscription by a prospectus hmftr called "the final prospectus," which it is anticipated will be issued in the course of a few months.

Form 30.

Another.

Such prospectus will be framed on the general lines of this prospectus, but with such modifications as may seem expedient. It is intended that the deposit pd on applicon by the underwriters shall be used for the purpose of providing the deposits which are to be provided and pd for the concession and subsidies to be granted, and the final prospectus will thus refer to the concession and subsidies as having been actually granted. Applicons for admission as underwriters of the issue must be made on the accompanying form, and must enclose the sum of £—— per debenture by way of deposit in respect of each debenture comprised in the applicon. The deposit thus pd by the underwriters will be pd into the —— Bank, and will be applied in or towards paying the deposits which have to be pd as the condition of the grant of the concession and of obtaining the subsidies, and when the concession and subsidies have been obtained the debentures will forthwith be offered to the public by the final prospectus as above indicated, and thereupon the coy will repay to the underwriters the deposits pd by them resply except where an allotment is made in respect thof.

In this case the preliminary prospectus was filed.

AGREEMENTS.

CHAPTER V.

INTRODUCTORY NOTES.

BEFORE COMMENCING BUSINESS a company in most cases enters into or ratifies or adopts a preliminary contract for the purchase of some specific property, *e.g.*, a mine, patent, business, concession, or estate. Several of the following forms of agreements are precedents for such contracts.

In framing such preliminary contracts the following principles must be borne in mind:-

1. A company cannot before it is incorporated enter into a contract, for it is non-existent.
2. It is not possible by any means, except an Act of Parliament, to bring into existence under the Companies (Consolidation) Act, 1908, a company tied and bound by a contract previously made, for a company cannot ratify or adopt a contract made before it was incorporated, even though expressly made on its behalf.
3. A company can ratify a contract made *after* its incorporation by some person professing to act on its behalf provided that the contract is one within the powers of the company, and in such case after ratification the company is bound as fully and completely as if it had originally authorized such person to enter into such contract on its behalf. For that is the general rule in regard to ratification.

"Whenever," said Lord Wensleydale, in *Ridgway v. Wharton*, 6 H. L. C. 296, "a man purports to make a contract with the agent of another, in order to bind that other the agent must have authority from him. It matters not whether it is authority previous or subsequent. If a man, professing to act for another, makes a contract for him, and authority is afterwards given by that other, the authority given subsequently is equal to the authority given before, according to the old maxim, *omnis ratihabitio retrotrahitur et mandato priori equiparatur*. If a contract is made by an agent, whether by authority before given or afterwards, by ratifying the contract it equally binds the principal."

But the doctrine of ratification is only applicable where at the time the contract is made there is in existence a principal capable of ratifying. Hence, where an agreement is made with a person who purports to contract as agent for an intended company, the company when subsequently registered cannot effectually ratify. *Kelner v. Barber*, L. R. 2 C. P. 174; *Empress Engineering Co.*, 15 C. D. 125; *Natal Land and Colonisation Co. v. Pauline, &c. Syndicate*, (1901) A. C. 120; *North Sydney Investment, &c. Co. v. Higgins*, (1899) A. C. 263; *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, (1902) 1 Ch. 146; *National Motor Mail Coach Co.*, (1908) 2 Ch. 215. In *Empress Engineering Co.*, Jessel, M. R., said: "The contract between the promoters and the so-called agent for the company was not a contract binding upon the company, for the company had then no existence: nor could it become binding on the company by ratification, because it has been decided, and, as it appears to me, well decided, that there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence."

1. Where an agreement *e.g.*, for sale is made with a person who purports to contract as trustee for an intended company, the mere fact that the company after its incorporation acts, by its directors, on such agreement as if it were bound thereby, or that its directors pass a resolution adopting such agreement, does not render the company liable on the agreement. It merely signifies that the company accepts the position of *cestui que trust*.

Thus, in *Northumberland Avenue Hotel Co.*, 33 C. D. 16, the preliminary agreement was made between Wallis and a trustee for the intended company, and was expressly adopted by the articles of association. Moreover, the company took possession of the land thereby agreed to be demised, and spent large sums thereon and paid rent to the lessor, and by resolution of the directors purported to assent to modifications of the agreement. All this notwithstanding, it was held that the company was not bound by the agreement.

The company," said Cotton, L. J., "seems to have considered, or rather its directors seem to have considered, that the contract was a contract binding on the company; but the erroneous opinion that a contract entered into before the company came into existence was binding on the company, and the acting on that erroneous opinion, does not make a good contract between the company and Mr. Wallis, and all the acts which occurred subsequently to the existence of the company were acts proceeding on the erroneous assumption that the contract of the 24th July was binding on the company. In my opinion that explains the whole of these transactions." A company merely taking the benefit of a pre-incorporation contract does not

bind the company to fulfil the obligations of that contract (*Rotherham Alum. & Co.*, 25 Ch. D. 103; *National Motor Mail Coach Co., Clinton's Claim*, (1908) 2 Ch. 515, overruling *English and Colonial Produce Co.*, (1906) 2 Ch. 435), though it may give the trustee a right of indemnity; *Hardoon v. Belilos*, (1901) A. C. 118. See also *North Sydney Investment and Tramway Co. v. Higgins*, 1899

A. C. 263, where a contract had been made with certain persons as trustees for an intended company, and by resolution of the directors after the company's incorporation that contract was adopted and confirmed, and it was held not to be binding on the company. "Their Lordships do not think that the adoption and confirmation by directors of a contract made before the formation of the company by persons purporting to act on behalf of the company creates any contractual relation whatever between the company and the other party to the contract, or imposes any obligation whatever on the company towards that party."

5. Nevertheless where an agreement (*e.g.*, for sale) is expressed to be made with a person professing to contract as agent or trustee for an intended company, the company when formed can enter into a *new* agreement with the parties to the preliminary agreement that the company shall adopt and carry out the agreement thus made on its behalf or for its benefit, and this will bind the company. See Forms 41 and 42. *Re Dale & Plant*, 61 L. T. 206; *Natal Land Co. v. Pauline Colliery Syndicate*, (1904) A. C. 120. Moreover, acts done by a company may justify the inference of a new contract in the absence of some authority from the vendor enabling the agent or trustee to concur in the adoption agreement on the vendor's behalf.

But an agreement merely between the agent or trustee and the company that the company shall adopt the preliminary agreement does not bring the vendor into contractual relations with the company. *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, (1901) 1 Ch. 196. So far as the vendor is concerned, the adoption agreement is *res inter alios acta*. Nor in such circumstances can the company sue the vendor on the preliminary agreement, for the company is a stranger to that agreement, and it is well settled that a person cannot sue on a contract to which he is not a party unless it is made on his behalf by an agent or a trustee for him. "A mere agreement between A. and B. that B. shall pay C., an agreement to which C. is not a party either directly or indirectly, will not prevent A. and B. from coming to a new agreement the next day releasing the old one. If C. were a *cestui que trust* it would have that effect." Per Jessel, M. R., *Empress Engineering Co.*, 16 C. D. 129, *Gandy v. Gandy*, 30 Ch. D. 57.

6. Even where no contract in writing for adoption as aforesaid

(Proposition 5, *supra*) is entered into after the incorporation of the company, a contract may in some cases be inferred from the acts of a company after its incorporation, for, although the company cannot ratify or by mere resolution adopt, "it does not follow from that that acts may not be done by the company after its formation which make a new contract to the same effect as the old one." Per Jessel, *M. R., Empress Engineering Co.*, 16 C. D. 128.

And accordingly, where a contract of sale made with a trustee for an intended company was carried into effect by conveyance of the property and by the issue of the debentures which were to be the consideration, Kay, J., found as a fact that there was a fresh contract between the company and the vendor, and refused to allow the company to repudiate the debentures as having been issued without consideration. *Howard v. Patent Ivory Co.*, 38 C. D. 156. But it is not prudent to act on the assumption that a direct contract can safely be omitted.

An important alteration was made in the matter of companies' contracts by sect. 6 (3) of the Companies Act, 1900. This section is now replaced by sect. 87 (3) of the Companies Act, 1908, and provides as follows: "Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it [s] become binding."

[322. *Share*] "Provisional" here means that the contract is to be read as if it contained a provision that it shall not be binding on the company unless and until the company becomes entitled to commence business. *Re Otto Electrical Manufacturing Co., Jenkins' case*, (1906) 2 Ch. 390. "Shall be binding" must not be taken to give any statutory sanction to the contract.

Private companies are exempt from this provision.

Another statutory alteration in the matter of contracts by companies is contained in the Companies Act, 1908, sect. 83, replacing sect. 11 of the Companies Act, 1900. "A company shall not previously to the statutory meeting vary the terms of a contract referred to in the prospectus, or statement in lieu of prospectus, except subject to the approval of the statutory meeting." If a company were allowed to do so, it might evade criticism of the contract by the shareholders at the statutory meeting.

Where there is to be a preliminary contract, one or other of the following four plans is usually adopted:

PLAN 1. - Agreement, before incorporation, with trustee or agent for intended company, followed by adoptive agreement after incorporation.

*Private Co's
exempt*

PLAN 2. -Agreement prepared before incorporation and expressed to be made between the vendor and some agent for the company: it is signed after incorporation and is subsequently adopted by the company.

PLAN 3. -Agreement prepared before incorporation and expressed to be made with the company: it is sealed by the company after incorporation.

PLAN 4. Articles of association are silent as to any agreement, but give directors power to purchase the property.

Best Course to be followed.

Whenever there is no particular reason for adopting Plan 1, it is expedient to adopt Plans 2, 3, or 4: for, by the adoption of any of those plans, the company becomes bound in due course without any appearance of the contract having been forced on it, and without the necessity for any supplemental contract. See the notes to Form 251, clause 3, *infra*.

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Plan 1.

Before the incorporation of the company, the promoters procure the owner of the property to enter into an agreement with some person, as trustee or agent for the intended company, for the sale of the property to the company upon certain terms and conditions. The memorandum and articles of association of the company are settled, with the concurrence of the vendor and of the promoters, contemporaneously with this agreement. In the articles is inserted a clause referring to the agreement—see *infra*, p. 643, clause 3, note], and authorizing the company to adopt and carry it into effect. The memorandum and articles are then registered, and the registrar issues his certificate, whereupon the company becomes incorporated. Shortly after the incorporation the directors hold a meeting at which the preliminary agreement is taken into consideration, and a resolution is passed for its adoption. This of itself would not be sufficient to make the company liable, but notice of the adoption is subsequently given to the vendor, and in due course the adoption is effected by means of a brief supplemental agreement, to which the vendor, the agent or trustee, and the company are parties, whereby the company is bound to perform the preliminary agreement in the place of the agent or trustee. See *forms of such agreement, infra*, pp. 369, 370.] The supplemental agreement is necessary where the preliminary agreement is made with an "agent," because it has been held that there can be no effectual ratification in such a case, inasmuch as the company

Plan 1.

Agreement with trustee or agent for intended company followed by supplemental adoptive agreement.

was not in existence when the preliminary agreement was made. See *supra*, pp. 321, 322.

**Reasons why
Plan 1
preferred.**

Plan 1 is sometimes preferred, because: (a) Before going to the expense of forming the company, the promoters may desire to have the vendor bound to sell on specified terms. This reason does not apply where the vendor is the promoter, or where the promoters are in a position to dictate to him. (b) The promoters may desire to bind the company absolutely to acquire the property upon the terms arranged by them before its incorporation. With a view thereto, the terms are embodied in a contract as in Plan 1, and in the articles a clause is inserted instructing the directors to carry the contract into effect. Promoters sometimes think, and perhaps rightly, that if the contract has already been executed and only waits for adoption, the directors will be less likely to raise questions as to the terms fixed than would otherwise be the case. But it must not be supposed that any such clause can bind the directors, or that it relieves them from the obligation to consider whether or no the adoption of the contract is for the company's benefit. See *Brazilian Rubber Plantations*, No. 1, 1911, 1 Ch. 425.

Plan 2.

Plan 2.

Agreement
with agent for
company sub-
sequently
adopted under
seal of com-
pany.

The agreement is prepared before the incorporation of the company, and is expressed to be made between the vendor and some person purporting to act as agent for the company. The memorandum and articles refer to the agreement as a contract already prepared and intended to be signed immediately *after* the incorporation of the company, and authorize the directors to ratify and adopt the same (see Form 93). The company is then registered, and immediately *afterwards* the parties to the agreement, viz., the vendor and the agent, sign the same. Subsequently, a meeting of the directors is held, and a resolution is passed to the effect that the agreement be ratified and adopted, and that the seal be affixed in token thereof. The seal is then affixed to a memorandum, on or below the agreement, in these terms: "The above or within-written] agreement is hereby ratified and adopted by the _____ Company, Limited. As witness the common seal of the said company this ____ day of _____."

Thenceforth, the company is effectually bound by the agreement, for the technical rule established in *Kelner v. Baxter*, L. R. 2 C. P. 174, does not apply, since the agreement was signed *after* incorporation, and is therefore capable of ratification.

**Advantages
of Plan 2.**

Plan 2 is sometimes adopted because it avoids the necessity for the supplemental agreement required by Plan 1, and at the same time enables the prospectus to be issued immediately after the incorporation and before any resolution for the adoption of the agreement has been submitted to the board. Moreover, promoters sometimes prefer to submit an agreement for adoption rather than a new agree-

ment for execution as in Plans 1, 3, 4. When Plan 2 is adopted, the directors should bear in mind that if they act on the contract, or otherwise show their adoption thereof, the company may be bound by implied ratification.

Plan 3.

Before the incorporation of the company an agreement expressed to be made between the vendor and the company itself, for the sale of the property to the company, is, with the privity of the vendor and the promoters, prepared. The memorandum and articles are at the same time prepared and settled with the like privity. In the articles is inserted a clause [see Form 251, clause 3, *infra*, p. 643] referring to the agreement and authorizing or requiring the directors forthwith to affix the seal of the company thereto, or declaring that the company shall forthwith execute the agreement. The memorandum and articles are then registered, and the registrar issues his certificate. At the first meeting of the directors the agreement is taken into consideration, and a resolution passed for its adoption. The vendor is informed of the resolution, and a day appointed for completion, when the agreement is executed, being afterwards in due course carried into effect.

Plan 3.
Agreement with company itself, with power in articles to execute.

Plan 4.

This plan ^{only} differs from Plan 3 in ^{one} respect, namely, that the articles do not expressly refer to the agreement, but authorize the directors to purchase the property on such terms and conditions as they think fit. These general powers are quite as effectual as an authority to adopt or enter into a specific agreement. *Overend, Gurney & Co. v. Gibb*, L. R. 5 H. L. 480. But the other plans are generally adopted. And one of those plans is preferable when the directors or some of them are vendors.

Plan 4.
General power in articles to directors to purchase without reference to specific agreement.

Where, as in Plan 1, a person purports to contract as agent for a company not yet formed, he is personally liable on the contract. *Kelner v. Baxter*, L. R. 2 C. P. 174. So, also, a person contracting as "trustee" is personally liable. *Northumberland Avenue Co.*, 33 C. Div. 16.

Personal liability of person contracting on behalf of a company not yet formed.

And where a person has so contracted as "agent," the fact that the company after its incorporation acts on, or purports to ratify or adopt the contract, will not relieve the agent from the personal liability he incurs from signing on behalf of a non-existent principal (*Scott v. Lord Ebury*, L. R. 2 C. P. 255), unless the transaction amounts to a new contract, *e.g.*, as in Form 41, *infra*. So too, where the contract is made with a "trustee" for a company, the trustee will not be

released from liability to the vendor by reason of the company purporting to adopt or acting on the footing that it is entitled to the benefit of the contract. *Northumberland Avenue Co.*, 33 C. Div. 16; *Walters v. Northern Coal Co.*, 5 De G. M. & G. 629; *Cox v. Bishop*, 8 De G. M. & G. 815. There must be an effective adoption contract. See Form 41.

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Agreement should be framed so that his liability should be merely nominal.

It is, however, seldom or never the intention of the parties that the agent or trustee should be so liable, and accordingly the agreement is so framed that his liability will be merely nominal. This is effected as follows: The agent agrees that the company shall purchase the property; a future day is fixed for the completion of the purchase; it is provided (*infra*, p. 368) that upon the adoption of the agreement by the company, in such manner as to become bound to carry it into effect, the liability of the agent or trustee shall cease, and that if the company does not adopt the agreement before a certain day (prior to the day fixed for completion), the agent or trustee may at any time afterwards rescind it. The effect of these provisions is, that if the company adopts the agreement, the agent or trustee is freed from liability; and if the company does not adopt it in due course, the agent or trustee, before the time fixed for completion, rescinds the agreement, and thereby terminates his liability before he has had to do anything under the agreement.

Proviso limiting liability of agent valid: *scus*, if purporting to relieve him from all liability.

A proviso thus limiting the liability of the so-called agent or trustee is valid; but, not uncommonly, it is provided that he shall incur no *personal responsibility* whatever. Such a proviso is, however, in law repugnant and void, the result being that the agent or trustee is personally bound to perform the contract. *Furnivall v. Coombes*, 5 M. & Gr. 736; *Williams v. Hathaway*, 6 C. D. 544.

Provisions of articles.

As to the operation of clauses in the articles of association providing for the adoption of an agreement, see *infra*, p. 643.

Even before the Act of 1908 was passed, when a company was started to acquire a specific property, and the capital was to be raised by public subscription, it was not unusual so to frame the agreement for the purchase of the property, that if within a fixed period a certain number of shares were not taken, the company could rescind, the object being that if the company should fail in raising the funds necessary to enable it to commence business it might be able to get rid of the agreement. Sometimes a similar power was given to the vendor, for he might not be willing to sell to a company which had not the means to develop a property for which he was probably to be paid partly in shares; or his own right to sell might be contingent on a certain number of shares being taken up.

But now, under the Act of 1908, s. 87 (3), "any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding."

As to the meaning of "provisional," see *Otto Electrical Engineering Co., Jenkins' Claim*, (1906) 2 Ch. 390, *supra*, p. 22.

As to when the company is entitled to commence business, see *supra*, p. 20; and as to the above sect. (87) the minimum subscription, see sect. 85 of the Act of 1908, and the notes thereto, *supra*, p. 9.

In preparing an agreement for sale, the following are some of the points which arise for consideration:

Points on
agreements
for sale.

- (a) On the sale of a business—Are the book debts to be included? Are any of them bad? Is allowance to be made for bad debts? Will the vendor guarantee the book debts? If they are to be excluded from the sale, is the company to collect them? Is the stock in-trade to be included at a fixed figure or to be taken over at a valuation? Is the sale to take effect from the date of the agreement, or from the day fixed for completion, or from some past date? Is the vendor to be precluded from competing with the company? Is the business to be carried on till completion on behalf of the vendor, or on the company's behalf?
- (b) On the sale of a patent—Are improvements to be included in the sale? Are further inventions which would not properly be described as mere improvements to be included? Are foreign patent rights to be included? Is the vendor to be bound to give information as to improvements? Is the patent valid? Is the purchaser to be at liberty to take any opinion as to its validity before completion, and to rescind if the patent be pronounced invalid?
- (c) On the sale of a mine—Is it to be examined by an independent expert before completion? Is there a good title? If the property is abroad can the company hold it, and is the purchase to be completed abroad or in England? If abroad, is the purchase-money to be sent abroad, or is it to be paid here to trustees pending information as to the title and transfer having been completed?
- (d) On the sale of a concession—Is it valid? Is it liable to forfeiture? Can it be vested in the company with or without consent; and, in the former case, what is to be done if the consent cannot be obtained?
- (e) On any sale, is there to be power to rescind if the company does not float, and who, in that case, is to pay the preliminary expenses?

Preliminary agreements very commonly provide for the issue of fully or partly paid-up shares for a consideration other than cash, *e.g.*, as the consideration for the sale of property or of services to be rendered to the company. Paid-up shares.

The law as to the issue of shares for a consideration other than cash has been materially altered by the Companies Act, 1900 (now replaced by the Companies Act, 1908).

For many years prior to the time when that Act came into operation (1st January, 1901), sect. 25 of the Companies Act, 1867, had been in force, whereby it was provided that every share in any company should be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same should have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares, and it was well settled that the contract thus required to be filed must show the number of the shares to be allotted, the amount to be credited as paid, and the consideration for which the shares were to be so credited. See the leading decisions on the Act, *infra*, Chap. XX. But by sect. 33 of the Companies Act, 1900, sect. 25 of the Act of 1867 was repealed as from January 1st, 1901, with the result that the provisions of the Act of 1862 in regard to payments for shares were restored, and they are now embodied in the Companies Act, 1908.

Now under the Act of 1862 a shareholder was liable for the full amount of his shares, save so far as the amount may have been previously paid up, either by himself or otherwise. The obligation is not very clearly expressed in the Act, but that it exists is conclusively settled by many decisions of the highest authority. It is also settled that payment may be made in cash, or in its equivalent, *e.g.*, by making over to the company property which it has power to acquire or rendering or agreeing to render it service, which it is willing to accept in satisfaction, of the amount of the share or any specified portion thereof.

The law, then, as it now stands is as follows:

1. A company with a share capital may issue shares credited as fully or partly paid up for a corresponding cash consideration.
2. A company may issue shares credited as fully or partly paid up for a consideration other than cash, provided that the consideration is something, *e.g.*, property or services, the acquisition of which is within the powers of the company, and is, in the honest opinion of the directors, of adequate value.

Sub-sect. (1) of sect. 88 of the Companies (Consolidation) Act 1908, is as follows:

Whenever a company limited by shares makes any allotment of its shares the company must within one month thereafter file with the Registrar of Companies

- (a) A return of the allotments stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and de

scriptions of the allottees, and the amount (if any) paid or due and payable on each share, and

- (b) in the case of shares allotted or fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment, together with any contract of sale or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

As to these requirements, see pp. 65 *et seq.* *supra*.

Sub-sect. (2) of the same Act provides in effect that if the above-mentioned contract has not at the time been reduced to writing, the company must within one month after the allotment file with the registrar the prescribed particulars of the contract, stamped with the same stamp duty as would have been payable if the contract had been reduced to writing.

3. An oral contract for the issue of paid up or partly paid up shares for a consideration other than cash is allowable, but particulars must be filed as above.
4. Where shares are issued as fully or partly paid up otherwise than in cash. Sect. 88 of the Act, and pp. 58 *et seq.*
5. If default be made in complying with the requirements of the above section, the directors and other officials will incur a penalty of 50*l.* a day. Relief may be granted by the Court where the omission to file was accidental or due to inadvertence.
6. Where shares are issued on a cash footing, it is open to the company subsequently to agree with the holder to accept property or services in satisfaction or part satisfaction thereof, and it is not necessary to file any contract in regard thereto; but the amounts or respective amount so paid or satisfied will have to appear in the annual list and summary under sect. 26.
7. If a valid contract be made for the acceptance by the company of specified property or services of substantial value in payment or part payment of shares, the Court will not whilst the contract stands, inquire into the adequacy of the consideration even at the instance of the liquidator. *Pell's case*, 5 Ch. 11; *Baylan Hall Co.*, 5 Ch. 346; *Wragg, Limited*, (1897) 1 Ch. 796.
8. Non-compliance with sect. 88 of the Act will not affect the validity of the contract which should have been filed, or render the shares which have been allotted liable to payment in cash.

**Contracts entered into before the Company is entitled to
commence Business.**

Sect. 87 of the Act of 1908 provides as follows:—

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

• • • • • • • •

(6) Nothing in this section shall apply to a private company or to a company registered before the first day of January, nineteen hundred and one, or to a company registered before the first day of July, nineteen hundred and eight, which does not issue a prospectus inviting the public to subscribe for its shares.

The words of the above sub-sect. (3) are wide enough to cover even contracts of membership, so that though the company has allotted the whole of the minimum subscription referred to in sects. 85 and 87 (1) of the Act, and has given notice thereof to the allottees, and so completed contracts with them, each such contract might still remain provisional, and not become absolutely binding until the conditions (b) and (c) (see p. 20) of sect. 87 (1), which are to be complied with before a company to which sect. 6 applies is entitled to commence business, have been satisfied. And there is after all nothing unreasonable in itself in such a construction, for no applicant for, or allottee of, shares in the very early stage ought in fairness to be held to his bargain if the company is never in a position to commence business. 'Provisional' means that the contract is to be treated as if it contained a stipulation that it is not to be binding on the company unless and until the company becomes entitled to commence business. *Otto Electrical Manufacturing Co., Jenkins' Claim*, (1906) 2 Ch. 330.

There is no need to insert an express condition to that effect in each contract, for the statute implies it. Nevertheless, it may be convenient for the benefit of the business man not learned in the law to set out the condition in the contract in some case.

The words 'and on that date shall become binding' merely remove the bar created by the section. They operate to terminate the provisional status of the contract and to make it absolute, but it is only binding for what it may be worth, and therefore any right to repudiate or rescind *e.g.* for misrepresentation will remain undisturbed.

As to varying such contracts, see *supra*, p. 22.

As to the Making of Contracts under Seal in Writing by Parol.

By sect. 76 of the Companies Act, 1908 (re-enacting sect. 37 of the Companies Act, 1867), it is provided as follows:

Sect. 37 of
Act of 1867
as to con-
tracts.

(1) Contracts on behalf of a company under the principal Act may be made as follows; that is to say:-

- (i.) Any contract which, if made between private persons, would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and may in the same manner be varied or discharged;
- (ii.) Any contract which, if made between private persons, would be by law required to be in writing signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged;
- (iii.) Any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company, by any person acting under its authority, express or implied, and may in the same manner be varied or discharged;

(2) All contracts made according to this section shall be effectual in law, and shall bind the company and its successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be.

(3) Any deed to which a company is a party shall be held to be validly executed in Scotland on behalf of the company if it is executed in terms of the provisions of this Act or is sealed with the common seal of the company and subscribed on behalf of the company by two of the directors and the secretary of the company, and such subscription on behalf of the company shall be equally binding whether attested by witnesses or not.

The statutory power, it will be observed, applies to all companies registered under the Act, and by virtue of it all such companies may except as regards the contracts specified in sub-sect. (1), contract without seal. The power may, of course, be controlled or qualified by the articles of association.

As to who is a "person acting under the express or implied authority of the company," under sub-sects. (2) and (3) of section

Effect
of sub. 37.

This will depend on the articles of the company. Generally speaking, the directors have express or implied authority to enter into contracts necessary for carrying the objects of the company into effect, and, of course, a board meeting can exercise the authority. If the board approves of a contract, the directors assembled thereat can sign the contract on behalf of the company, pursuant to sect. 141. In most companies the directors can, under the articles, delegate their powers, or any of them, to committees, consisting of such member or members of their body as they think fit; and if this is the case, the power to enter into a specific contract

Authority
of agent

the power generally, may be vested in the committee, and a contract signed by the committee will be binding. So, too, where there is power to appoint agents, &c., or to delegate to a manager or other person. See further as to what is a duly authorized person, *Re London and Paris Hotel Co.*, 20 Eq. 442; *Browning v. Gr. Central Mining Co.*, 5 H. & N. 806; *Royal Bank of India's v. v. v.*, 252; *Land Credit Co.*, 4 Ch. 460; *Chapman v. Smithurst* (1909) 1 K. B. 727 (C. A.).

Contracts without seal.

The test of when a trading company can contract without use of seal apart from the above enactment is given in *South of Ireland Colliery Co. v. Wadde*, 1 R. 34 P. 469.

Contract on behalf of company.

As to the form which a contract to be signed on behalf of a company should take: Suppose it to be a contract between A. B. and the company. It may be expressed to be made *ex. pte.* between A. B. of the one part, and the company of the other part, or between A. B. of the one part and C. D. the person or persons authorized to enter into it on behalf of the company, of the other part. The former is generally considered the better plan, but they are equally effectual. *Aggs v. Nicholson*, 1 H. & N. 465.

Where Plan (a) is adopted, the testimonium clause, if any, in this form: As witness the hand of A. B. and C. D. E. F. and G. H. on behalf of the company. In witness whereof A. B. and two of the directors of the company, or its authorized agents, have hereunto set their hands.

Of course no testimonium clause is necessary, and if used to be sufficient if the contract is signed thus:

A. B.
D., for the Company.

Agent not liable.

If the agent is made party to the contract as in Plan (b) the testimonium clause, if used, will run: As witness the hands of the said parties hereto the day, &c.; and the agent can, if he think it expedient, *ex abundanti cautela*, qualify his signature by prefixing, or adding words showing his agency. It is now settled, however, that where an agent enters into a contract on behalf of another, it is not essential, in order that he may avoid personal responsibility, to add any qualifying words to his signature, *ex. pte.* as agent for A. B., or "on behalf of A. B.," or "on account of A. B.," or "for A. B." *Prima facie* if he signs without qualification, he is personally liable, but it is a question of intention, and if in the body of the agreement he purport to contract "as agent," or "on account of," or "on behalf of," or "for" another, he will escape liability on the contract. See *Gadd v. Houghton*, 1 Ex. Div. 357; *Pike v. Ongley*, 18 Q. B. D. 719; *Chapman v. Smithurst*, (1909) 1 K. B. 727 (C. A.). Although, if not authorized, he may be liable in damages for breach of warranty as to his authority. *Collen v.*

Wright 8 E. & B. 647; *Hallbat v. Leuz*, 1901 1 Ch. 311. *Weeks v. Probert*, L. R. 8 C. P. 427; *Firbank's Errors v. Humphreys*, 18 Q. B. D. 60; *Oliver v. Bank of England*, 1902 1 Ch. 610.

AS TO ORAL AGREEMENTS.

As appears from sect. 76 (1) (iii) of the Act of 1908, these can be oral contracts made by any person acting under the express or implied authority of the company, and, of course, innumerable contracts are so made. In this connection, the Statute of Frauds and the Sale of Goods Act, 1893, should be borne in mind, but although sect. 4 of the former Act provides that, as regards certain agreements, and in particular

As to Statute of Frauds

- (i) any special promise to answer for the debt, default, or miscarriage of another person;
- (ii) any contract or sale of lands, tenements, or hereditaments or any interest in or concerning the same;
- (iii) any agreement that is not to be performed within the space of one year from the making thereof;

"no action shall be brought thereon" unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This section does not invalidate the agreement. The statute in this part of it, does not say that unless those requisites are complied with the contract shall be void, but merely that no action shall be brought upon it." Per Jervis, C. J., *Leroux v. Brown*, 1862, 12 C. B. 801, *Hogle v. Hogle*, 1893 1 Ch. 84. The object of the Act is only to prevent certain important classes of contracts resting on the "fragile testimony of memory." Accordingly, a company can make a parol agreement in relation to any such matters, and the agreement can be enforced if due is taken to obtain the evidence required by the statute, e.g., if an admission of the terms of the agreement signed by some duly authorized officer of the company can be produced.

Parol contract within statute, when enforceable

The words of the statute, "some memorandum or note thereof" have been construed with great liberality: they have been held to include any written memorandum or admission of the terms of the contract, whether made before or after the contract, provided that it is made before action brought. Thus a proposal in writing acceptably has been held a sufficient memorandum as against the proposer. *Watts v. Anwoorth*, 1 H. & C. 83, *Reuss v. Pickslay*, L. R. 1 Ex. 342. A letter from the party to be charged to an agent or friend, mentioning the terms of the agreement made with some third party, seems sufficient (*Filby v. Hounsell*, 1896 2 Ch. 737; *Barley v. Sweetman*, 9 C. B. N. S. 843), e.g., a letter from a company to its own solicitor mentioning the terms of the contract made *etc.*

v. Holland, L. R. 1 C. P. 1, and the question is not one of intention, but simply of evidence. "The Court," said Bowen, L. J., in *Hoyle v. Hoyle*, (1893) 1 Ch. 99, "is not in quest of the intention of the parties, but only of evidence under the hand of one of the parties to the contract, that he has entered into it. Any document signed by him [or his agent], and containing the terms of the contract is sufficient for the purpose. In *Bailey v. Sweeting*, 9 C. B. N. S. 843, a letter to an agent of the person sought to be charged was held sufficient, and whether it is a letter to an agent or to a friend is immaterial.

So also in *Jones v. Victoria Graving Dock*, 2 Q. B. D. 314, where an agreement was orally made between the plaintiff and the company in the terms of a certain draft, it was held that a minute of the board of directors signed by the chairman and referring to such draft, and resolving that it be engrossed and signed, was a sufficient memorandum within the statute. It was contended in this case that the signature of the chairman to the minutes was put in order to verify the proceedings of the board in obedience to the Companies Act 1862, and not in order to attest or verify the contract, and that as the signature was put *alio intuitu* it could not be available for the purpose of satisfying the Statute of Frauds. But the Court held that there was no foundation for this contention. "What," said Lush, L. J., who delivered judgment, "is this but an assertion under the hand of the company's agent that the company had entered into the agreement which was contained in the draft referred to? . . . the question is not what its object was, but whether it is a written and signed statement of the contract." See also *Queensland, &c. Co.*, (1894) 3 Ch. 181; and *Griffiths Cycle Corporation v. Humber* (1899) 2 Q. B. 414.

How to
comply with
requirements
of statute as
regards parol
agreement.

Thus, suppose that a company desires to purchase a piece of land and that for some reason it is expedient to carry the transaction through by parol agreement, it can be done thus: Let the vendor make a proposal in writing, addressed to the company, and let the directors pass a resolution authorizing one of their body to accept such proposal on behalf of the company, and let him accept the same orally, and let him subsequently report in writing to the company the fact that he has orally accepted the proposal as authorized, and let such report be read at a board meeting and be entered in the minutes. In the result there is a valid contract, satisfying the requirements of the Statute of Frauds, whichever party has occasion to rely on it, for the proposal thus orally accepted is a sufficient memorandum as against the vendor (*Reuss v. Pickelsly*, *supra*), and as against the company the minutes show the authority of the agent. . . . his letter is a sufficient memorandum signed by the company's agent. *Gibson v. Holland*, L. R. 1 C. P. 1; *Jones v. Victoria Graving Dock*, 2 Q. B. D. 323; *Hoyle v. Hoyle*, (1893) 1 Ch. 81; *Queensland Land, &c. Co.*, (1894) 3 Ch. 181. It may be added

that a proposal thus orally accepted requires no stamp. See *infra*, p. 338. An oral acceptance of one of two alternatives contained in a written offer makes an enforceable contract as against the writer. *Lever v. Koffler*, (1901) 1 Ch. 513. Part performance of an oral contract to sell land may take the case out of the Statute of Frauds (*Dickinson v. Barrow*, (1904) 2 Ch. 339), provided such part performance shall be unequivocally referable to the contract. *Alderson v. Maddison*, 8 App. Cas. 467. As to filing particulars of an oral contract for the issue of paid-up or partly paid-up shares for a consideration other than cash, see sect. 88, and p. 331, *supra*.

As to Stamps.

Stamps

Not under Seal

Except where otherwise provided by the Stamp Act, 1891 (54 & 55 Viet. c. 39), an agreement in writing *not under seal* entered into by or on behalf of a company generally comes under the following heading in the schedule to the Stamp Act, 1891: "Agreement, or any memorandum of an agreement, made in England or Ireland under hand only, or made in Scotland, without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument," and accordingly requires a 6d agreement stamp.

By sect. 22 of the same Act, it is provided that the duty of 6d. upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed.

The mode of cancelling is prescribed by sect. 8 of the Act, namely:-

Adhesive stamps

How to be cancelled

- (1) An instrument the duty upon which is required or permitted by law to be denoted by an adhesive stamp is not to be deemed duly stamped with an adhesive stamp, unless the person required by law to cancel the adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing; or otherwise effectually cancels the stamp and renders the same incapable of being used for any other instrument, or for any postal purpose, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time
- (2) Where two or more adhesive stamps are used to denote the stamp duty upon an instrument, each or every stamp is to be cancelled in the manner aforesaid.
- (3) Every person who, being required by law to cancel an adhesive stamp, neglects or refuses duly and effectually to do so in the manner aforesaid, shall incur a fine of 10/.

Having regard to the words in italics, the signature and date need not now be written across the stamp if it is otherwise effectually

cancelled. *McMullen v. Sir Alfred Hickman Steamship Co.*, 71 L. J. Ch. 766; 18 T. L. R. 650.

Under Seal

Agreement
under seal.

A contract under seal, except where otherwise provided by the Stamp Act, 1891, is usually liable to duty under that Act, as a "deed of any kind whatsoever not described in the schedule," i.e., it requires a 10s. stamp.

Oral.

Oral
agreement.

An oral agreement, of course, requires no stamp; nor does a mere proposal in writing, orally accepted (see *supra*), for such a proposal is not "an agreement or memorandum of an agreement, whether the same be only evidence of a contract or obligatory upon the parties from its being a written instrument." *Drant v. Brown*, 3 B. & C. 666, in which Holroyd, J., said, "This was a mere proposal; if it had been accepted by writing, it must have been stamped; but being accepted by parol, the agreement was in law a parol agreement." And see per Hawkins, J., in *Carlill v. Carbolic Smoke Ball Co.* 1892, 2 Q. B. 493.

So in *Cloy v. Crofts*, 20 L. J. Ex. 361, where a schoolmaster embodied his terms in a prospectus and a verbal contract was made thereon, it was held that the prospectus was a proposal and not an agreement, and that no stamp was necessary. "The defendant, by adopting the proposal and sending his sons to the school, makes it a contract. . . . A memorandum does not require a stamp where being a mere proposal in the first instance, it afterwards becomes binding by subsequent matter." Per Parke, B. See, however, *Warner v. Millington*, 3 Drew. 523; *Smith v. Neale*, 2 C. B. N. S. 67; and *Reuss v. Picksgley*, L. R. 4 Ex. 342.

Agreements for Sale of Property.

Sect. 18 of
Customs, &c.
Act, 1889.

By sect. 18 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), *ad valorem* duty was imposed on all agreements for the sale "of any property, save such as passes by delivery, or must be conveyed by deed," but this enactment was found intolerable, and by sect. 59 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), the following was substituted:

Sect. 59 of
Stamp Act,
1891.

- (1) Any contract or agreement made in England or Ireland under seal, or under hand only, or made in Scotland, with or without any clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or any property locally situate out of the United Kingdom, or goods, wares, or merchandise, or stock, or marketable securities, or any ship or vessel or part interest, share, or property of or in any ship or vessel, shall

be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold.

- (2) Where the purchaser has paid the said *ad valorem* duty, and before having obtained a conveyance or transfer of the property, enters into a contract or agreement for the sale of the same, the contract or agreement shall be charged, if the consideration for that sale is in excess of the consideration for the original sale, with the *ad valorem* duty payable in respect of such excess consideration, and in any other case with the fixed duty of ten shillings, or of sixpence, as the case may require.
- (3) Where duty has been duly paid in conformity with the foregoing provisions, the conveyance or transfer made to the purchaser or sub-purchaser, or any other person on his behalf or by his direction, shall not be chargeable with any duty, and the Commissioners, upon application, either shall denote the payment of the *ad valorem* duty upon the conveyance or transfer, or shall transfer the *ad valorem* duty thereto upon production of the contract or agreement, or contracts or agreements, duly stamped.
- (4) Provided that where any such contract or agreement is stamped with the fixed duty of ten shillings or of sixpence, as the case may require, the contract or agreement shall be regarded as duly stamped for the mere purpose of proceeding to enforce specific performance, or to recover damages for the breach thereof.
- (5) Provided also that where any such contract or agreement is stamped with the said fixed duty, and a conveyance or transfer made in conformity with the contract or agreement is presented to the commissioners for stamping with the *ad valorem* duty chargeable thereon within the period of six months after the first execution of the contract or agreement, or within such longer period as the commissioners may think reasonable in the circumstances of the case, the conveyance or transfer shall be stamped accordingly, and the same and the said contract or agreement shall be deemed to be duly stamped. Nothing in this provision shall alter or affect the provisions as to the stamping of a conveyance or transfer after the execution thereof.
- (6) Provided also that the *ad valorem* duty paid upon any such contract or agreement shall be returned by the commissioners in case the contract or agreement be afterwards rescinded or annulled, or for any other reason be not substantially performed or carried into effect so as to operate as, or be followed by, a conveyance or transfer.

Having regard to the above section (59), a written agreement for the sale of property, with the exceptions specified in sub-sect. (1) of the above section, requires to be stamped as if it were an actual conveyance on sale of the estate, interest or property contracted or agreed to be sold. The duty on conveyances was fixed by the Stamp Act, 1891, at 2s. 6d. per cent., and so in proportion, but by the Finance (1909-10) Act, 1910, the duty was doubled. See sect. 73, which provides that "the said duties chargeable under the heading 'conveyance on sale or on transfer of any property' in the first schedule to the Stamp Act, 1891 (in this part of this Act referred to as the principal Act), shall be double those specified in that

Construction
of sect. 59.

schedule, provided that this section shall not apply to the conveyance or transfer of any stock or marketable securities as defined by sect. 122 of that Act, or to any conveyance or transfer where the amount or value of the consideration for the sale does not exceed 500*l.*, and the instrument contains a statement certifying that the transaction thereby effected does not form part of the larger transaction or of the series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds 500*l.*"

With reference to the above sections, it may be convenient to consider in detail some of the wording:—

"Made in England," &c. It is to be noted that the *ad valorem* duty imposed by the section (59, *supra*) was not to attach unless the agreement was "made in England [including Wales] or Ireland or Scotland."

Where a contract is constituted by offer and acceptance it is to be taken to be "made" when the acceptance took place. *Müller & Co. v. Margarine v. Inland Revenue*, (1900) 1 Q. B. 310. "In my opinion," said Collins, L. J., in that case, "a contract is made within the meaning of sect. 59 when the signature of the last necessary party is affixed."

And upon appeal this view was pronounced correct by the House of Lords, *Inland Revenue v. Müller & Co.*, (1901) A. C. 217.

Accordingly a contract made abroad was not touched by the section and it was at one time a common practice, in order to avoid the duty, to enter into a contract for sale in some foreign place, even where the property to be sold was wholly or in part within the United Kingdom: but contracts made abroad are no longer exempted, for by sect. 7 of the Revenue Act, 1909 (9 Edw. 7, c. 43), it is provided that "The limitation of sect. 59 of the Stamp Act, 1891 (which makes certain contracts chargeable for the purposes of stamp duties as conveyances on sale) to contracts and agreements made in England, Ireland or Scotland shall cease to have effect." Hence the words "or made anywhere else" should be read into sub-sect. (1) of sect. 59 immediately before the words "for the sale."

"For the sale of any equitable estate or interest in any property whatsoever." It has been held that these words mean for the sale of an equitable estate or interest as distinguished from the legal estate or interest. *West London Syndicate v. Inland Revenue* (1898) 2 Q. B. 507; *Danubian Sugar Factories v. Inland Revenue* (1901) 1 Q. B. 257.

Thus, if the agreement is for the sale of an equity of redemption, the *ad valorem* duty is, it has been held, payable thereon even if the property be situate abroad. *Farmer & Co. v. Inland Revenue* (1898) 2 Q. B. 141.

So, also, if the terms of the agreement indicate the intention that the legal estate shall be left outstanding and the equitable estate only conveyed, the *ad valorem* duty will attach. *Chesterfield Brewery Co. v. Inland Revenue*, (1899) 2 Q. B. 7.

The mere fact, however, that the agreement for sale gives the purchaser the option in certain events of taking a declaration of trust instead of a conveyance of the legal estate does not make the agreement one for the sale of an equitable interest only. *West London Syndicate v. Inland Revenue*, (1898) 2 Q. B. 507.

Lands, tenements, hereditaments and other property locally situate out of the United Kingdom. In *Smelting Co. of Australia v. Inland Revenue*, (1897) 1 Q. B. 175, it was contended that the words "or property locally situate out of the United Kingdom," following as they do the words "lands, tenements, hereditaments or heritages," all of which denote real property, ought to be construed as meaning property of the same kind; and Lord Esher, M. R., and Lopes, L. J., considered that the words should be so read; but Rigby, L. J., considered that the words ought not to be so limited, and the decision of the House of Lords in *Inland Revenue v. Müller & Co.'s Margarine*, (1901) A. C. 217, is obviously inconsistent with such a restricted construction of the words.

In the case last mentioned, Lindley, L. J., said: "The words 'lands, tenements and hereditaments' themselves exhaust real property, and the introduction after them of the word 'property' shows that something more is to be excepted. Nothing more can be suggested which is *eiusdem generis*, and nothing but personal property remains."

Locally situate," &c. In *Smelting Co. of Australia v. Commissioners of Inland Revenue*, (1897) 1 Q. B. 175, it was held that an agreement made in England for the sale of a share in a patent granted in New South Wales and a sole licence to use in a district of that colony the invention protected by the patent was liable to *ad valorem* duty under the section on the ground that the property was not property "locally situate out of the United Kingdom." Lord Esher, M. R., in that case was of opinion that the expression "locally situate" could not apply to something which in truth and in fact has no locality. "It may be," said his Lordship, "that there are chattels of which it may fairly and truly be predicated that they are locally situate out of the United Kingdom; it is not necessary to decide that it be so: I will assume it. If a chattel is a physical, tangible thing, which can be touched and seen, and which can be placed in a particular place, it may be locally situate within the meaning of those words, but the property here in question could not be touched or seen or placed anywhere; it is incapable of being brought



within the fair and true meaning of the words 'locally situate,' or of being said to exist in any locality." And Lopes, L. J., said: "I do not see how a share in a patent or a licence to use a patent which is not a visible or a tangible thing can be said to be locally situate anywhere." This decision was referred to in the argument in *Inland Revenue v. Müller & Co.'s Margarine*, (1901) A. C. 220, as an authority for the proposition that an incorporeal right can have no local situation; but Lord Davey said that he did not "express any opinion on the abstract question whether an incorporeal right can have a local situation beyond saying that I am not impressed with the difficulty of holding that it may have one for revenue purposes in analogy to the decisions in the probate cases." See *Attorney-General v. Bauwens*, 4 M. & W. 171. and in the same case Lord Lindley said, referring to the *Smelting Co. of Australia v. Inland Revenue*, *supra*, "Lord Esher and Lopes, L. J., considered that incorporeal personal property could not be said to be situate anywhere. This is, of course, true physically speaking, but not, I think, in contemplation of law."

In *Danubian Sugar Factories v. Inland Revenue*, (1901) 1 Q. B. 249, it was held that the benefit of a contract to transfer land situate abroad was not within the words "property locally situate out of the United Kingdom," but the authority of this decision is impaired by the decision last referred to.

In *Inland Revenue v. Müller & Co.'s Margarine*, (1901) A. C. 217, it was contended that goodwill had no locality, and could not be said to be situate anywhere, but the House of Lords negatived this contention. "For my part," said Lord Macnaghten, "I think that if there is one attribute common to all cases of goodwill, it is the attribute of locality"; and in the same case Lord Lindley said: "Goodwill is only taxable as property, and the local conception of property appears to me to involve the local conception of existence somewhere. Incorporeal property has no existence in nature, and has, physically speaking, no locality at all. We, however, are dealing not with anything which in fact fills a portion of space, but with a local conception, or in other words with rights regarded as property; but to talk of property as existing nowhere is to use language which to me is unintelligible. The authorities which bear upon the locality of incorporeal personal property for purposes of probate appear to me to afford the best guides for the solution of the case before us. Those cases tend strongly to show that for purposes of probate, goodwill, except so far as it merely enhances the value of lands and hereditaments, must be regarded as personal property situate somewhere; and if this were a probate case, I do not suppose that anyone would say that the goodwill with which we have to deal would be regarded as in any sense situate in this country."

In *West London Syndicate v. Inland Revenue*, (1898) 2 Q. B.

507. there was an agreement for the sale of the goodwill of the business of an hotel proprietor, and the lease of the hotel, with furniture, book debts, &c. It was held that the goodwill was not to be regarded as attached to the premises, and that *ad valorem* duty in respect thereof was chargeable: but query whether this case would now be supported.

As to book debts, see *Measures Bros. v. Inland Revenue*, 82 L. T. 689.

"Goods, Wares, or Merchandise."

These words include electrical energy. *County of Durham Electrical Power Distribution Co. v. Inland Revenue Commrs.*, (1909) 2 K. B. 604 (C. A.).

They do not include fixtures, unless actually severed. *Lee v. Gaskell*, 1 Q. B. D. 700; *Hobson v. Gorringe*, (1897) 1 Ch. 182.

What Law governs the Interpretation and Operation of Contracts.

In framing a contract it is in some cases material to consider whether it is or is not necessary or desirable to make special provisions as to the law which is to govern it.

Of course, if the contract is made in England between a company registered in England and some other person or persons also resident there, and it provides for performance in England, the law of England will apply; unless, indeed, there be some provision to the contrary in the contract.

But cases frequently arise in which the circumstances are very different. Thus, some party to the agreement, *e.g.*, the vendor, may be a foreigner or an Englishman resident abroad; the subject-matter of the contract may be property situate abroad, or shares, concessions, patents, or other assets constituted under some foreign law; the performance of the contract may have to take place abroad, as where property is to be delivered or conveyed abroad, or where services are to be rendered abroad; or the contract may happen to be made abroad, as where the company by its agent enters into a contract in a foreign country.

In all such cases the question arises, What law is to govern the contract? The answer to this question is, that the law which the parties intend to apply is to apply. *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 600.

If the intention is expressly declared, *e.g.*, where the contract provides (*infra*, p. 362) that it is to be construed and have effect as a contract made in England or in some other specified country, the contract must be construed and have effect accordingly.

But where there is no such express direction, it is necessary to ascertain the intention by inference. *Hamlyn & Co. v. Talisker*

Distillery, (1894) A. C. 202; *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society*, (1903) 1 K. B. 249.

Primâ facie, the parties to the contract are presumed to intend that the law of the country where it is made shall govern as to its interpretation and operation. *Robinson v. Bland*, 1 W. Bl. 258; *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 589; *South African Breweries v. King*, (1900) 1 Ch. 273; *De Beers v. British South Africa*, (1911) A. C. 52.

But there is no hard and fast rule either that the law of the place where the contract is made or the law of the place where it is to be performed shall apply, and slight indications of intention may turn the scale and suffice to determine the question. Thus, when it is a question which of the laws of two countries apply, and the contract contains a provision which is valid under the law of one, but invalid under the laws of the other, that circumstance tends to show that it was intended that the laws of the former should apply. *Missouri Steamship Co.*, 42 C. D. 321; and see the case last referred to. In *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 599, Bowen, L. J., said that "The only certain guide is to be found in applying sound ideas of business convenience and sense to the language of the contract itself with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law, or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad without altering any of the incidents which attached to the contract according to English law. Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days when commercial transactions have altered in character and increased in complexity, and there can be no hard and fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal."

Looking to the foregoing remarks and the desirability of securing certainty of interpretation it seems best, where a foreigner is a party to a preliminary or other contract with a company, to provide expressly that the law of England shall apply, and further to provide for service in England on an agent of the foreigner.

It is also well, where the contract provides for payment to a person not resident in England, to state where the payment is to be made. for the general rule is, that where no place of payment is specified, either expressly or by implication, the debtor must seek his creditor *Robey v. Snaefell Co.*, 20 Q. B. D. 132; *Charles Duval, Ltd. v. Gans*, (1904) 2 K. B. 685.

PRECEDENTS.

AGREEMENT to sell BUSINESS to NEW COMPANY.

Form 31.

General form.

This is an example of the form of agreement commonly adopted in Plan 3, *supra*, p. 327. It can readily be altered to suit the case of one vendor.

AN AGREEMENT made the — day of —, between A., of —, B., of —, and C., of — (hmftr called "the vendors"), of the one Parties.
part, and the — Coy, Limtd (hmftr called "the coy"), of the other
part: WHEREAS the vendors have for some time past carried on Recitals.
business as —, at — and elsewhere, under the style or firm of
"M. & Co."; AND WHEREAS the coy has been formed under the Cos
(Consolidation) Act, 1908, with a nominal capital of £—, divided
into — shares of £— each, with a view, amongst other things,
to the acquisition of the sd business: AND WHEREAS by clause 3 of
the arts of asson of the coy it is provided that the coy shall enter
into the agreemt therein referred to, being this agreemt. Now it
is hby agreed as follows:—

1. The vendor shall sell, and the coy shall purchase—

First, the goodwill of the sd business [with the exclusive right to use the name of M. & Co. as part of the name of the coy, and represent the coy as carrying on such business in continuation of the vendor's firm, and in succession thereto, and the right to use the words "late M. & Co.," or any other words indicating that the business is carried on in continuation of or succession to the sd firm], and all trade marks connected therewith.

Agreement
for sale.

Paroels.

The words in brackets are probably implied in the word "goodwill." *Walker v. Levy*, 10 C. Div. 436. But an assignment of a goodwill does not authorize the use of the trade name in such a way as to expose the vendor to liability. *Thynne v. Shore*, 45 C. D. 577; *Townsend v. Jarman*, (1900) 2 Ch. 698. As to the right of a vendee to restrain a vendor from soliciting his old customers, and otherwise interfering with the goodwill, see note, *infra*, p. 357.

A conveyance of the goodwill may carry the benefit of covenants not to compete by employes or a late partner of the vendor. *Jacoby v. Whitmore*, 49 L. T. 335; *Townsend v. Jarman*, (1900) 2 Ch. 698.

The sale of a goodwill by a trustee in bankruptcy carries no implied restriction as against the bankrupt. *Walker v. Mattram*, 19 C. Div. 355; *Dawson v. Beeson*, 22 Ch. 505.

Form 31.

As to the necessity of expressly mentioning goodwill. see *Re Bennett, Clarke v. White*, (1899) 1 Ch. 316.

The amount payable for goodwill is one of the particulars which must be stated in the company's prospectus. Companies Act, 1908, s. 81 (1) (g).

As to the imposition of conditions on the sale of a patented article, see *National Phonograph Co. of Australia v. Menck*, 27 T. L. R. 239.

Under sect. 70 of the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), a trade mark when registered was only assignable in connection with the goodwill of the business. See *Magnolia Metal Company's Trade Marks*, (1897) 2 Ch. 371. An assignment in gross was invalid. *Thorneloe v. Hill*, (1891) 1 Ch. 569. The above section is repealed by sect. 73 of the Trade Marks Act, 1905 (5 Ed. 7, c. 15), as from 1st April, 1906 (see sect. 2), where it is replaced by a similar enactment (in sect. 22), with the following addition: "But nothing in this section contained shall be deemed to affect the right of the proprietor of a registered trade mark to assign the right to use the same in any British possession or protectorate or foreign country in connection with any goods for which it is registered together with the goodwill of the business therein in such goods." See Kerly, Trade Marks, 3rd ed. 346.

Where a company purchases an old trade mark, which consists of or includes the name of the proprietor of the business, and the company has taken that name with the word "limited" added thereto, leave will be given, under sect. 92 of the Patents, Designs and Trade Marks Act, 1883, now replaced by Trade Marks Act, 1905, s. 32, to add the word "limited" to the trade mark. *Guinness & Co.'s Trade Mark*, 5 Rep. Pat. Cas. 316, since followed in several cases; and see *Henry Clay, & Co.*, (1892) 3 Ch. 553; see Kerly, Trade Marks, 3rd ed. 316. But no abbreviation of the word "limited" is allowed. *Hothbrook's Tms.*, 18 Rep. Pat. Cas. 447; Kerly, Trade Marks, 3rd ed. 319.

Secondly, all the freehold, copyhold and leasehold hereditaments resply specified in the first, second, and third schedules hto.

Sometimes it is considered undesirable to show in the filed agreement the full particulars of the property, and in such cases the description can run "All the freehold, copyhold and leasehold property belonging to the vendors in connection with the said business."

Thirdly, all the plant, machinery, office furniture, patents, licences, horses, waggons, carts, stock-in-trade, implements and utensils to which the vendors are enttd in connection with the sd business.

As to the meaning of "plant," see *London and Eastern Counties, &c. Co. v. Creasey*, (1897) 1 Q. B. 768. "Plant" and "machinery" are two quite different things: per Kekewich, J., *Re Brooke*, 64 L. J. Ch. 27; and see *Re Nutley and Finn*, W. N. (1894) 64; *Thompson v. City Glass Bottle Co.*, (1902) 1 K. B. 233; and Stroud's Judicial Dictionary.

Fourthly, all the book and other debts due to the vendors in connection with the sd business, and the full benefit of all securities for such debts.

A cheque or bill of exchange given in respect of a pre-existing debt operates as conditional payment thereof, and on the condition being performed by actual

payment, the payment relates back to the time when the cheque or bill was given, and therefore when defendant sold to a company his business as existing on December 31, 1887, with the goodwill, stock-in-trade, and "all book and other debts due to the vendor in connection with the said business, and the full benefit of all securities for such debts;" and on January 1, 1888, had in his possession cheques and bills of exchange, given for trade debts, which had been received by him before that date and were subsequently honoured, Byrne, J., held that the trade debts, having been paid, did not pass to the company, and that the cheques and bills were not securities within the meaning of the agreement. *Felix Hadley & Co. v. Hadley*, (1898) 2 Ch. 680.

As to the stamp duty on book debts, see *supra*, p. 340.

Form 31.

Fifthly, the full benefit of all pending contracts and engagements to which the vendors are or may be entitled in connection with the said business.

Sixthly, all cash in hand and at the bank, and all bills and notes of the vendors in connection with the said business.

Seventhly, all other property to which the vendors are entitled in connection with the said business.

The above specification of the premises sold is given in considerable detail. If desired, it can be expressed more concisely, thus, "The goodwill of the said business and all the assets of the vendors in connection with such business"; but it is generally considered preferable to give some details. In the above clause all the assets of the vendors in connection with the business are included, but sometimes a sale only comprises certain specified assets, *e.g.*, goodwill, freehold and leasehold hereditaments, plant, stock-in-trade, contracts, and engagements, thus leaving the vendors the cash, bills, notes, book debts, &c. Sometimes everything is sold, "except the book debts, belonging to the vendor, in connection with the said business, on the — day of —," and in such case it is not uncommon to insert a clause providing that, as regards the excepted book debts, the company shall use its best endeavours to collect the same. See Clause 12, *infra*.

As to the contract and return now required to be filed, where shares are allotted wholly or in part for a consideration other than cash, see the Companies Act, 1908, s. 88, and the notes thereto, *supra*, pp. 64, 65 *et seq.* Probably much of the case law on the repealed "cash payment section," sect. 25 of the Companies Act, 1867, as to the statement of the consideration in the contract will apply to sect. 88 of the Act of 1908. The consequences of not complying with that section will of course be different from those of neglecting to comply with sect. 25.

There is an implied indemnity by the purchaser, as to contracts. *Howater & Sons v. Mirror of Life Co.*, 50 W. R. 381.

As to vendor's lien for unpaid purchase-money, see *Stuckley v. Kekewich*, (1906) 1 Ch. 67.

2. [Part of] the consideration for the said sale shall be the sum of £—, which shall be paid and satisfied as follows, viz.: As to the sum of £— in cash, and as to the sum of £— by the allotment to the vendors or their nominees of — fully paid-up [ordinary or preference] shares in the capital of the company of £— each, to be numbered — to — inclusive (and as to the sum of £— by the allotment to the

Consideration in cash and shares [and debentures or debenture stock]

Form 31. vendors or their nominees of £—— debentures [or debenture stock] of the coy carrying interest at the rate of —— p.c.p.a. as from the — day of ——].

If the allotment is to be made to nominees a supplemental contract constituting their title to allotment should be made before allotment, for it is doubtful whether a subsequently made contract can "constitute" their title.

The principal contract and the supplemental contract will have to be filed with the Registrar within one month after allotment (sect. 88 of the Act of 1908); in default the directors and other officials will incur heavy penalties.

Looking to sect. 83 of the Act of 1908, which provides that a company shall not prior to the statutory meeting vary the terms of a contract referred to in the prospectus, except subject to the approval of the statutory meeting, it will often be desirable to give by the contract alternative modes of satisfying the consideration, for the adoption of an alternative is not a variation.

The consideration is sometimes wholly cash, and sometimes wholly paid-up, or partly paid-up shares (e.g., —— shares in the company of 10/. each, numbered, &c., with the sum of 7/. per share credited as paid up thereon), and sometimes wholly debentures or debenture stock, and sometimes part of the consideration is of each kind.

When part of the consideration is to be satisfied by debentures or debenture stock, the agreement should contain elsewhere a clause, as follows:—"The debentures aforesaid are to be framed in accordance with the forms set forth in the —— schedule hereto"; or "The debentures aforesaid, and the trust deed securing the same, are to be framed in accordance with the forms which, for the purpose of identification, have been subscribed by N., a solicitor of the Supreme Court"; or "The debenture stock aforesaid is to be constituted and secured by a trust deed framed in accordance, &c." Not uncommonly the consideration is a specified sum, "whereof £—— is to be paid in cash and the balance, £——, may be satisfied, at the option of the company, either in cash or as to the whole or any part [or parts] thereof by the allotment to the vendors or their nominees of fully paid-up shares in [or debentures of] the company, to be treated [respectively] as of par value." If the option is exercised in favour of an allotment of shares, it is desirable to execute before allotment, and in due course to file a supplemental contract, showing how many shares are thus to be issued and constituting the title of the allottees, so that the filed contract may show the aggregate and denoting numbers of the paid-up shares. See *supra*, p. 67, and sect. 88 (1) (b), *supra*, p. 64.

As to stating the consideration for the goodwill, sect. 81 of the Act of 1908, sub-sect. 1 (g), requires the prospectus to specify the amount payable for goodwill. In view of this it may be desirable to add to the above clause the words, "Of the said sum of £—— the sum of £—— is payable for the goodwill."

Consideration for stock-in-trade to be ascertained by valuation.

(2b. The consen for the sd stock-in-trade shall be such a sum as shall be certified by Messrs. —— of —— to be the fair value thof, or if any difficulty shall arise in obtaining their certificate, then a sum equal to the fair value of such ppty; and so that any difference in regard thereto shall be referred to the decision of two competent valuers, one to be appointed by the vendors and the other by the coy or by Messrs. —— of ——], and the submission may be made an order of the High Court. The consen moneys mentd in this clause are hnfr referred to as the valuation moneys.]

Sometimes the consideration for the stock-in-trade is dealt with separately, **Form 31.**

as above.

Where a purchase at a valuation of any considerable subject-matter is intended, it is desirable so to frame the contract that the valuation shall be a submission to arbitration within the Arbitration Act, 1889, otherwise serious loss and inconvenience may ensue.

An agreement to sell at a price to be fixed by valuers is not a submission to arbitration within the meaning of the Act, for there is no "difference" between the parties, and the Act only applies where the parties have agreed to submit present or future differences to arbitration. *Collins v. Collins*, 26 Beav. 306. Accordingly in that case the Court refused to appoint an umpire on the valuer's default. And where the Act does not apply the Court has no power to appoint a valuer in the place of one who dies, or refuses to act, or to remit the valuation where a mistake has been made. Where, however, the agreement is framed as above, these difficulties are avoided, for if the certificate of the named referee is not obtainable, the alternative provision arises, and any difference goes to arbitration. It is the more important to see that the Act will apply, because until the valuation has been effected the Court cannot enforce specific performance. *Gourlay v. Duke of Somerset*, 20 Ves. Jr. 430; *Milnes v. Gery*, 13 Beav. 1; *Jekers v. Vickers*, 4 Eq. 529; *Tillett v. Charing, & Co.*, 26 Beav. 1; *et v. Hart*, 18 Ch. D. 685; see also Fry on Specific Performance. Sometimes the contract provides that the difference "shall be referred to arbitration as hereinafter provided," and contains the usual arbitration clause. *Infra*, p. 367. See also as to what is a reference to arbitration, *Bos v. Helsham*, L. R. 2 Ex. 79; *Richardson v. Smith*, 5 Ch. 741; *Smith v. Peters*, 20 Eq. 511; *Carrus Wilson*, 18 Q. B. Div. 7; *Hammond and Waterton's Arbitration*, 62 L. T. 808; and Russell on Arbitration, 9th ed., pp. 44, 45.

3. As the residue of the consors for the sd sale, the coy shall undertake to pay, satisfy, discharge, and fulfil all the debts, liabilities, contracts and engagements of the vendors in relation to the sd business, and shall indemnify them against all proceedings, claims and demands in respect thereof.

As residue of consideration company to undertake vendor's liabilities.

Very commonly a clause as above is inserted, and the price is fixed accordingly, e.g., assets worth 130,000*l.*, and debts 30,000*l.*, therefore price 100,000*l.* But sometimes the full consideration is given for the assets, and the vendors clear off the debts and liabilities.

Sometimes it is provided that the debts and liabilities aforesaid shall be deemed to include any moneys owing to the vendors in respect of their private accounts with the firm.

As to the importance of providing for indemnity against claims and demands, see *Warwick v. Richardson*, 10 M. & W. 284; *Taylor v. Chichester Rail. Co.*, L. R. 2 Ex. 390.

Where the premises are in the metropolis and within the area of the Gas Light and Coke Company, the purchasers are liable to that company for arrears of gas. *Gas Light and Coke Co. v. Cannon Brewery Co.*, (1903) 1 K. B. 593.

As to stamp duty where payment is to be made as part of the consideration, see *Swayne v. Inland Revenue*, (1900) 1 Q. B. 172.

As to Deposit.—It is not usual to require a deposit when a new company is purchasing, but when a deposit is paid the purchaser has a lien if the purchase is determined without any default on his part. *Whitbread & Co. v. Watt*, (1902) 1 Ch. 835; *Ridout v. Fowler*, (1904) 1 Ch. 658.

Form 31.Commence-
ment of title.

4. The title to the sd hereditaments shall commence—

- (a) As to the sd freehold hereditaments, with an indenture dated, &c., being a conveyance on sale to M.;
- (b) As to the sd several leasehold hereditaments, with the indentures of lease under which the same are held by the vendors;
- (c) As to the sd copyhold hereditaments, with a covenant to surrender on sale, and a surrender and admittance accordingly in the year ———.

And the coy shall not investigate or make any requisition or objection in respect of the prior title.

In an agreement for sale to a company of a going business, the title is generally looked into beforehand, and in such a case a clause (7c, *infra*) is commonly inserted that the title shall be accepted, but occasionally special conditions as to the title are made; their nature must depend on the circumstances. The Vendor and Purchaser Act, 1874, and the Conveyancing and Law of Property Acts, 1881, 1882, 1892 and 1911, must be borne in mind. Sect. 3 of the Act of 1881 does not, it seems, prevent a purchaser from raising an objection to the earlier title if it can be shown *aliunde* to be defective. *Waddell v. Wolfe*, L. R. 9 Q. B. 515; *Broad v. Manton*, 12 C. D. 131; *Cox and Nere's case*, (1891) 2 Ch. 109; *Re Nisbet and Pott's Contract*, (1905) 1 Ch. 391; but a condition that the purchaser shall not investigate the prior title as above is effective, and precludes such an objection. *Home v. Bently*, 5 De G. & S. 520; *Nat. Prop. Bank and Marsh*, (1895) 1 Ch. 190; *Williams v. & P.* 161. It does not, however, preclude objection in respect of a defect disclosed by the vendor. *Smith v. Robinson*, 13 C. D. 148.

And if the purchaser proves that the title is bad, or too doubtful, specific performance will not be ordered. *In re Scott and Alvarez's Contract*, (1895) 1 Ch. 593; 2 Ch. 603; *Re Wallis and Barnard's Contract*, (1899) 2 Ch. 515; *Re Hughes and Ashley's Contract*, (1900) 2 Ch. 595, 602; *Nichols and Van Joel's Contract*, (1910) 1 Ch. 43.

As to the effect of losing title deeds, see *Halifax Commercial Bank and Wood*, 47 W. R. 194, and *Dart v. & P.*, 7th ed. 156.

Special con-
ditions of sale.

(4a. It shall be assumed [here state any required assumptions], e.g., that A. B., a former owner of the freehold, died intestate, and without issue.)

A vendor is not entitled to rely on such a condition when he knows that the assumption is contrary to the fact (*Broad v. Manton*, *Re Banister*, 12 C. D. 131; *Re Marsland Granville*, 24 Ch. D. 17); but if he believes the assumption to be correct, he is entitled to rely on the provision. *Sandbach and Edmondson*, (1891) 1 Ch. 99; *Blairg v. Kewes*, (1906) 2 Ch. 175.

What incum-
brances.

5. The sd premises are sold free from all incumbrances [except the mortgages specified or referred to in the ——— schedule hto], but as regards the freeholds, subject to all quit, chief and other rents affecting the same, and as regards the leaseholds, the rents and covenants contained in the leases or agreements for leases under

which the same are held, and as regards the copyholds subject to the customs of the several manors under which they are held, and as regards all such hereditaments to all rights of way, light, and other easements, if any, affecting the same resply, and to all existing leases and tenancies, and agreements therefor.

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On the sale of a lease the vendor should disclose the existence of unusual and onerous covenants. *Molyneux v. Hawtrey*, (1903) 2 K. B. 487.

As to the inquiries to be made when the mortgage moneys are stated to belong to the mortgagors upon a joint account, see *Re Blumberg and Abraham*, (1899) 2 Ch. 340.

6. No further or other evidence shall be required of the identity of any of the sd hereditaments with the ppty to which title is shown by the abstract besides such evidence, if any, as may be gathered from the descriptions in the documents abstracted.

Identity of parcels.

This may require to be supplemented in some cases, e.g., by provision for a statutory declaration, and in others it may be omitted altogether.

7. The description of the sd several hereditaments is believed, and should be correct; but if any error should be found therein, the same, if capable of compensation, shall not annul the sale, but a fair compensation shall be allowed by the vendors in respect thereof.

Description of parcels.

Description here means description of the corporeal property, not of the title. *Beyfus v. Masters*, 39 C. D. 110; *Debenham v. Searbridge*, (1901) 2 Ch. 98. It can, of course, be extended to the title. Such a provision does not prevent the vendors from avoiding payment by nulling the contract under a clause like 7b. *Ashburner v. Newell*, (1891) 3 Ch. 405; Dart, V. & P. 7th ed. 177, 178.

Under such a clause compensation may be enforced after conveyance as well as before (*Palmer v. Johnson*, 13 Q. B. D. 351; *Clayton v. Leech*, 41 Ch. D. 103); but the words "provided the same is claimed before conveyance," can be added.

As to the effect of similar words, see *Leyland and Taylor's Contract*, (1900) 2 Ch. 625; *Curlish v. Salt*, (1906) 1 Ch. 335. The authorities as to conditions as to compensation were reviewed by Buckley, J., in *Jacobs v. Revell*, (1900) 2 Ch. 858; and see *Re Nisbet and Pott's Contract*, (1905) 1 Ch. 391; and *Shepherd v. Croft*, (1910) 1 Ch. 521. As to the jurisdiction to enforce specific performance with compensation in the absence of a condition on the subject, see *Rudd v. Lascelles*, (1900) 1 Ch. 814.

Such a condition does not, as a rule, apply to defects in title. *Debenham v. Searbridge*, (1901) 2 Ch. 98.

7a. The coy shall make its objections and requisitions, if any, in respect of the vendors' title to any of the sd hereditaments, and all matters appearing in any abstract or muniment of title, or this agreement, and send the same to Messrs. —, the vendors' solors, at No. —, — Street, &c., within — days from the delivery of the abstracts, and in default of such objections and requisitions, if none.

Requisition on title, &c.

Form 31. and subject to such, if any, shall be deemed to have accepted the title.]

Very commonly upon a sale to a company, the agreement does not contain any provision as to requisitions or objections; and where the title is accepted (as in clause 7c, *infra*), this clause will be omitted.

Power of
annulment
where com-
pany persists
in objections.

7b. If the coy shall make [or shall insist] on any requisition or objection as to title, conveyance, or otherwise, which the vendors shall be unable, or on the ground of expense, delay, or otherwise, shall be unwilling to comply with, the vendors may, notwithstanding any previous negotiation or litigation, by notice in writing determine this agreement [except as to clause 13a *h*of], without giving rise to any claim for expense or otherwise.]

In the case of a sale to a company, the agreement very commonly contains no provision or clause as above mentioned, for the title in many cases is investigated beforehand, and even when this is not done this clause is commonly omitted, especially where the company is at once going to the public for subscriptions, for it would be highly inconvenient if, after floating the company, the vendor was in a position to rescind.

As to the operation of the clause, it is well settled that it is effective, and that a vendor is not bound to assign any reason for rescission. *Re Glenton and Saunders to Haden*, 53 L. T. 434 (C. A.). There is a difference between "making" and "insisting" in such a clause. In the one case, the vendor may rescind on delivery of the requisitions (*Ntarr-Bowkett*, 42 C. D. 375), but in the other case the power to rescind does not arise until the purchaser not only makes, but insists. See *Re Glenton and Saunders*, *ubi supra*.

A power to rescind must be exercised within a reasonable time and in good faith. *Smith v. Wallace*, (1895) 1 Ch. 385; *Maryden v. Samson*, 28 W. R. 954; *Quinion v. Horne*, (1906) 1 Ch. 596.

A condition of sale empowering the vendor to annul the sale, if the purchaser makes any objection or requisition "as to the title, particulars, conditions, or any other matter or thing relating or incidental to the sale," which the vendor is unable or unwilling to comply with, extends to a matter of conveyance as well as of title.

The ordinary condition of sale giving the vendor a power of rescission applies only where he has some title, not where he has none, or none to part of the property. *In re Deighton and Harris's Contract*, (1898) 1 Ch. 459; *Jackson and Haden's Contract*, (1906) 1 Ch. 412.

Where property was sold under conditions empowering the vendor by notice to rescind the sale if any objection should be insisted on which he should be unable to remove, "notwithstanding any intermediate negotiation," and providing that on rescission the purchaser should be entitled to receive back his deposit without interest or costs, and the condition was silent as to intermediate litigation, and the purchaser insisted on an objection that the particulars misrepresented that the property was freehold, and that the title shown was only to a term under an underlease; and on this ground commenced an action on November 30, 1896, for rescission, return of his deposit, and payment of the expenses of investigation as to the title, and before further proceedings were taken the vendor, on December 4, 1896, gave the purchaser notice of the rescission of the contract, and offered to repay the deposit, and it was held that no misrepresentation was made out. *Byrne, J.*, held that the notice was in time,

and that the purchaser was only entitled to a return of his deposit without interest, and to the costs of the action up to the time of the receipt of the notice to rescind, and that he must pay the defendant's costs as from that date. *Isaacs v. Tinsell*, (1898) 2 Ch. 285.

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Sub-sect. 6, sect. 3, of the Conveyancing and Law of Property Act, 1881 does not affect the ordinary right of a purchaser to have the title-deeds handed over to him on completion, and the mere fact that obtaining the deeds for this purpose may cause the vendor trouble and expense is no answer to the purchaser's demand.

On an open contract the vendor must bear the expense of obtaining title-deeds required by the purchaser to be handed over on completion, although such title-deeds are not in the vendor's possession, and are not referred to in the abstract. *Dutby and Jenson's Contract*, (1898) 1 Ch. 41.

On the sale of the lease of a public-house the contract fixed a day for completion, and the plaintiff, the purchaser, paid a deposit to the defendants as stakeholders. It was a term of the contract that the deposit should be forfeited if the purchaser refused to perform his part of the agreement. Before the date fixed for completion the vendor committed an act of bankruptcy. This came to the notice of the purchaser, who thereupon refused to complete, and demanded the return of the deposit; and the Court of Appeal held that though the contract for sale was protected by sect. 49 of the Bankruptcy Act, 1883, the assignment and the payment of the purchase-money, in pursuance of the contract but after notice of the act of bankruptcy, would not have been protected, and that the purchaser was therefore not bound to complete, and was entitled to recover the deposit. *Poole v. Marshall, Purkes & Co.*, (1899) 1 Q. B. 710; Hart, V. & P., 7th ed. 295.

7c. The coy shall, without [further] investigation, objection, or requisition, accept such title as the vendors have to the sd premises hereby agreed to be sold. Unreserved acceptance of title.

Where the title has been already investigated, or is well known, a clause as above is very common, and in the case of a private company it is generally used.

8. The purchase shall be completed on the — day of —, at the office, No. —, — Street, London, of Messrs. —, the vendors' solicitors, when possession of the premises shall, as far as practicable, be given to the coy, and the monies so far as the same consists of cash and shares [and debentures] shall be paid and satisfied subject to the provisions of this agreement, and thereupon the vendors and all other necessary parties, if any, shall at the expense of the coy execute and do all assurances and things for vesting the sd premises in the coy, and giving to it the full benefit of this agreement as shall be reasonably required. Completion of purchase.

As to the costs of obtaining a mortgagee's concurrence, see *Willett and Argenti*, W. N. (1889) 66; 60 L. T. 735; distinguished in *Sander and Walford's Contract*, W. N. (1900) 183.

9. If from any cause whatever other than the wilful default of the vendors the purchase shall not be completed on the sd — day of —, Interest on cash consideration if

Form 31.

purchase not
completed on
fixed day

—, the coy shall pay interest on the sd sum of £— cash at the rate of — p.c.p.a. until the purchase shall be completed.

Where completion was delayed by the vendor going abroad, it was held to be wilful default on his part. *Young and Harston's Contract*, 31 C. D. 168, discussed in *Bennett v. Stone*, (1902) 1 Ch. 226. Deliberate neglect by a vendor may amount to wilful default (*Wilson and Stevens' Contract*, (1894) 3 Ch. 546); the vendor's inability to procure concurrence of necessary parties may be wilful default (*Hetting and Merton's Contract*, (1893) 3 Ch. 269; distinguished in *Re Wood and Lewis' Contract*, (1898) 2 Ch. 211, and *Earl of Strafford v. Maples*, (1896) 1 Ch. 235); and so also may neglect to deliver abstract through misunderstanding the contract (*Pelly and Jacobs' Contract*, 80 L. T. 45), or an unreasonable refusal to approve the form of conveyance. *Bennett v. Stone*, (1903) 1 Ch. 509.

In *Young and Harston's Contract*, *supra*, Bowen, L. J., said: " 'Default' is a purely relative term, just like negligence; it means nothing more, nothing less, than not doing what is reasonable under the circumstances, not doing something which you ought to do, having regard to the relations which you occupy towards the other person interested in the transaction."

Delay in completion by the day fixed, occasioned by the time occupied in remedying a defect in the vendor's title which was not and could not be known to him at the time of entering into the contract, is not attributable to a "default" on his part so as to prevent interest running against the purchaser under a clause for payment of interest by the purchaser "if from any cause whatever other than the default of the vendor" the purchase should not be completed by the day fixed. In *re Woods and Lewis' Contract*, (1898) 1 Ch. 483; affirmed, (1898) 2 Ch. 211; and see *Bennett v. Stone*, *supra*. Interest will run if the real cause of delay is the purchaser's inability to pay. *London (Mayor) and Tubbs*, (1894) 2 Ch. 524. And the vendor's repudiation of the contract by resisting the purchaser's claim to specific performance does not necessarily constitute such "wilful default" as to disentitle him to interest. *North v. Percival*, (1898) 2 Ch. 128. See also *Bayley-Worthington and Cohen's Contract*, (1909) 1 Ch. 648, in which all the cases were considered.

Consents of
landlords as to
assignment of
leaseholds, or
in default
declaration of
trust for
company.

10. Divers of the leaseholds specified in the — schedule hto are only assignable with the consent of the landlords from whom the same resply are held. The vendors shall use their best endeavours to obtain the requisite consents for the assignment thereof to the coy, and in any case where such consents cannot conveniently be obtained the vendors shall at the option of the coy execute a declaration of trust of the premises in favour of the coy, or otherwise deal with the same as the coy shall direct.

Where the sale comprises leaseholds, the terms of the leases must be carefully considered, and the agreement must be framed accordingly. If the covenant is merely against assignment, a demise for the whole term (less one day) is allowable; and so is an equitable assignment (*Gentle v. Faulkner*, (1900) 2 Q. B. 267); and if there is a covenant against assignment and sub-letting, a declaration of trust may be available; and if there is a covenant only against sub-letting, that does not include assigning. *Doyle and O'Hara's Contract* (1899), 1 Ir. Rep. 113. But if there is a covenant also against parting with possession, very special expedients are required.

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A limited company may be a "respectable and responsible person" within the meaning of a covenant not to assign without the consent of the lessor (such consent not to be withheld in the case of a "respectable and responsible person." *Willmott v. London Road Car Co.*, (1910) 2 Ch. 525, overruling on this point *Harrison, Ainslie & Co. v. Barrow-in-Furness Corp.*, 63 L. T. 84.

A breach of the covenant not to assign, &c. may give the lessor the right to re-enter (*Harman v. Ainslie*, (1904) 1 K. B. 698; Conveyancing Act, 1881, s. 14); even at the suit of an assignee of the equity of redemption. *Matthews v. Usher*, 81 L. T. 542; *Molyneux v. Richard*, (1906) 1 Ch. 34. Production of a receipt for the last rent due is not conclusive evidence that the covenants have been performed. *Highett and Bird's Contract*, (1903) 1 Ch. 287; explained *Tillen and Driscoll's Contract*, (1904) 2 Ch. 226.

No action lies for refusing to give the consent. *Sear v. House Property and Investment Society*, 10 C. D. 387; *Goodwin v. Saturley*, 16 T. L. R. 437.

Where there is a covenant against assignment without consent, and consent is refused on grounds which are not obviously unreasonable, the title will not be forced on an unwilling purchaser. *Marshall and Salt's Contract*, (1900) 2 Ch. 202. But the Court will not allow unreasonable conditions. *Young v. Ashley Gardens Properties*, (1903) 2 Ch. 112; *Jenkins v. Price*, (1907) 2 Ch. 229; *S. C.*, (1908) 1 Ch. 10, C. A. The covenant not to assign runs with the land. *McEacharn v. Colton*, (1902) A. C. 104; Woodfall, L. & T. (18th ed.) 753.

Where the vendor induces the landlord to refuse consent, the purchaser may have the contract rescinded and damages against the vendor. *Day v. Singleton*, (1899) 2 Ch. 320, C. A.; dist. *Pease v. Courtney*, (1904) 2 Ch. 503.

The Court has no power, under sect. 14 of the Conveyancing Act, 1881, to relieve against forfeiture for breach of covenant not to assign or underlet. Nor can the Court relieve on the ground of mistake, even when an assignment or sub-lease is made in forgetfulness of the covenant (*Barrow v. Isaacs*, (1891) 1 Q. B. 417); or because it is thought to be unimportant. *Eastern Telegraph Co. v. Dent*, (1899) 1 Q. B. 835. See also *Dymock v. Showell's Brewery Co.*, 15 T. L. R. 13.

The leases under which the leasehold portions of the premises are held have already been submitted for the inspection of the coy, and accordingly the coy is to be deemed to have notice of the contents thereof.]

Unless otherwise provided, a purchaser of leaseholds is not, prior to completion, fixed with constructive notice of unusual and onerous provisions in the lease. *Reeve v. Berridge*, 20 Q. B. D. 523; *White and Smith's Contract*, 1896) 1 Ch. 637.

And see sect. 3 (1) of the Conveyancing Act, 1882, and *Molyneux v. Hawtrey*, 1903) 2 K. B. 487.

As to registered leaseholds, see *Voss and Saunders' Contract*, 103 L. T. 493.

[10a. As regards any of the premises subject to mortgages which cannot be paid off until after the time for completion, the vendors shall if so required by the coy, convey the same to the coy subject to the mortgages affecting the same respdy, and the coy shall be at liberty to retain out of the cash portion of the sd consen a sum sufficient to pay off and satisfy in full all claims under such mortgages.]

As to mortgages.

Form 31.

This clause will, of course, only be required if the vendors purport to sell free from the mortgages, and arrangements in such a case are generally made for clearing off the mortgages without delay.

Vendor to discharge liabilities not undertaken by company.

10b. Save as hitherto provided, the vendors shall pay, satisfy, and discharge all their debts and liabilities in connection with the sd business as on the — day of —, and shall indemnify the coy against all proceedings, claims, and demands in respect thereof.]

The insertion of this clause depends, of course, on whether the company or is not to undertake all debts and liabilities.

Possession to be retained by vendors until completion, and they to carry on business, &c. for company.

11. The possession of the sd premises shall be retained by the vendors up to the sd — day of —, and in the meantime they shall carry on the sd business in the same manner as heretofore, so as to maintain the same as a going concern, and they shall from the date hof [or as from the — day of —] be deemed to [have been and to] be carrying on such business on behalf of the coy, and shall account and be entitl to be indemnified accordingly.

As to capitalising interim profits.

Where a business is purchased it is very common to make the purchase from a past date [*e.g.*, the date of the last balance sheet, made, perhaps, some months previously]; the desire being that the company shall take the profits as from that date, and be able to declare dividends as if it had carried on business from that date. There is, however, serious difficulty in giving effect to such desire, for the interim profits, when acquired, represent so much capital expended by the company, and therefore constitute part of the capital assets of the company, and to apply the same in paying dividend would be to pay a dividend out of capital, for the amount of which the directors would be personally responsible.

Sometimes the interim profits are excepted, *e.g.*, by inserting a clause expressly providing that "there shall be excepted from the sale the profits of the business made between the 30th August last and the date hereof, and the profits of the business for the year ending the 30th August next shall be ascertained in due course, and the vendors shall in satisfaction of the said excepted profits accept a sum bearing the same ratio to the year's profits as the period aforesaid bears to the year." Of course, there is nothing to prevent the vendor, when profits are so excepted, from (subsequently to the agreement) assigning the same to the company by way of donation, on the footing that they are to be placed to the credit of the first year's profit and loss account, or to reserve. And this has sometimes been done.

Vendor not to carry on similar business.

12. The vendor shall covenant with the coy that he will not at any time hereafter, either solely or jointly with, or as manager or agent for, any other person or persons, or coy, directly or indirectly, carry on, or be engaged, or concerned, or interested in the business of a — —, or permit or suffer his name to be used or employed in carrying on or in connection with any such business, within 100 miles of the sd leasehold premises, save so far as the vendor shall as a member of the coy be interested, or as an officer or servant or agent of the

coy be employed, in the business of the coy: And in case the vendor shall commit any breach of the foregoing stipulation, he shall pay to the coy [immediately on every such breach] the sum of £—, as liquidated damages in respect thereof.] **Form 31.** Liquidated damages.

In the absence of a stipulation to the contrary such as the above, the vendor of the goodwill of a business may set up a similar business, either in the same neighbourhood or elsewhere; but he may not solicit the customers of the old business. See *Trego v. Hunt*, (1896) A. C. 7, which in part overruled *Pearson v. Pearson*, 27 C. D. 145, and restored *Labouchere v. Dawson*, 13 Eq. 322; *Gillingham v. Beddow*, (1900) 2 Ch. 242. The rule in *Trego v. Hunt* applies to all persons who were customers prior to the sale, and is not limited so as to exclude persons who, before solicitation, became of their own accord the vendor's customers. *Curl Bros., Ltd. v. Webster*, (1904) 1 Ch. 685. And where the business is sold or disposed of, this rule will operate for the benefit of the purchaser, although goodwill is not specifically mentioned, for a vendor cannot on principle derogate from his grant. *Jennings v. Jennings*, (1898) 1 Ch. 378; *David and Matthews*, (1899) 1 Ch. 378. And see *Macfarlane v. Dumbarton Steamboats Co.*, 36 Sc. L. R. 771.

This state of things, however, is not in general sufficient protection; hence the need for a clause as above. The benefit of such a provision is assignable with the business (*Baines v. Geary*, 35 C. D. 154; *Wright v. Chappell*, 17 W. R. 655), and may pass with the goodwill (*Jacoby v. Whitmore*, 32 W. R. 18), unless the covenant appears to be merely personal. *Davies v. Davies*, 36 C. D. 559.

Although a general covenant not to carry on business in competition with the purchaser would not be valid (see *Trego v. Hunt*, (1896) A. C. 7, 27), yet an agreement by the vendor of a business not to carry on a similar business is valid, provided that it does not go beyond what is reasonably necessary for the protection of the purchaser (*Mitchell v. Reynolds*, 1 Sm. L. C. 391; *Badinche Anilin v. Schott*, (1892) 3 Ch. 447; *Nordenfelt v. Maxim Nordenfelt Co.*, (1894) A. C. 535; *Underwood v. Barker*, (1899) 1 Ch. 300; *Tivoli, Manchester, Ltd. v. Colley*, 52 W. R. 632; *Lamson Pneumatic Tube Co. v. Phillips*, W. N. (1904) 134; 91 L. T. 363 (eastern hemisphere); *Stuart v. Halstead*, 55 S. J. 598), and is to be construed according to the intention. *Moerich v. Fenestre*, 67 L. T. 708.

The old rule that a restraint unlimited in space was void has been relaxed, and the restraint may be world-wide if the circumstances justify so wide a restraint. See *Nordenfelt v. Maxim Nordenfelt Co.*, *supra*; *Underwood and Sons v. Barker*, (1899) 1 Ch. 300. The test is what is reasonably necessary for the protection of the covenantee. Reasonableness is a question for the Court.

A covenant by a newspaper reporter not to be connected with any other newspaper within twenty miles, not too wide. *Sir W. G. Leng & Co. v. Andrews*, (1909) 1 Ch. 768 (C. A.).

A covenant in restraint of trade, which is not wider than is reasonably required for the protection of the covenantee, will not be held void on any ground of public policy, unless some specific ground so holding it void can be clearly established. But such cases are exceptional. *Underwood and Sons v. Barker*, (1899) 1 Ch. 300. And the covenant is not necessarily bad because it purports to restrain the covenantor during the whole of his life. *Haynes v. Doman*, (1899) 2 Ch. 13; *Hood & Moore's Stores v. Jones*, 81 L. T. 169; *Lamson Pneumatic Tube v. Phillips*, 91 L. T. 363. Especially when the covenantor is a servant. *Marshall, Ltd. v. Leek*, 17 T. L. R. 26. As to an infant covenantor, see *Hooper v. Willis*, 94 L. T. 624; and *Leng v. Andrews*, (1909) 1 Ch. 703.

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A covenant not to carry on within (say) the United Kingdom is not divisible, that is to say: if it is too wide a restraint it is void altogether, although if confined to London or some other specified district it would have been valid. But a covenant may be framed so as to be divisible, e.g., "Not to carry on in London or within 100 miles or within 300 or within 500, or within the United Kingdom." If the reasonableness of such restraint is called in question the Court may hold it valid in part and void as to the rest, e.g., valid as to London and 100, and void as to the rest, for it is divisible. See *Price v. Green*, 16 M. & W. 346; *Davies, Turner & Co. v. Lowen*, 64 L. T. 655; *Badische Anilin, & Co. v. Schott*, (1892) 3 C. D. 447. But unless the provision is thus alternatively expressed it may be impossible to divide the good from the bad. *Baker v. Hedgecock*, 39 C. D. 520; *Ehrman v. Bartholomew*, (1898) 1 Ch. 671. For an example of a severable agreement, see *William Robinson & Co. v. Heuer*, (1898) 2 Ch. 451.

Each case is to be separately considered with due regard to its circumstances, and accordingly the greatest care must be taken not to make the restraint too wide, as otherwise it may be totally ineffective. Thus a restraint is unreasonable and void if it goes beyond what is required, e.g., if the business is that of a brewer and the vendor is restrained not only from carrying on such business, but any other business. *Perle v. Saalfeld*, (1892) 2 Ch. 149, C. A.; but see *Woodbridge v. Bellamy*, (1911) 1 Ch. 326.

A contract, though too wide as regards space, may be held valid if it only prohibits the use of the old name. *Vernon v. Hallam*, 34 Ch. D. 748; *White, Tomkins and Courage v. Wilson*, 23 T. L. R. 449.

A contract "not to carry on" does not, in all cases, prevent the vendor from acting merely as manager or agent for another. *Allen v. Taylor*, 19 W. R. 35; 24 L. T. 249. But see *Palmer v. Mallett*, 36 C. Div. 411, and *Robertson v. Willmott*, 25 T. L. R. 683.

The words "permit or suffer" import knowledge. *Somerset v. Wade* (1894), 42 W. R. 399.

"Not to be interested" imports a pecuniary interest, and does not touch the case of a vendor's wife or relations setting up and carrying on business. *Handbury v. Cundy*, 58 L. T. 155. And see *Cade v. Calfe*, 22 T. L. R. 243, and *Gophir Diamond Co. v. Wood*, (1902) 1 Ch. 950.

"Not to be interested or concerned" prohibits acting as manager or servant (*Jones v. Heavens*, 4 C. D. 636; *Newling v. Dobell*, 19 L. T. 408; *Hill & Co. v. Hill*, 55 L. T. 769), and being interested as a shareholder in a rival company's business. *Wright v. Chappell*, 17 W. R. 655; *Castelli v. Middleton*, 17 T. L. R. 373 (1901). But see *Cory & Son v. Harrison*, (1906) A. C. 274.

"Not to solicit within" or "do any work or act for, &c. within" the specified district, prohibits soliciting by letter posted beyond the district. *Callard v. Taylor*, 3 T. L. R. 698; *Edmundson v. Render*, W. N. (1905) 121. And soliciting within the district may, at any rate if it is at all systematic, amount to a breach of contract not to carry on business within that district. *Turner v. Evans*, 2 Ell. & B. 512. But "not to act as agent within" the district may allow acting beyond the district for a firm acting within. *Fairbrother v. England*, 40 W. R. 220.

"Not to sell below certain prices." *Elliman v. Carrington*, (1901) 2 Ch. 275; *National Phonograph Co. v. Edison Bell Co.*, (1908) 1 Ch. 335; *McGrutter v. Pilcher*, (1904) 2 Ch. 306.

Distances in such contracts are measured as the crow flies. *Moufflet v. Cole*, L. R. 8 Ex. 32.

If the restraint is from trading at a particular place, which is, say, a borough or any place within so many miles of it, the distance is measured from the borough boundary, and not from the centre of the town. *Cattle v. Thorpe*, W. N. (1900) 83.

"Not to compete directly or indirectly within the district," prohibits dealing with persons within the district. *Rogers v. Drury*, 36 W. R. 496. **Form 31.**

The "neighbourhood" has been held to mean the immediate neighbourhood. *Stride v. Martin*, 77 L. T. 600.

Wrongful discharge releases a servant from his covenant. *General Bill Posting Co. v. Atkinson*, (1908) 1 Ch. 537.

Occasionally the vendor contracts to deal exclusively with the company. Thus, in the case of the vendor of a brewery being the proprietor of a hotel which he retains, a covenant is inserted that the vendor, his heirs and assignees, will purchase their beer from the company alone or its successors in business. Such a covenant is not void as being in restraint of trade (see *Cutt v. Tourle*, 4 Ch. App. 654; *Clegg v. Hands*, 44 C. Div. 503; *Birmingham Breweries v. Jameson*, W. N. (1898) 15, 145; 67 L. J. Ch. 403; 78 L. T. 512), and runs with the land, and the successors in business need not be brewing at the same brewery as the original covenantee. *Manchester Brewery Co. v. Coombs*, 82 L. T. 347; (1901) 2 Ch. 608.

As to liquidated damages: the object and intention of such a provision is to assess the damages prospectively, so that if the covenant is broken the covenantee shall be entitled on proof of the breach to the amount thus assessed, without being called on by witnesses or otherwise to prove the actual damage sustained: but it has been held that, even when the contract expressly declares the amount fixed to be payable as liquidated damages, the context may impliedly negative this intention, and where the amount fixed is made payable in several events of varying importance, the Court regards that circumstance as cogent evidence that the words are not to be read in their *prima facie* sense. *Kemble v. Farren*, 6 Bing. 1; *Dodd v. Churton*, (1897) 1 Q. B. 562; *Strickland v. Williams*, (1899) 1 Q. B. 382, 384; *secus* where payable in one event; *Law v. Local Board of Redditch*, (1892) 1 Q. B. 127.

Accordingly, it is in some cases expedient to add further words emphasizing the intention, e.g., "it being the intention that the said sum shall in every such case be paid as agreed compensation for such breach of covenant, and without any need to prove, and irrespective of, the actual damages sustained."

The Court could not well override this, for "to construe is nothing more than to arrive at the meaning of the parties as expressed in the language they have used." *Scott v. Corporation of Liverpool*, 3 De G. & J. 360.

A provision for payment of liquidated damages does not preclude the other party from obtaining an injunction. *National Provincial Bank v. Marshall*, 40 C. D. 112.

But according to *Wright, J.*, the covenantee cannot have both the damages and the injunction, but must elect between the two remedies. *General Accident Assurance Corp. v. Webster*, (1902) 1 K. B. 377.

As to release of the covenantor's obligations where the company goes into liquidation. *Measures Bros. v. Measures*, (1910) 1 Ch. 336; and see *General Bill Posting Co. v. Atkins*, (1909) A. C. 118.

[12a. Of the conson asfd, £— is the conson for the sale of the goods, chattels, moneys, and other effects capable of manual delivery and forming part of the purchased ppty.] **Apportionment of stamp duty.**

The Revenue authorities will not always accept a provision as above, and vendors very commonly prefer not to disclose the apportionment in a filed contract. And see in *Wragg*, (1897) 1 Ch. 796, where an apportionment clause led to onerous litigation.

12b. All books of account of the firm, and all books of reference to customers, and all other books and documents of the said firm (except **Books of account**)

Form 31.

such as relate exclusively to the private affairs of the said firm or the individual members thereof, shall be delivered by the vendors to the coy on possession being given of the premises, pursuant to the provision in that behalf hnbefore contained, and the coy shall thenceforth, subject to the following proviso, be entld to the custody thereof, and to the use thereof for the purpose of carrying on its business; but the vendors shall have free access, at all reasonable times, to such of the sd books and documents as show or relate to the outstanding book debts and credits of the vendors, or may otherwise be requisite for enabling the vendors to collect and get in the assets of the sd firm not hby agreed to be sold, and to liquidate the affairs thereof; nevertheless, when and so soon as any of the sd books of reference and other books shall cease to be necessary for the carrying on of the sd business, the same shall be delivered over to the vendors, who shall thereupon become absolutely entld thereto.]

This and the next following clause are occasionally inserted.

Accommodation in office to be given to vendors.

12c. The vendors shall be entld to such accommodation as they may reasonably require in the counting-house of the coy, in the sd leasehold premises, for the purpose of collecting the book and other debts due to the vendors in respect of the sd business and liquidating the affairs thereof; and the vendors shall make all such book and other debts payable at the sd premises, and at no other place, the object being to secure the continued resort of the customers of the sd firm to the sd premises, and so to give to the coy the full benefit of the goodwill of the sd business.]

Vendor guarantees book debts.

12d. The vendor guarantees that the book debts included in the sale a/sd shall in the aggregate produce the sum of £—, being the amount at which they are included in the sale, and unless they shall within the period of twelve calendar months from the date hereof produce that sum, the vendor shall, if so required by the coy, pay to the coy a sum sufficient to make good the deficiency, and he shall thereupon be entld to the uncollected book debts a/sd.]

The above is sometimes inserted.

Company to collect book debts.

[12e. The coy shall collect, on behalf of the vendor, all the book debts of the vendor excepted from the sale hby agreed to be made, and in doing so the coy shall act under the direction of the vendor, and shall, once a month, account to the vendor for all moneys so collected, less all expenses of collection; and for the purposes of facilitating such collection, the vendor shall do whatever the coy may reasonably require, and the coy shall not be responsible for any losses in the course of the collection a/sd.]

As to this clause, see *supra*, p. 347.

12f. Each of the vendors shall, if he shall so long live, retain and hold in his own name the whole of the shares to be allotted to him pursuant to clause 5 hof for a period of six calendar month. from the allotment thof, and shall retain and hold in his own name at least 75 p.c. of the sd shares for a period of five years from the time of such allotment.]

Form 31.

Vendors to hold shares for certain period.

Such a clause as the above is occasionally inserted.

13. The coy shall, subject to the consent of the office and to the completion of the purchase, be entld to the benefit of the current insurance of the premises.

Benefit of insurance.

Prima facie, a purchaser is not, in the event of fire, entitled to repudiate the contract or to any reduction in the purchase-money (*Paine v. Meller*, 6 Ves. 349), nor is he entitled to the benefit of any insurance effected by the vendor (*Rayner v. Preston*, 18 C. D. 1); and if a fire occurs, and the vendor obtains the insurance money, and is subsequently paid the purchase-money, he must recoup the office, for his only right is to indemnity (*Castellain v. Preston*, 11 Q. B. D. 380); even if the vendor, on recovering the insurance money, reduced the purchase-money *pro tanto*, he would be accountable for the amount to the office. *West of England Fire Co. v. Isaacs*, (1897) 1 Q. B. 226. No doubt, indirectly, the purchaser may, in some cases, be enabled to get the benefit of the insurance by calling on the office to reinstate under 14 Geo. 3. c. 78, s. 83; but, notwithstanding *Ex parte Gorely*, 4 De G. J. & S. 477, it is doubtful whether that Act applies beyond the bills of mortality. See dicta in *Westminster Fire Office v. Glas., &c. Soc.*, 13 App. Cas. 714, 716. In the result the proper course is for the purchaser, immediately on the execution of the contract, to make arrangements with the insurance office, and the above clause leaves him free to do this.

13a. The vendors shall pay all the costs of, and incidental to, the preparation and execution of this agreemt, and of the memdum and arts of asson of the coy, and of the registration thof, and of all stamps, fees, and legal expenses, incident to the formation of the coy, and generally all preliminary expenses whatever incurred in relation to the coy down to the first general allotment of shares, or to the time when the directors determine not to proceed to allotment.]

Preliminary and other expenses to be borne by vendors.

Sometimes this clause is varied so as only to cover costs up to incorporation, and very commonly no such provision is made.

The clause means all the reasonable costs, &c. which a prudent man would incur in the matter. *Malvern Urban District Council v. Malvern Link Gas Co.*, 83 L. T. 326, 328.

A promoter can only recover from the company what he has paid in preliminary expenses where he proves a contract by the company to pay. *English and Colonial Producers Co.*, (1906) 2 Ch. 435; *National Motor Mail Coach*, (1908) 2 Ch. 515.

Form 31.

Validity not
to be im-
peached

13b. The validity of this agreemt shall not be impeached on the ground that the vendors, as promoters or otherwise, stand in a fiduciary relation to the coy, and that the directors, having accepted office at their request, do not constitute an independent board.]

A clause as above is sometimes inserted, and may have some operation (*Postage Stamp Automatic Co.*, (1892) 3 Ch. 566); but it should be made to fit the circumstances, e.g., if one of the directors is to receive a payment from the vendor or is interested as a partner or shareholder in the vendor company, let the facts be disclosed here and the clause provide that he is not to be accountable. The clause is no use unless it covers the particular case. See *Olympia, Ltd.*, (1898) 2 Ch. 153, 157, 168; and p. 132, *supra*; and cf. *Brazilian Rubber Plantations* (No. 1), (1911) 1 Ch. 425.

Determina-
tion if shares
not suffi-
ciently
subscribed

14. Unless before the — day of — the coy shall have become entld to commence business, either of the parties hto may by notice in writing to the other determine this agreemt except as to clause 13a hof, but such determination shall not give rise to any claim for com-
pensation, expenses or otherwise.

This clause is inserted to meet the contingency of the company not becoming entitled to commence business under sect. 87 of the Companies Act, 1908; it will, therefore, of course be omitted in the case of private companies.

Service of
notices.

15. Any notice hereunder may be served on the vendors by sending the same through the post, addressed to them at No. —, — Street, —, and shall be deemed to have been served within twenty-four hours after the same is posted.

It would seem that notice might in the absence of such a clause be given by post. *James v. Institute of Chartered Accountants*, 98 L. T. 225.

This agree-
ment to take
effect as an
English
contract.

Appointment
of agent in
England to
represent
vendors for
legal pro-
cesses, &c

[15a. This agreemt is to be construed and take effect as a contract made in England, and in accordance with the law of England, and the vendors hby submit to the jurisdiction of the High Court of Justice in England, and hby appoint the — Bank, Limtd, and every clerk for the time being of that coy, to be the agent in London of the vendors for the purpose of accepting service on behalf of the vendors resply of any writ, notice, order, judgment, or other legal process or document in respect of any matter arising out of this agreemt, and such appointment shall not be revocable, and service of any such document on such appointee shall be deemed to be good service on the vendors for all purposes, and the vendors elect domicile at the registered office of the sd bank.]

Where the vendor is a foreigner, a clause as above may be desirable, see p. 343, *supra*. Such a clause is effective, and cannot be revoked. *Tharsis, &c. Co. v. Société, &c. des Métaux*, 58 L. J. Q. B. 435; approved by the Court of Appeal in *Montgomery v. Liebenthal*, (1898) 1 Q. B. 487; *Copin v. Adamson*, 1 Ex. D. 17.

It does not offend against the rule that the parties cannot contract that the Court shall have a jurisdiction not given by Order XI. r. 1. *British Wagon v. Gray*, (1896) 1 Q. B. 35. **Form 31.**

16. The coy shall cause this agreemt to be duly filed with the Registrar of Companies pursuant to sect. 88 of the Companies (Consolidation) Act, 1908, and also, in the case of shares allotted to the vendors' nominees, shall cause a sufficient contract to be so filed constituting the title of such nominees. **Agreement to be filed**

Where the agreement provides for the issue of paid-up or partly paid-up shares, a clause as above is useful as a reminder.

If there is to be an invitation to the public to subscribe for shares, a contract like the above should contain a new clause to the effect that—

[17. This agreemt is provisional only, and is not to become absolute unless and until the coy has become entld to commence business.]

See sect. 87 of the Act of 1908, *supra*, p. 20.

AS WITNESS, &c.

THE SCHEDULES ABOVE REFERRED TO.

Special Clauses in Vendors' Agreements.

Upon payment of the cash portion of the purchase-money the vendor shall enter into a covenant with the coy for the benefit of the members thof, guaranteeing that the net profits of the coy in respect of the sd business during each of the three years next following the — day of — next shall amount to not less than [10] p.c.p.a. on the pd-up capital of the coy not exceeding 100,000L., and that if there shall be no profits, or a deficiency of profits, in any of the sd three years the vendor, his heirs, executors, or administrators shall, immediately after the same shall have been ascertained, and notice thof given to him or them, pay to the coy, in trust for the members thof, a sum sufficient to make up the amount guaranteed. The certificate in writing of the auditor or auditors for the time being of the coy as to the amount at any time payable under this clause shall, as against the vendor, be conclusive evidence thof for the purposes of this clause.

Form 32.

Guarantee of
profits by
vendor

to the intent
that the
members may
respectively
sue the com-
pany for any
breach of such
covenant

Guarantee of Profits.

It occasionally happens, where a going business is sold to a company, that the vendor guarantees that the profits shall, during a limited period, amount to a particular sum. The guarantee is usually given for the benefit of the share-

Form 32.

holders, and is stated in the prospectus as an attraction. Where the transaction is *bona fide*, it has been held that the members thereby acquire an independent right, which they will be able to rely on if the profits are insufficient. See *South Llanharran Co.*, 12 C. Div. 503; and *Gelly Deg Colliery Co.*, 33 L. T. 440. But it would seem that such a guarantee cannot be considered *bona fide* given where part of the capital is paid to the vendor as the consideration for the guarantee, *e.g.*, where an addition to the price is made in order to cover the guarantee so given. And *query* whether these cases are quite consistent with the principles laid down in *Trevor v. Whitworth*, 12 App. Cas. 409. In any case, such guarantees require to be very carefully framed. See *Stuart's Trusts*, 4 C. D. 213, where it was held that the guarantee amounted to a provision for payment of dividends out of capital, and accordingly that the members could not claim the benefit thereof as against the company's creditors. Sometimes the performance of the guarantee is secured by the investment of a fund in the names of trustees. A company can in some cases release a guarantee by a vendor. *Sheffield Nickel Co. v. Unwin*, 2 Q. B. D. 214.

Where a vendor guarantees the company a certain dividend for a fixed number of years there is no implied contract by the company to carry on the business disentitling it, if it discontinues the business during the currency of the guarantee, to sue the vendor on it (*Brown & Co. v. Brown*, 36 T. L. R. 272), *a fortiori* where the company discontinues only one out of several of the businesses bought. *Ibid.*; cf. *Rhodes v. Forwood*, 1 A. C. 256; and *Ex parte Maclure*, L. R. 5 Ch. 737; *contra*, *Telegraph Despatch Co. v. McLean*, L. R. 8 Ch. 658. Where there is a guarantee fund, it is sometimes provided that if the profits in any year amount to the guaranteed sum, a part of the fund shall be released. In *South Llanharran Co.*, *ubi supra*, it was provided that any moneys paid under the guarantee should be repaid out of the surplus profits which in any subsequent year remained after payment of a 10 per cent. dividend for that year. As to construction of a guarantee, see *Addison v. Vera*, 9 T. L. R. 607.

The clause provides usually for a guarantee for a term of years, but occasionally it provides for a perpetual guarantee, and in that case the question has been raised whether such a guarantee contravenes the rule against perpetuities.

It is well settled that the rule does not apply to a personal covenant or contract (*Walsh v. Secretary of State for India*, 10 H. L. C. 367), but it has been suggested that if the guarantee is for the benefit of the holders for the time being of the shares, it ought to be analyzed into its component elements, and when so analyzed it resolves itself into first a covenant to pay an annuity, and secondly, a settlement of that annuity on the holders for the time being and from time to time of the shares, that it is thus a settlement of property—the supposed annuity—and open to objection as constituting a perpetuity.

But this reasoning is as fallacious as it is far-fetched. The guarantee cannot be treated as including the grant of an annuity. A grant of an annuity of inheritance must be on the ordinary lines of inheritance, and an annuity to A., the holder of a share, which is to go over when he parts with the share to the transferee, and so on *toties quoties*, is a thing unknown to the law. We are asked, therefore, to metamorphose the guarantee for the purpose of bringing into existence an annuity which is impossible in law in flagrant violation of the principle embodied in the maxim, *Ut res magis valeat quam pereat*. The guarantee, it is to be noted, is for the benefit of the holders for the time being and from time to time of the shares, and under such a guarantee each holder for the time being has only to show that he is a holder of the shares, and as such he is brought within the class of beneficiaries indicated, and becomes

entitled to claim the benefit of the guarantee. It matters not how he obtained the transfer of the shares. His title to participate in the benefit of the guarantee is not derivative, but independent. It attaches under the contract of guarantee the moment he can show that he occupies the position of a shareholder, and is therefore a *cestui que trust*. But the mere fact that a contract of guarantee is with trustees for the beneficiaries does not affect the position so far as the question of a perpetuity is concerned; whether the trustees or the beneficiaries in their right sue, they must sue on the contract—a mere personal contract—as in the case above referred to. They cannot sue by virtue of the devolution of title to any annuity or other property, and this being so, there is no foundation for the suggestion of invalidity above referred to.

Form 32.

As between the holders of the 12,000 shares to be allotted to the vendors pursuant to clause — hof (which shares are huftr referred to as the vendors' shares), and the holders of the other shares in the capital of the coy which have been already or shall hereafter be issued, not exceeding 20,000 in number (huftr referred to as the ordinary shares), the profits of the coy, from the 1st day of January, 1912, to the 31st day of December, 1917, shall be applied first in paying to the holders of the ordinary shares a cumulative preferential dividend at the rate of 6 p.c.p.a. upon the amount for the time being pd up, or credited as pd up, on the ordinary shares held by them resply.

Form 33

Vendors' shares deferred.

Sometimes upon the sale of a going concern the vendor agrees to give a limited preference of this kind to the shares taken up by the public.

The memorandum will refer to the agreement, and set out the clause, and state that the shares included in the certificate form part of the vendor's shares.

So long as the capital pd up on the 5,000 10l. shares to be issued to the vendor as afsd shall exceed what on the average is pd up on the other issued shares, the excess shall not be deemed to carry dividends, and upon each certificate, &c.

Form 34.

Another.

The vendors shall have the option, during the term of three years from the date hof, of taking up at par shares in the capital of the coy forming part of its initial capital, to an extent not exceeding in the whole 100,000 shares of 1l. each, and the coy shall accordingly set aside 100,000 of the shares in its initial capital to answer such option, and the following provisions in regard to such option shall have effect, that is to say:—

Form 35.

Option to vendor to subscribe for shares at par.

- (a) The option shall in each case be exerciseable by notice in writing to the coy.
- (b) The vendors may, under the option afsd, take up all or any of the sd 100,000 shares, and may exercise the option from time to time, taking on each occasion a part of the shares afsd not being less than 25,000 shares.
- (c) As and whenever the vendors exercise the sd option, they must, along with the notice afsd, pay to the coy the sum of ten

Form 35.

shillings per share in part payment of the shares to be taken, and the balance of the amount of such shares, namely, ten shillings per share, shall be pd to the coy within thirty days after the allotment of the shares so taken.

A clause such as the above is not uncommon, and sometimes such an option may be of great value. In giving such an option the company does not impliedly contract not to wind up until the option is exercisable, and if it winds up the option still remains exercisable. If the liquidators refuse to give effect to the option, the party entitled thereto can prove for damages and the reversion on his share in the existing assets of the company after deducting the price he had agreed to pay for the shares. *Hirsch & Co. v. Burns*, 77 L. T. 377.

Form 36.

Exclusion of
objectionable
assets.

[The coy is to be at liberty, at any time within — days from the date hof, to notify in writing to the vendors that the coy objects to any particular asset, whether bill, note, book debt, or chose in action, comprised in the sale, and within — days after receiving notice of any such objection the vendors shall pay over to the coy in cash a sum equal to the value at which such asset was brought into the balance sheet, upon the basis of which the sale has been arranged, and thereupon such asset shall be deemed to be excluded from the sale, and the vendors shall be entld thereto.]

Vendor may pay Promoter Syndicate.

Form 37.

The vendor shall be at liberty to make over to the B. Syndicate, Limtd (hmftr called "the B. Syndicate") a portion, viz., £—, of the cash and — of the pd-up shares mentd in clause 2 hof in respect of the services of that coy to him in relation to the formation and promotion of the coy, and the syndicate, notwithstanding the fiduciary position it stands in as a promoter of the coy, shall be in no wise accountable to the coy for what it so obtains, and the intention is that this provision shall enure for the benefit of the syndicate, and the vendor shall be regarded as a free thof accordingly.

The object of the concluding words is to give the syndicate a right to the benefit of the stipulations by creating a trust in its favour. See *Empress Engineering Co.*, 16 C. D. 125; *Rotherham Alum Co.*, 25 C. D. 103; *Kelly v. Larking*, (1910) 2 Ir. R. 550, and *supra*, pp. 148, 149.

A vendor may now, out of his consideration, cash or shares, pay commission if the payment would have been legal if made directly by the coy. See sect. 89 (3) of the Act, and p. 278 *et seq.*, *supra*.

If any difference shall arise between the parties touching these presents, or the construction of, or any clause or thing herein contained, or any matter in any way connected with these presents, or the operation of, or the rights, duties, or liabilities of either party in connection with the premises, then and in every or any such case the matter in difference shall be referred to two arbitrators, one to be appointed by each of the parties in difference.

Form 38.

Arbitration

Occasionally a clause as above is inserted in agreements, but its insertion is not to be recommended, for a dispute can generally be settled more speedily and with less expense without a reference to arbitration, besides which such a clause gives too much power to a hostile or cantankerous vendor, who can get up a dispute and so obtain discovery of the books of the company.

The vendors guarantee the due payment of the overdrawn accounts specified in the list, which, for the purpose of identification, has been subscribed by — and — to the extent in each case set opposite the said account in the — column of the said list, but the coy shall be entitled to work all such overdrawn accounts either within the limit of or in excess of the overdraft existing as on the date hereof. Nevertheless, the working of any such account so as to allow of overdraft in excess of the existing overdraft shall, as regards the excess, be at the sole risk of the coy. The guarantee of the vendors as regards each such account shall be deemed to be a continuing guarantee, and shall extend to the payment of the balance for the time being and from time to time of such account not exceeding the amount of the overdraft at the date of, and the vendors shall not be entitled to insist that payments into the account after the date of are to be treated as in satisfaction *pro tanto* of items to the debit of such account on the date of, and the coy, without prejudice to such guarantee, is to be at liberty to give time to the customer, and to release or modify any security, and generally to make any concessions to the customer which the coy may think expedient.

Form 39.

Guarantee of certain accounts

The above clause is occasionally used, but it is somewhat stringent, and is only to be adopted in special circumstances.

AGREEMENT for SALE made with AGENT or TRUSTEE for intended COMPANY prior to its formation.

Form 40.

This is an example of a form of an agreement commonly adopted in Plan 1. *See* p. 325.

Agreement with agent or trustee for intended company

AN AGREEMENT made the — day of —, between A., of, &c. Parties. (hereafter called the vendor), of the one part, and B., of, &c., on behalf

Form 40. of the coy below mentd (which coy is hnfr referred to as the coy), of the other part.

Sometimes it is preferred to make the agreement with B. "as trustee for the company below," &c., but the adoption of that course has occasionally led to difficulty where modifications were subsequently desired, for though an intended company when registered cannot claim any right under an agreement made with a person purporting to act before its incorporation as its agent, it may be that the company can claim the benefit of an agreement made with a trustee on its behalf before its incorporation, and therefore that the trustee is not entitled to modify without the company's consent.

Recitals.

WHEREAS the vendor has for some time past carried on business as, &c., upon the hereditaments hnfr described. AND WHEREAS the coy, to be called The — Coy, Limtd, is about to be formed under the Cos (Consolidation) Act, 1908, having for its objects, among other things, the acquisition and working of the sd business. AND WHEREAS the memdm and arts of assn of the coy have with the privity of the vendor been already prepared. AND WHEREAS the nominal capital of the coy is to be 80,000l., divided into 10,000 shares of 8l. each. AND WHEREAS by the sd arts of assn it is provided that the coy shall immediately after the incorporation thof adopt the agreemt therein referred to, being these presents: Now IT IS HEREBY AGREED as follows:—

Sometimes the memorandum and articles have not been prepared when the agreement is executed, and in such case the third and fifth recitals should be omitted.

Agreement to sell.

The vendor shall sell and the coy when incorporated shall purchase. *Here should follow such of the clauses in Form 31, supra, as may be required, e.g., 1 to 13 and 15.]*

Discharge of B.

15. Upon the adoption of this agreement by the coy in such manner as to render the same binding on the coy, the said B. shall be discharged from all liability in respect thof.

As to this clause, see *supra*, p. 327 *et seq.*

Power to rescind shares not subscribed.

16. Unless before the — day of — the coy shall have become entld to commence business, either of the parties hto may, by notice in writing to the other, determine this agreement, and after adopting this agreement the coy shall stand in the place of the sd B., for the purpose of this clause.

Power to rescind if not adopted.

17. If this agreement shall not be adopted by the coy in manner afsd before the — day of — next, either of the parties hto may, by

notice in writing to the other, determine the same; and in the case of an invitation to the public for the first time to subscribe for shares add the words of clause 17 of Form 31]. **Form 40.**

See *supra*, p. 328.

18. The determination of this agreemt under clause 16 or 17 hereof shall not give rise to any claim for compensation, expenses, or otherwise. **No claim for damages.**

See *supra*, p. 328.

As WITNESS the hands of the parties hto the day and year first above written.

THE SCHEDULE ABOVE REFERRED TO.

As to adoption of contracts, see *supra*, p. 327. See also sect. 87, sub-sect. 3 of the Act of 1908. Having regard to this section, if the adoption takes place before the company has become entitled to commence business, and there has been, or is to be, an appeal to the public to subscribe for shares, a clause should be inserted as in clause 17, p. 363, *supra*.

AGREEMENT *by* COMPANY ADOPTING CONTRACT MADE ON ITS BEHALF BEFORE ITS INCORPORATION. *For indorsement on Original Contract.* **Form 41.**

AN AGREEMT made this — day of —, between A., of, &c., of the first part, B., of, &c., of the second part, and The — Coy, Limtd (huftr called the coy), of the third part. WHEREAS, since the execution of the within-written agreemt, the coy has been incorporated in accordance with the intention in that behalf referred to in such agreemt: **Parties.** **Recitals.**

NOW IT IS HEREBY MUTUALLY AGREED as follows:—

1. The within-written agreemt is hby adopted by the coy, and shall be binding on the sd A. and on the coy in the same manner, and take effect in all respects as if the coy had been in existence at the date thof, and had by these presents ratified the same. **Adoption.**

2. The sd B. shall from henceforth be discharged from all liability under or in respect of the sd agreemt. **B. discharged.**

IN WITNESS, &c.

Where a contract is made on behalf of an intended company [as above, pp. 327 *et seq.*], it is requisite to take steps to bind the company when it comes into existence. An idea prevailed at one time that a company could

Form 41. ratify such a contract, but it is now well settled that it cannot. *Empress Engineering Co.*, 16 C. Div. 125; *Northumberland Avenue Co.*, 33 C. Div. 16. See *supra*, p. 322. Accordingly the usual plan is to execute an agreement as above, so as to effect a novation of contract. See *supra*, p. 323. Where the preliminary contract is made with B. as "trustee" for the intended company, clause 1 must run as in the form following. That such an adoption is effective, see *Boston Deep Sea Co.*, 39 C. Div. 359; *Natal Land Co. v. Pauline Colliery Syndicate*, (1904) A. C. 120.

Form 42. AGREEMENT by COMPANY ADOPTING, WITH MODIFICATIONS, CONTRACT MADE BEFORE ITS INCORPORATION.

Recitals.

Parties: the coy, 1; the vendor, 2; A., 3. WHEREAS by an agreeemt (huftr called the preliminary contract) dated, &c., and made between the vendor, of the one part, and the sd A., as trustee for the coy (which was then intended, and has since been formed under the Cos (Consolidation) Act, 1908), of the other part, it was agreed that the vendor should sell, and the coy should purchase, certain ppty upon the terms, and subject to the stipulations therein expressed: AND WHEREAS a copy of the preliminary contract is set forth in the schedule hto.

NOW THESE PRESENTS WITNESS AND DECLARE as follows:—

Adopting preliminary contract.

1. The preliminary contract is hby adopted by the coy, and shall (subject as hnfr provided) be binding on the vendor and the coy in the same manner, and take effect as if the coy had been in existence at the date thof, and had been a party thereto instead of the said B.

Completion.

2. The time for the completion of the sale shall be postponed to the — day of —.

Modification of terms of sale.

3. If at the time for completion less than 10,000 shares in the coy's capital have been taken up, the cash portion of the purchase-money, viz., 50,000*l.*, shall be satisfied as to 20,000*l.* by the issue to the vendor or his nominees, of 2,000 fully paid-up 10*l.* shares in the coy's capital, and as to 30,000*l.* as follows:— that is to say, at the time for completion, one moiety of the then capital moneys of the coy shall be pd to the vendor, and the other moiety shall be retained by the coy for its general purposes; and out of the capital moneys subsequently paid up the coy may retain for its general purposes any sum not exceeding 5,000*l.*, and, subject as aforesaid, shall pay such capital moneys, as and when received, to the vendor, until the residue of the sd sum of 30,000*l.* has been paid, with interest, at the rate of 5 p.c.p.a., as from the time for completion to the time of actual payment. And, unless within six calendar months from the first allotment of the coy's shares, the whole of such residue has been pd, the coy may at any time thereafter satisfy the balance thof, then remaining unpd, by issuing to the vendor or his nominee fully pd-up shares to be regarded

as of par value (or the balance shall thereupon immediately become payable in cash).

Form 42.

4. If at the time for completion less than — shares shall have been taken up, then upon payment of the amount hnbefore made payable at the time for completion, and upon the allotment of the sd 2,000 shares, the vendor will transfer the ppty to the coy in accordance with clause — of the preliminary contract.

When transfer to be effected.

5. As in Form 41, cl. 2.]

B. discharged.

6. Unless before the — day of — at least — shares in the coy shall have been applied for by responsible persons, either of the parties hto of the first and second pts may, by notice in writing to the other, annul the sale, and thereupon the preliminary contract and these presents shall become void, save as regards this and the last preceding clause hof.

Power to rescind.

7. As in Form 31, cl. 16.]

Filing contracts.

IN WITNESS, &c.

Add schedule containing copy of preliminary contract.]

As to adoption of contracts, see note *supra*, p. 323.

AGREEMENT by COMPANY for SALE of its ENTIRE BUSINESS as a **Form 43.** GOING CONCERN.

AN AGREEMENT made the — day of —, between A. B., of —, Parties on behalf of The — Coy, Limtd (hnftr called "the Coy"), of the one pt, and The — Corporation, Limtd (hnftr called "the Corporation"), of the other pt.

WHEREAS the coy was incorporated in the year — under the Cos Recitals. Acts, 1862 to 1900, with a nominal capital of £—, divided into — shares of £— each: AND WHEREAS the whole of the sd shares have been issued and are fully pd up: AND WHEREAS by the memdum of asson of the coy it is declared that one of the objects of the coy is to sell the undertaking of the coy, or any pt thof, for such conson as the coy may think fit, and in particular for shares, debentures, or securities of any kind having objects, altogether or in pt, similar to those of this coy: AND WHEREAS the objects of the corporation are in pt similar to those of the coy: AND WHEREAS the corporation is desirous of acquiring the undertaking and ppty of the coy.

Now, THEREFORE, IT IS AGREED as follows:—

1. The coy shall sell, and the corporation shall purchase, the Sale. undertaking of the coy, which expression shall be deemed to include all the lands, buildings, hereditaments, goods, chattels, moneys, credits, debts, bills, notes, goodwill, things in action, contracts,

Form 43. agreements, securities, and other assets whatsoever and wheresoever of the coy, except its uncalled capital.

Consideration.

2. As a pt of the consen for the sd sale, the corporation shall undertake, pay, satisfy, discharge, perform, and fulfil all the debts, liabilities, contracts, engagements, and obligations of the coy whatsoever, and shall indemnify the coy against all actions, proceedings, claims, and demands in respect thof.

Further consideration.

3. As a further pt of the consen for the sd sale, the corporation shall, if the coy within — weeks from the date hof, passes an effective resolution for the voluntary winding-up thof, pay all the costs, charges, and expenses of and incident to the winding-up and dissolution of the coy, and shall indemnify the coy against all actions, proceedings, claims, and demands in respect thof.

Further consideration.

4. As further consen for the sd sale, the corporation shall pay to the coy the sum of £—— in ca

Title.

5. Title accepted.

Completion.

6. The sale and purchase hby agreed to be made shall be completed on the — day of — next, when the sd consen in cash and shares shall be pd and satisfied, and the coy shall execute and do all such assurances and things as shall reasonably be required by the coy for vesting in it the sd premises.

Conditions.

7. This agreemt is conditional on the same being ratified by a resolution of a general meeting of the coy, and if the same is not so ratified within — weeks from the date hereof, either of the parties hto may, by notice in writing to the other, rescind this agreemt.

Filing.

8. [Agreemt to be filed. See *Form 31, cl. 16.*]

As WITNESS, &c.

Sale of undertaking before going into liquidation.

It is a very common thing for a company to agree to sell its undertaking as a going concern without going into liquidation, but in order to justify such an agreement power to dispose of the undertaking must be found in the memorandum of association of the company. No doubt, by proceeding under sect. 192 of the Companies Act, 1908 (replacing sect. 161 of the Act of 1862), almost any company under the Act can sell its undertaking, but there are cases in which it is not convenient to proceed under that section, for an effective agreement cannot be made under the section unless and until the company goes into liquidation, and appoints liquidators, and invests them with authority to exercise the powers of the section. Where the purchasing company is already a going concern with large resources, there may be no objection to the vendor company, after settling the terms of the agreement, or entering into a provisional agreement, going into liquidation; but even in such cases the vendor company sometimes prefers to postpone liquidation till after completion. And where the purchasing company is to be formed and floated the vendor company may find itself placed in a very awkward predicament if it goes into liquidation with a view to making the agreement, and then subsequently the new company is not formed, or does not float. In the result the agreement may fall to the ground, and the vendor company may find that it has lost its status as a going concern without obtaining any corresponding benefit, and that it cannot start again without either reconstructing or applying to the Court to stay the winding-up. If, on the other hand, the vendor company being in a position so to do, makes

an agreement for sale without going into liquidation, that agreement can, of course, provide that, unless the sale is duly carried into effect, the agreement may be rescinded, and then, if things go wrong, that power can be exercised, and the vendor company can resume and continue its business. Sometimes such an agreement is made direct with the new company, or with a trustee for it, and sometimes it is made with some person as an intermediary, who re-sells to the new company at a profit.

A company cannot sell its whole undertaking unless there is power to do so in its memorandum of association. *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Cas. 712. But where the memorandum makes the sale of its undertaking one of the company's objects, such a sale is *intra vires* and allowable. *Cotton v. Imperial and Foreign Co.*, (1892) 3 Ch. D. 454; *New Zealand, &c. Co. v. Pencock*, (1894) 1 Q. B. 622.

Nevertheless, according to a remarkable decision of the Court of Appeal (*Bingood v. Henderson's Transvaal Estates Co.*, (1908) 1 Ch. 743), or to the reasons assigned for the decision, a sale of the undertaking for shares made with a view to distribution of the proceeds amongst the members of the selling company cannot be made under a power in the memorandum even though immediately followed by a voluntary winding-up. For observations on this decision, see *infra*, Chap. XXI.

After the agreement has been ratified, the seal of the company should be affixed to a memorandum at the foot of the agreement as follows:—

PURSUANT to a resolution passed at a general meeting of The ——— **Form 43.**
Coy, Limtd, held the ——— day of ———, the above agreement is hereby **Memorandum**
ratified. As witness the common seal of the coy. this ——— day of ———. **of ratification.**

Sometimes the agreement is made conditional on its being adopted, under sect. 192 of the Act of 1908, replacing sect. 161 of the Act of 1862, *v.g.*, "This agreement is conditional on the same being adopted by the liquidator of the company, pursuant to a special resolution of the company conferring on him the requisite authority, under sect. 192 of the Companies Act, 1908," but in such cases the provisions of the agreement will require considerable modifications. See Chap. XX., *infra*.

Sometimes the purchasing company has not, when the agreement is made, power to purchase the business, and in such case it is necessary either to wait until the objects of the purchasing company have been extended (see *Petitions, infra*, Chap. XVII.), or if a conditional agreement is required at once, it can be made with C. D., on behalf of the purchasing company, and a clause can be inserted making the agreement conditional, *inter alia*, "on its being effectually adopted by the company after its objects shall have been extended so as to allow of such adoption."

Insurance Business.

As to transfer of life insurance businesses, see Form 45 and *Petitions, infra*, Chap. XVII.

Banking Business.

As to transfer of banking businesses where the vendors are a firm, Form 43 can be readily adapted; and where the vendors are a company, the above form can sometimes be adapted, or one of the forms in Chap. XXI., *infra*. Occasionally, however, special provisions are required.

Form 45.**AGREEMENT for TRANSFER of LIFE ASSURANCE BUSINESS.**

(As to life assurance companies generally, see Chap. XVII.)

Agreement
for transfer of
life assurance
business.

AN AGREEMENT made, &c., between A. on behalf of the B. Coy (hmftr called "the B.") of the one pt. and the C. Assurance Coy (hmftr called "the C.") of the other pt.

WHEREBY IT IS AGREED as follows:

Contracts and
liabilities to
be taken over.

1. The C. shall take over all the life assurance contracts and all the annuity contracts of the B. current or capable of revival or of other cos for which the B. is liable as from the 31st day of December, 19—, and shall assume the liabilities of the B. in respect of such contracts, and the B. and its assets shall stand discharged from all liability in respect thof.

Assets to be
made over to
meet lia-
bilities.

2. The B. shall make over to the C. assets sufficient as on the sd 31st day of December, 19—, to provide for the liabilities to be assumed by the C. as afsd.

How such
assets to be
ascertained.

3. For the purpose of ascertaining the amount of the assets to be made over to the C. as afsd the value of the liabilities to be undertaken by the C. as afsd shall be ascertained and certified by L. and M. upon the bases and principle following, that is to say:—

(1.) Valuation to be made as on the 31st day of December, 19—.

(2.) The Mortality Tables to be employed shall be (a) for the assurance contracts, the Institute of Actuaries' H. M. (5) Table, and (b) for the annuities, the Government Experience Table, 1884.

(3.) The rate of interest assumed in the calculations shall be 3 p.c.p.a. throughout.

(4.) The premiums to be valued shall be the ordinary premiums only throwing off all extra premiums for health and instalments and commission (if any).

(5.) The proportion of the annual premium income reserved as a provision for future expenses and profits shall be 10 p.c. and such further percentage as the valuers shall agree upon, not exceeding 2½ p.c., as may in their opinion be necessary for the purpose of carrying out this agreement.

Certificate of
valuers and
selection of
assets.

4. The sd L. & M. shall also value the assets of the B., and their certificate as to the value thof shall be conclusive as between the parties hto, and when such value has been certified it shall rest with the B. and its liqrs to select the particular assets which are to be made over to the C. pursuant to clause 2 hof.

Differences
of valuers to
be referred
to arbitrator.

5. If the sd L. & M. shall differ in regard to any such valuation as in clauses 3 and 4 hof, then and in such case the difference shall be referred to A., of, &c., actuary, or to some other person selected by the B. and the C., and the award of such person shall be conclusive.

Premiums,
&c. to be
accounted for.

6. The B. shall account to the C. for all premiums and other moneys falling or accruing due after the 31st December, 19—, and

received by the B. in respect of such assurance contracts as from the 31st December, 19—, and the C. shall be deemed to be liable to bear and shall recoup all payments made by the B. in respect of the sd assurance contracts and annuities accrued or emerged as from the sd 31st of December, 19—, and a proper account shall be made out accordingly, and if the balance is against the C. the assets to be made over to it under clause 2 *h*of shall be reduced *pro tanto*.

7. The residue of the assets of the B. shall be converted into money and the proceeds of such conversion shall be retained by the liqrs *thof* and shall be applied in paying off the debts and liabilities, if any, of the B. which are not to be assumed by the C. as *afsd*, and of all the costs, charges and expenses of the parties *hto* and of the liqrs of the B. of and incident to the winding-up and final dissolution of the B., and the surplus shall be distributed among the shareholders of the B. in accordance with their rights and interests in the assets of the B.

8. The C. shall accept, without objection or requisition, such title as the B. has to the assets to be made over as aforesaid.

9. The C. shall enlarge all the assurance contracts to be made over as *afsd*, and which shall not have become claims before the agreement is sanctioned by the Court in manner following, that is to say:—

- (a) By making all death or maturity claims payable within fourteen days after the delivery and approval of the proofs of death or maturity and of title.
- (b) By freeing all such contracts from all conditions in restriction of travel, residence, or occupation.

10. Moreover, the C. shall open an account, and on the 31st December, 19—, and on the 31st December in each succeeding year, shall carry to the credit of such account a sum equal to 5 p.c. of the premium revenue on such of the sd assurance contracts as confer the right to participate in profits during the year ending such 31st December, and the sums from time to time standing to the credit of such account shall be deemed to carry interest at the rate of 3 p.c. p.a., with yearly rests, and on the 31st December, 19—, and at the expiration of each succeeding quinquennial period, the amount standing to the credit of such account shall be appropriated by way of equivalent reversionary bonus for the benefit of the holders of the sd assurance contracts whose assurances shall on such 31st December, 19—, or at the expiration of each such quinquennial period, be in force or capable of revival and in proportion to the premiums of the period.

11. The B. and the liquidators thereof shall procure the directors of the B. to give to the C. an undertaking that such directors shall, for a period of at least three years from the date of the resolution confirming the winding-up, for the same remuneration *resply* as they now receive and from such last-mentioned date to be *pd* by the C., assist in consolidating the transfer, collecting the assets, and

Form 45.

Application of residue of assets.

Acceptance of title.

Enlargement of assurance contracts.

Quinquennial account to be opened for benefit of participating holders.

Directors of transferor company to assist in consolidating the transfer, &c.

Form 45.

Staff to be
taken over.

Indemnity of
directors,
trustees, and
other officers.

Liability of
transferor
company
limited to its
property,
and of its
members to
their liability
on their
shares.

Completion
after sanction
of Court.

Charges on
assets of
transferor
company
not to be
prejudiced.

Winding-up.
Modification
of the
arrangement.

Deed poll
covenanting
with policy
holders, &c.
to observe this
agreement.

Agreement to
be conditional
on resolutions
passed and
adoption by
liquidators
and sanction
of Court.

maintaining and developing the business connections of the B. in relation to the policies and annuities to be transferred pursuant hto.

12. The C. shall take over the staff of the B., and indemnify the B. against all claims for salary or otherwise by the members of that staff as from the 31st December, 19—, and shall recoup to the B. all payments made by the B. in respect thof, and of all proper office and other expenses incident to the carrying on of the business as from the sd 31st December, 19—.

13. The C. shall indemnify the directors, trustees, auditors and other officers of the B., and each and every of them, and their and each and every of their executors and administrators, against all such liabilities as the B. is now liable to indemnify them against under clause — of the deed of settlement of the — of —, 18—, of the B.

14. The liability of the C. under this agreemt is limtd to its ppty and funds for the time being, and accordingly the individual liability of each proprietor is limtd to the amount unpaid on his shares.

15. The arrangement embodied herein is to be carried into effect forthwith after the same shall have been sanctioned by the Court as huftr provided.

16. Nothing in this scheme contained shall prejudice any existing security, lien or charge upon the assets of the B. or any pt thof.

17. The winding-up of the B. shall be completed, and the dissolution thof shall be effected with all convenient speed.

18. The liqrs of the B. may assent to any modifications in the arrangement embodied herein on conditions which the Court may think fit to approve or impose, and which the C. shall consent to.

19. When and so soon as this agreemt has been sanctioned by the Court as huftr provided, the C. shall execute a deed poll covenanting with the holders of the assurance contract and annuity contracts to be taken over as afsd to observe the provisions in their favour resply herein contained.

20. This agreemt is conditional on all such resolutions of the B. as may be necessary being passed and on its being adopted by the liqrs of the B. with due authority, and on its being sanctioned by the Chancery Division of the High Court of Justice.

IN WITNESS, &c.

In the above case the sale is out-and-out, but more commonly nowadays an assurance business is transferred on the footing that the company which takes it over shall place the assets of the business in a separate fund to be worked for the benefit of the policyholders in the transferring company, and to be the primary fund for answering policies and claims, the transferring company guaranteeing its sufficiency and taking any surplus. Very commonly the company which takes over the concern is given the right to a percentage of the income of the fund

as compensation for working it. The following is an outline of the clauses which have in several cases been adopted, the transferring company being referred to as the A. Company, and the other company as the B. Company. **Form 45.**

CLAUSES upon TRANSFER of ASSURANCE BUSINESS for SPECIAL FUND in HANDS of the TRANSFEREE COMPANY. **Form 46.**

1. A fund for the protection and sole benefit of the A. Coy's policy-holders and annuitants and others is to be established by the B. Coy, and is to be called "The A. Coy Fund," and such fund is to be vested in the B. Coy as trustee for the purposes here mentioned, and is to consist of— **Separate fund for policy holders, &c. of transferring company.**

- (a) The assets to be transferred as aforesaid.
- (b) All proceeds arising from sales, exchanges, and other dealings with the A. fund.
- (c) All assets acquired with assets of the B. fund.
- (d) All income arising from assets for the time being of the A. fund.
- (e) All premiums and other payments received in respect of the A. policies and annuity contracts for the time being subsisting; and
- (f) All sums received in respect of any compromise, arrangement, modification, substitution, or other dealing in relation to the A. policy and annuity contracts.

2. The A. fund is to be kept separate from the general assets of the B. Coy, and is to be regarded as a trust fund applicable for the benefit of those entitled to A. policy and annuity contracts and other persons towards whom the A. Coy is under liability, and accordingly out of the A. fund the B. Coy is from time to time and in due course to pay, satisfy, and discharge all claims and moneys from time to time payable in respect of the A. policies and annuity contracts, and all sums payable in respect of compromises, surrenders, or otherwise in relation to A. policies and annuities, and all sums payable to the B. Coy by way of recoupment as here provided, and all premiums on re-insurance policies effected in relation to any A. policies or annuity contracts, and all claims, liabilities, pensions, and all sums from time to time payable to the B. Coy or otherwise by way of contribution to management expenses or otherwise under clause 5 hereof, and all other debts and liabilities of the A. Coy existing at the time of the commencement of this Act, and all other sums under these presents payable out of the said fund, and, subject to all such payments as aforesaid, the A. fund is to be held for the benefit of the participating policy-holders of the A. Coy. **Trusts of fund.**

Form 46.

Transferee
company to
undertake
liabilities of
transferor
company.

Management
expenses.

Temporary
advances.

Management
and control
of fund.

Quinquennial
valuations.

No new
policies or
annuities to
be granted
with reference
to the fund.

Participating
holders only
entitled to
profits of
fund.

Transfer of
staff.

Fund and
transferee's
property
alone liable.

Act of Parlia-
ment or
sanction of
Court.

3. The B. Coy is to be liable in the place of the A. Coy upon and in respect of all the debts, liabilities, contracts and engagements of the A. Coy, including its policies and annuity contracts, but upon the footing that its liability is primarily to be out of the A. fund, and if this shall be insufficient or exhausted, then out of its own fund and property.

4. [Out of the premiums a contribution towards management expenses to be taken by the B. Coy.]

5. [B. Coy to be recouped with interest temporary advances.]

6. [Provisions for the management and control of the A. fund by the directors of the B. Coy.]

7. [Quinquennial valuations and distribution of surplus moneys to participating policyholders.]

8. [No new policy or annuity contract to be granted with reference to the A. fund except upon a surrender and in substitution, &c.]

9. [Participating policyholders of the A. Coy only entitled to participate in profits of the fund.]

10. [Provision for the transfer of staff.]

11. [Provision that fund and property of B. Coy are alone to be liable if needs be.]

12. [Provision for obtaining Act of Parliament to effectuate the transfer or otherwise for obtaining the sanction of the Court.]

Form 47. AGREEMENT for SALE of PATENTS. CONSIDERATION : CASH and FOUNDERS' SHARES.

Parties.

AN AGREEMENT, &c.: parties, vendor, 1; coy, 2.

Agreement
to sell.

1. The vendor shall sell, and the coy shall purchase, first, the patents specified in the schedule hto. and the full and exclusive benefit thof; and secondly, the benefit of all improvements on the inventions referred to in the sd patents resply, and of all further inventions in connection with the manufacture of —, which have been already or may hereafter be made by the vendor, and all British patents which may be obtained by or on behalf of the vendor for any such improvements or further inventions, and the full and exclusive benefit thof.

Having regard to the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), as amended by the Patents and Designs Act, 1907 (7 Ed. 7, c. 28), there is no need to provide that the purchaser shall be entitled to apply

for extensions, or to sue for infringement, or to disclaim, inasmuch as the Act and the patent together confer the requisite powers on the owner of the patent for the time being.

Sometimes the sale includes foreign as well as British patents, thus—

Form 47.

"The vendor shall sell and the company shall purchase:—

- "(1) The benefit of the patent of his Majesty, dated &c., numbered . . . and granted to the vendor in respect of an invention in relation to electric cables (hereinafter called the present invention);
- "(2) The benefit of any foreign patents which have already been obtained by or on behalf of the vendor in respect of the present invention, and the benefit of all pending negotiations for the acquisition of foreign patents;
- "(3) The benefit of all future inventions which shall be made by the vendor in connection with the manufacture or working of electric cables;
- "(4) The exclusive right, so far as the vendor can confer the same, to apply for and obtain foreign patents for the present invention, and any such future inventions as aforesaid, and the benefit of all patents so obtained;
- "(5) The benefit of all extensions and prolongations of the terms and privileges granted by any such patents as aforesaid."

The following is more limited:—

- (a) The patents for the United Kingdom, France, Germany, Austria, Italy, and Spain specified in the schedule hereto, which patents have been granted in respect of the inventions referred to in the same schedule;
- (b) The exclusive right, so far as regards the countries aforesaid, and so far as the vendor can confer the same, to all improvements on the said inventions made or to be made by the vendor, and to apply in those countries respectively, either in the name of the vendor or otherwise, for patents for such improvements, and the full and exclusive benefit of all patents so obtained.

An agreement to sell future inventions is not open to objection. *Printing, &c. Co. v. Sampson*, 19 Eq. 462; *Maxim Nordenfett v. Nordenfett*, (1894) A. C. 535; *Wallace and Williamson*, Pat. p. 330.

As to what are "improvements" under a covenant to communicate improvements, see *Hopkins v. Linotype, Ltd.*, 101 L. T. 838.

As to joint and several covenants on an assignment by two or more patentees, see *National Society for Distribution, &c. v. Gibbs*, (1900) 2 Ch. 280; *Wallace and Williamson*, Pat. p. 452.

A licensee of a patent cannot rid himself of liability to royalties by transfer to a limited company. *Cummings v. Stewart*, (1900) 1 Ir. R. 236.

2. As the reason for the sale, the coy shall pay to the vendor the sum of 3,000*l.* cash, and shall issue to him or his nominees the whole of the 100 founders' shares of 1*l.* each in the capital of the coy, and such shares shall be deemed for all purposes fully pd up.

Consideration.

3. The vendor shall from time to time, with all convenient speed, communicate to the coy or its assigns all such improvements and further inventions, and shall give them full information as to the exact mode of working and using the same, and shall from time to

Incidental provisions.

Form 47. time at the request and expense of the coy execute and do all such documents and things as may be requisite for the purpose of enabling the coy to obtain British patents for such improvements and further inventions, and shall from time to time and at all times during the term of years to be computed from, &c., and without making any charge therefor, give all such advice, explanation, and instruction to the directors and other officers and workmen of the coy as may be necessary to enable them effectually to exercise and work such improvements and further inventions resply, and shall for such purposes at the expense of the coy prepare and furnish to the coy all necessary plans, drawings, and models.

This clause requires some slight modification when foreign patents are sold.

Completion.

4. The purchase shall be completed on the day of , at, &c., when the sd sum of 3,000*l.* cash shall be pd to the vendor, and the sd founders' shares shall be allotted as aforesaid. And thereupon, and from time to time, and at any time afterwards, the vendor shall at the expense of the coy execute and do all such assurances and things as may reasonably be required by the coy for carrying the sale into effect and giving to the coy the full benefit of the agreement.

5. Unless before the day of next at least shares in the coy's capital shall have been taken up by responsible persons, either of the parties hto may by notice in writing to the other rescind this agreement, and such rescission shall not give rise to any claim for expenses or otherwise.

IN WITNESS, &c.

Add schedule containing particulars of patents.]

On a sale by the patentee of a patented article a condition can be imposed, e.g., that the article shall not be sold under a specified price, and a purchaser will not be able to use the article in contravention of this condition. *Badische Anilin und Soda Fabrik v. Ilex*, (1906) 1 Ch. 605; *National Phonograph v. Menck*, (1911) A. C. 336 (P. C.). And see *infra*, p. 424.

Sometimes the company is only given an option, to be exercised within a limited time after communication, to acquire patents in respect of improvements and further inventions, so that if the company does not elect to proceed the vendor may himself proceed; and the same plan is sometimes adopted as regards foreign patents. Occasionally special provision is made for obtaining foreign patents and realizing the same by sale, or otherwise, and dividing the proceeds, whether consisting of cash, shares, or otherwise, between the vendor and the company, or for issuing to the vendor paid-up shares in the company in proportion to a certain proportion of such proceeds.

Sometimes companies are brought out with an exclusive licence or concession (acquired for a lump sum in cash, shares, or otherwise) to use patented inventions for all or specified purposes within a limited district. But there was great difficulty in framing these concessions satisfactorily; for a patented article duly made and sold carried with it *prima facie* a licence to use the same

Form 47.

within the limits of the patent (*Betts v. Wadant*, L. R. 6 Ch. 239); and accordingly any person who could duly acquire the patented article outside the district could sell and use it within the district. The difficulty was met, but by no means effectually, by the insertion of covenants by the grantor and grantee not to sell for use outside their respective districts.

However, it seems probable that for the future, instead of such a concession, it will be found advisable to purchase and obtain an assignment of the patent for the particular district, under sect. 36 of the Act of 1883, above referred to. That section provides that "A patentee (*i.e.*, the owner for the time being) may assign his patent for any place in or part of the United Kingdom or Isle of Man, as effectually as if the patent were originally granted to extend to that place or part only." This provision appears admirably calculated to facilitate the concession system, and it would seem that where a patent for a district has been sold it will not be lawful to sell or use in that district a patented article made elsewhere. *Van Heyden v. Neustadt*, 14 C. Div. 230; *Neilson v. Betts*, L. R. 5 H. L. 1; *Admir v. Young*, 12 C. Div. 13; *Société des Manufactures de Glace v. Tilghman's Co.*, 5 C. Div. 1; *Nobel's Explosives Co. v. Jones*, 8 App. Cas. 5; *United Telephone Co. v. Sharplea*, 29 C. D. 164; *Wallace and Williamson*, Pat. pp. 328, 329.

Where a licence only is to be granted, the licensee should be empowered to sue for infringements, if so intended. *Heap v. Hartley*, 42 C. Div. 461; *Guyot v. Thomson*, (1894) 3 Ch. 388; *London Printing Alliance v. Cox*, (1891) 3 Ch. 291. Having regard to these cases and to *Limmer Asphaltic Co. v. Commissioners of Inland Revenue*, L. R. 7 Ex. 211 (but see *National Telephone Co. v. Inland Revenue Commissioners*, (1899) 1 Q. B. 250), it would seem that a premium payable for the grant of a licence is not liable to ad valorem duty as consideration for a sale. A licence granted for value cannot *prima facie* be revoked by the grantor for breach by the grantee of the contract. *Guyot v. Thomson*, *supra*.

Where a royalty is made payable, the question sometimes arises whether a company is impliedly bound not to wind up during the currency of the patent. It is very difficult to imply such a covenant. *Ellis v. Dodson*, 60 L. J. Ch. 353; 7 T. L. R. 318; *Hirsch v. Burne & Co.*, 77 L. T. 377 (H. L.); *Brown & Co. v. Brown*, 36 L. T. 272; *Railway and Electric Co.*, 30 C. D. 597; *Hamlyn v. Wood*, (1891) 2 Q. B. 488; *Turner v. Goldsmith*, (1891) 1 Q. B. 544. See, however, *Ogden v. Nelson*, (1905) A. C. 109.

By proper provisions, specified obligations can be attached to run with the patent so as to bind the owners for the time being. *Weydermann v. Société Générale*, 19 C. Div. 246; explained *Guyot Pneumatic Tyre Co. v. Clipper Co.*, (1902) 1 Ch. 146.

Sect. 87 of the Patents, Designs and Trade Marks Act, 1883, provides that where a person becomes entitled by assignment and transmission or other operation of law to a patent, the controller shall, on request and on proof of title to his satisfaction, cause the name of such person to be entered as the proprietor of the patent . . . in the register of patents . . . the person for the time being in the register of patents . . . as proprietor of a patent . . . shall, subject to the provisions of this Act, and subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licences as to or otherwise deal with the same, and to give effectual receipts for any consideration for such assignment, licence or dealing, provided that any equities in respect of such patent, design, or trade mark may be enforced in like manner as if in respect of any other person or property.

But if the registered proprietor creates an equitable interest in favour of A., and subsequently in favour of B. with notice of A.'s equity, B. will not be allowed priority over A. *Ixion Tyre Co. v. Spillshury*, (1898) 2 Ch. 484.

Form 48.

Agreement to
grant licence
to company to
manufacture
goods for
licensor.

Exclusive
licence to
company.

Only transfer-
able with
consent

Company to
supply syndi-
cate with
machines.

Regulation
as to orders.

Supply.

Price.

New kinds of
machines.

AN AGREEMENT made the — day of —, between The —
Syndicate, Limtd (hntfr called "the Syndicate"), of the one pt, and
The — Coy, Limtd (hntfr called "the Coy"), of the other part:
WHEREBY IT IS AGREED as follows:—

1. The Syndicate shall grant to the coy an exclusive licence—

- (1) To manufacture in the United Kingdom for use in the United Kingdom electrical machines, and to sell and let on hire such machines for use in the United Kingdom, and the machines manufactured under such licence are hntfr referred to as "the licensed machines."
- (2) For the purposes afd but no further to exercise the rights vested in the syndicate or its trees under the patents specified in the schedule hto.

2. The sd exclusive licence is not to be transferred without the consent of the syndicate under its common seal, and if at any time the coy shall cease to carry on its business the sd licence shall determine.

3. The deed granting the sd licence is to confer on the syndicate the right from time to time during the continuance of such licence to order and obtain from the coy electrical machines of any kind from time to time manufactured by the coy, whether under the sd licence or under any other licence or otherwise, but upon the footing that the goods so ordered shall only be for use by the syndicate for the purposes of its own manufacturing business.

4. Every order under the last preceding clause shall be in writing and shall state specifically—

- (a) The number and character of the machines and apparatus ordered.
- (b) The time when they are required to be delivered.
- (c) Whether the syndicate desires to purchase or hire the same.
- (d) Whether the same are to be used in the business of the syndicate in the United Kingdom or abroad, and in the latter case in what country.

5. With all reasonable despatch after any such order the coy shall comply with the same, and shall deliver the goods ordered to the syndicate at the works of the coy in London when such goods are ready for delivery.

6. Where goods are ordered as afd the price is to be a sum equal to the shop-cost thof, with an addition thereto of not more than one-half the difference between such shop-cost and the price charged by the coy for similar goods to its most favoured customer (other than the syndicate) in the United Kingdom.

7. Whenever the coy acquires a new kind of machine or a material part thereof, or any invention in relation to cigarette-making

machinery, the coy shall forthwith give to the syndicate full information as to the same. **Form 48.**

8. Should any of the patents specified in the schedule hto be infringed, the coy shall be at liberty to take proceedings in the name of the syndicate for restraining the continuance of such infringements and for obtaining damages in respect of the infringements committed, and the coy shall have full conduct of such proceedings, and may at its discretion prosecute, compound, discontinue, abandon, or deal with the same, and shall be entld to all damages obtained in respect thof, and shall also be entld in the name of the syndicate to take all such proceedings as may seem expedient to the coy, with a view to enforcing any undertaking or injunction that may be obtained in the course of such proceedings, and for obtaining the committal of any persons for contempt in respect of any breach of any such undertaking or injunction. Nevertheless the coy shall at all times keep the syndicate indemnified against all expenses and outgoings occasioned by any such proceedings, and on the other hand the syndicate shall execute and do all such things as the coy may reasonably require for facilitating such proceedings. **Infringement of patents.**

9. Proper accounts for the purposes hof shall be kept by the coy, showing the lowest prices from time to time charged by it, and the syndicate shall have the option from time to time of testing the accuracy of such accounts by employing an independent auditor or auditors to examine the books of the coy, or by calling for a statutory declaration by the secretary of the coy verifying the prices set forth in such account, and in the former case the coy shall give such auditor or auditors all reasonable facilities for making such examination, and in the latter case shall procure its secretary to make such declaration. **Accounts.**

10. The consen for the sd licence to be granted pursuant to cl. 1 hof is to be a sum of £—, which sum is to be satisfied by the allotment to the syndicate of — fully paid up shares of 1/ each in the capital of the coy, which shares are to be numbered — to — inclusive. **Consideration.**

11. The syndicate is, during the continuance of the licence afsd, to keep the patents specified in the schedule hto on foot, and is to pay all fees and sums requisite for such purposes, and is at its own expense to apply for and obtain all possible prolongations and extensions thof. **Syndicate to keep patents on foot.**

12. The licence afsd is to continue during all the residue unexpired of the terms of years granted or conferred by the patents specified in the schedule hto, and during all prolongations and extensions of the same terms. **Duration.**

13. The sd licence shall be by deed, and it shall be completed on the — day of —, at the offices of Messrs. —, of —, when the same shall be executed and delivered to the coy, and at the same time **Completion.**

Form 48. the coy shall execute a counterpart thof and deliver the same to the syndicate and allot the sd shares.

IN WITNESS, &c.

SCHEDULE

Particulars of Patents.]

Form 49. AGREEMENT for SALE to COMPANY of FOREIGN MINES.

- Parties.** AN AGREEMENT made the — day of —, between A., of —, in the State of — (huftr called the vendor), by B., his attorney, of the one pt, and the — Coy, Limtd (huftr called the coy), of the other pt: WHEREBY IT IS AGREED as follows:
- Agreement for sale.** 1. The vendor shall sell, and the coy shall purchase, the mines, mining rights, mills, stamps, orehouses, plant, machinery plant, stock, ore, and other ppty and rights specified in the first schedule hto, and huftr called the scheduled premises.
- Inspection.** [2 The coy shall, with all reasonable despatch, direct W., or some other competent person, to inspect and report upon the value of the scheduled premises, and unless the report of such person shall be deemed satisfactory by the coy, the coy shall be at liberty, by notice in writing to the sd B., to rescind this agreement, provided such notice be given before the — day of —.
- Title.** 3. The vendor shall make out to the satisfaction of the coy a good title to the scheduled premises, according to the laws in force in the sd State, free from all incumbrances, except any royalties imposed by the Mining Code of the sd State.
- Consideration.** 4. The consen for the sd sale shall be 100,000*l.*, whereof 20,000*l.* shall be pd in cash, and the balance shall be satisfied by the issue to the vendor or his nominees of debentures for securing 30,000*l.*, and 5,000 10*l.* shares of the coy, to be numbered — to — inclusive, and to be considered for all purposes as fully pd up.
- Completion.** 5. The sale shall be completed at L., in the sd State, on the — day of —, when the vendor shall duly transfer the scheduled premises to the coy or its nominees, and the certificates of title to the sd 5,000 shares, and the sd debentures, shall be handed over to the vendor.
- Transmission of certificates and debentures.** 6. The coy shall, before the time for completion, execute the sd certificates and debentures, and transmit the same to L., there to be ready for issue at the time for completion. Each of the sd certificates shall comprise — shares, and the sd debentures shall be in the form set forth in the second schedule hto.

7. The coy shall also appoint some person in L. to be its attorney or agent, with full powers in relation to the completion of the sale, and shall notify such appointment to the vendor not less than — days before the time for completion. The coy shall cause such attorney or agent to transmit to it telegraphic information of the completion of the sd transfer. **Form 49.**
Agent.

8. Not less than — days before the time for completion the coy shall pay the sd sum of 20,000*l.* cash to J. & D. upon trust to place the same on deposit in their joint names at the — Bank, in the City of London, and to keep the same there deposited until they shall be satisfied that the scheduled premises have been duly transferred in accordance with 'ause 5 hof, and thereupon to withdraw the sd deposit and any interest, and pay the same to —, the vendor's agent in London, or as he shall direct. If — agreement shall be rescinded under clauses 2 or 11 hof, the sd deposit and interest shall be forthwith withdrawn and pd over to the coy. Deposit.

9. Possession of the scheduled premises shall be given to the coy at the time for completion, and the vendor shall in the meantime keep the same in good repair and condition, and shall work the mines and mills in as full and effectual manner as the same have hitherto been worked. As from the — day of — the vendor shall be deemed to have been carrying on the said mines and mills for the benefit of the coy; and he shall account to the coy for all moneys and other benefits received, and shall be indemnified by the coy against all expenses whilst so carrying on the same. Possession.

10. The vendor shall pay all the costs of and incidental to the preparation and execution of this agreement, and of the memorandum and articles of association of the coy, and of the registration thereof, and of all stamps, fees, and legal expenses incident to the formation of the coy, and generally of all preliminary expenses whatever incurred in relation to the coy up to the incorporation thereof; and if the result of the inspection to be made pursuant to clause 2 hof shall be unsatisfactory to the coy, or if the vendor shall fail to show a good title to the sd premises, the vendor shall also pay the costs, charges, and expenses incurred by the coy in relation to such inspection, but so that such last-mentioned costs, charges, and expenses shall not exceed £—. Vendor to pay preliminary expenses.

11. [Form 31, clause 14.]

12. For the purposes of this agreement any notice may be given to the vendor by leaving the same for him at the — Bank in L., or (at the option of the coy) by leaving the same at No. —, — Street, in the City of London; and any notice so left shall be deemed to have reached the vendor at the expiration of forty-eight hours after it is so left. Rescission.
Notices.

IN WITNESS, &c.

[Add schedules—(1) containing particulars of mines, &c., and (2) form of debenture.]

P.

C C

Form 50. AN AGREEMENT made the — day of —, 1895, between the — Syndicate, Limtd (hmftr called "the Syndicate"), of the one pt. and A., of —, and B., of — (hmftr called "the purchasers"), of the other pt: WHEREBY IT IS AGREED as follows:—

Option. 1. The purchasers or their assigns shall have the option of purchasing the concession, a translation whereof is set forth in the schedule hto, and all the interests of the syndicate therein.

When to be exercised. 2. The sd option shall be exercisable either by the purchasers or their assigns, by notice in writing to the syndicate at any time within three calendar months from the date hof, and if the purchasers or their assigns shall exercise the sd option the syndicate shall sell, and the purchasers or their assigns shall purchase, the sd premises on the terms hmftr expressed; and if the sd option is exercised by the assigns of the purchasers, then and in such case the purchasers shall not be in any way liable hereunder.

Consideration. 3. The consen for the sd sale shall be the sum of 50,000*l*.

Company. 4. Should the purchasers or their assigns exercise the sd option, the syndicate will, if required by the purchasers or their assigns, accept pd-up shares in a coy (hmftr called "the new coy"), forming 20 p.c. of its capital, and not by less than 50,000*l*., in satisfaction of the sd sum of 50,000*l*., provided—

(a) That the new coy is registered under the Cos Acts, 1862 to 1890, as a coy limtd by shares.

(b) That the registered capital of the coy does not exceed 250,000*l*.

(c) That the new coy has a working capital of 50,000*l*.

(d) That the purchasers shall have exercised the option given them by clause 1 of this agreemt, and shall have resold the concession to the new coy, or in the alternative that the new coy, as the assigns of the purchasers, shall have exercised the sd option.

Conditions. 5. Until the time for completion hmftr mentd, or up to the expiration of the sd period of three calendar months, in case the sd option shall have been previously exercised, the syndicate shall comply with all the terms of the sd concession, and keep the same from becoming forfeited or void.

Completion. 6. If the purchasers or their assigns should exercise the sd option, the purchase shall be completed with all convenient speed thereafter, and before the — day of —, 1896, when possession of the land comprised in the sd concession shall be given to the purchasers or their assigns, as the case may be, and the syndicate shall execute and do all assurances and things for vesting the sd concession and all its interests therein in the purchasers or their assigns, and thereupon the sd consen shall be pd or satisfied, and possession shall, as soon as conveniently may be, be given to the purchasers or their assigns.

7. Should the sd option be exercised, the purchasers or their assigns shall, before the time hbefore fixed for completion, appoint some competent agent in East Africa, or send out such person there, to examine and report on the title of the sd concession, and to certify the transfer thereof; and a telegram from such agent, stating that the title is satisfactory and that the transfer is complete, shall be sufficient evidence of the facts. **Form 50.**
Agent.

8. The consen for the sd option shall be the sum of 500*l.* cash, to be pd by the purchasers immediately on the execution hof, and the sd sum shall be retained by the syndicate whether the sd option shall or shall not be exercised, and shall not in any case be treated as pd on account of the sd purchase consen. **Payment.**

9. Should the sd agent not report as to the title to the sd concession to the satisfaction of the purchasers or their assigns before the — day of —, 190 —, the purchasers or their assigns may, at any time thereafter before the completion of the sd purchase, by notice in writing to the syndicate, annul the sale; and if the sd purchase consen shall not be pd or satisfied at the time and in the manner afsd, then and in any such case the syndicate may at any time afterwards, by notice in writing to the purchasers or the new coy, as the case may require, annul the sale. **Title.**

10. If the sale is annulled under clause 9 hof by the purchasers or their assigns, the syndicate shall repay to the purchasers the sd sum of 500*l.*; but if such annulment is made by the syndicate, neither party shall have any claim against the other for expenses, damages, or otherwise. **Repayment.**

11. A notice hereunder may be served on each of the purchasers by sending the same through the post, addressed to him at his address above mentd, and shall be deemed to be served at the expiration of twenty-four hours after the same is posted in London. **Notice.**

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO [*copy translation of concession*].

AGREEMENT for SALE of SHIP to SINGLE SHIP COMPANY.

Form 51.

Parties: A., B., and C., "the vendors" (1), and "the company" (2). **Parties.**

1. The vendors shall sell, and the coy shall purchase, the steamship specified in the schedule hto, together with all the gear, stores, and other effects, and the benefit of all contracts and engagements therein mentd. **Sale.**

Form 51.

Consideration.

2. The consen for the sd sale shall be 32,000*l.*, which shall be satisfied as to 3,000*l.* by crediting as paid up the eight shares which by the coy's memdm of assen, the subscribers thereto (including the vendors) have agreed to take up; and as to the balance (29,000*l.*) by the allotment to the vendors, in the proportion specified in the second schedule hto, of the remaining fifty-six shares in the coy's capital: such shares to be deemed for all purposes fully pd.

Sometimes the vendors and their friends subscribe the memorandum for all the shares.

Completion.

3. The purchase shall be completed on the — day of —, and thereupon the vendors shall transfer the sd steamship and premises to the coy, free from incumbrances.

No duty is payable on the sale, transfer, or other disposition of any ship or vessel, or interest or property therein. See Schedule to Stamp Act, 1891.

4. [See Form 31, clause 16.]

IN WITNESS, &c.

[Schedules—(1) giving particulars of ship, &c.; (2) showing how shares to be apportioned.]

Sometimes the agreement for sale provides for the appointment of some of the vendors as managers at specified remuneration; but it seems better not to disclose this in an agreement which must be filed. As to sale of ship at instance of share-owner where majority sell to a company, see *Re Hereford*, (1895) P. 284.

Form 52.

Satisfaction of part of price in paid-up shares.

AN AGREEMENT made the — day of —, 1901, between A. B. of —, the vendor, of the one pt, and the — Coy, Limtd (hntfr called "the coy"), of the other pt, supplemental to a contract (hntfr called "the ppal contract"), dated the — day of —, and made between the same parties: WHEREBY IT IS AGREED as follows:—

1. The sum of £—, pt of the cash portion of the price payable by the coy under clause 2 of the ppal contract, shall be satisfied by the allotment to the vendor of — fully pd-up shares in the coy of £— each, numbered — to — inclusive.

2. The ppal contract shall be varied accordingly.

3. This agreeent is conditional on the same being approved by the statutory meeting of the coy now about to be held.

As WITNESS, &c.

When it becomes necessary to vary a contract referred to in the prospectus such variation requires the approval of the statutory meeting. See sect. 83 of the Act of 1908, *supra*, p. 324.

**AGREEMENT as to ISSUE of PAID-UP SHARES to VENDOR'S
NOMINEES.**

Form 53.

AN AGREEMENT made the --- day of ---, 1901, between A. B., of --- (hmftr called "the vendor"), of the first pt, and the --- Coy, Limtd (hmftr called "the coy"), of the second part, and C. D., of ---, of the third pt. WHEREAS by an agreement (hmftr called "the preliminary contract"), dated the --- day of ---, 19---, and made between the vendor, of the one pt, and the coy, of the other pt, provision was made for the sale to the coy of certain ppty, and pt of the consen for the sd sale was to be the allotment to the vendor or his nominees of --- fully pd-up shares in the coy of 1l. each, numbered --- to --- inclusive. AND WHEREAS the vendor desires to have divers of the sd shares allotted to the sd C. D. as his nominee, and to place the coy in a position to file a contract constituting the title of such allottees to such shares. NOW THEREFORE IT IS AGREED as follows:--

Issue of paid
up shares to
vendor's
nominees.
Parties.

1. The coy shall as and when the time for the allotment of the sd shares shall arrive [or shall forthwith] allot the sd --- as such nominee --- fully pd-up shares, pt of the sd --- shares. Allotment.

2. The sd shares shall be numbered --- to --- inclusive. Numbers.

IN WITNESS, &c.

Where shares are to be allotted to the vendor's nominee, it appears to be desirable to make and file a supplemental contract as above constituting the title to allotment of the nominees; for sect. 88 of the Act of 1908 requires that in the case of shares allotted in whole or in part for a consideration other than cash a contract in writing "constituting the title of the allottee to such allotment" shall be filed, and imposes heavy pecuniary penalties on the directors and officials for non-compliance. See *supra*, pp. 64-66.

It is open to argument that the principal contract does not "constitute the title of the nominee to such allotment"; his title appears to be constituted by the contract plus the nomination; yet the section says, "constituting the title of the allottee to the allotment," not constituting wholly or in part the title of the allottee to the allotment. No doubt, where the section says "a contract," that would cover several successive contracts, as, for example, where the sale is for so many paid-up shares to be allotted to the vendor or his nominees, and afterwards, for valuable consideration, the vendor contracts to sell some of these shares, and to nominate the purchasers. The second contract would be a contract under which the title of the allottee to the allotment was constituted. So, too, where in the original contract the nominee is a *cestui que trust* of the vendor, and has therefore an equitable right to the allotment under the contract, that would be sufficient to constitute his title. The expression "a contract in writing" does not import that the writing must be signed by the vendor and the company and the allottee, but it must be a contract constituting the title of the allottee to such allotment. Accordingly, where there are several nominees, it is a common practice to make a supplemental contract between the parties to the original contract and some person purporting to act as trustee for and on behalf of the proposed allottees,

Form 53.

and then to provide therein for allotment to them accordingly. In any case, it seems far better to preclude any question on the section than to leave the directors open to the risk of penalties accruing.

Sometimes an allotment is made to a nominee without filing any contract constituting his title to such allotment, and the question arises whether, after allotment, it is possible to make a contract "constituting" the title of the allottee to such allotment. It is difficult to see how this can be done. No doubt a contract purporting to confirm or ratify the agreement might be made and filed, but unless the allotment was in some sense irregular or voidable, it seems difficult to hold that such a contract "constitutes" the title. The allottee as nominee of the vendor may have a perfectly good title to the shares as paid-up shares, but penalties may nevertheless be running. It might, however, be possible to obtain an order from the Court extending the time for filing the requisite contract (see the proviso to sub-sect. (3) of sect. 88). For this purpose it would only be necessary to show that through inadvertence no contract constituting the title of the allottee had been made or filed, and the order having been obtained, the question would arise what about the previous allotment; that would not be invalidated, and the order merely extends the time for filing, and does not extend the time for making the contract, so that the ground is not completely cleared.

Another plan is to proceed under sub-sect. (2) of sect. 88 of the Act to file particulars of a contract which was not reduced to writing, but this has to be done within the month. Thus the making of a contract with the nominees of a trustee for them at the proper time, that is before allotment, is the only satisfactory course.

Form 54. AGREEMENT to ISSUE PAID-UP SHARES in SATISFACTION of DEBT DUE by COMPANY.

Recitals.

AN AGREEMENT made the — day of —, between the A. M. B. Coy, Limtd (hmftr called the A. Coy), of the one pt, and the C. D. and E. Coy, Limtd (hmftr called the C. Coy), of the other pt. WHEREAS by an agreement, dated the — day of —, and made between the C. Coy, of the one pt. and the A. Coy, of the other pt (being the agreemt No. 1 referred to in the introduction to the arts of asson of the A. Coy), the A. Coy agreed to pay the C. Coy for the works and matters undertaken by the C. Coy in connection with making and constructing a dock at — the sum of 225,000*l.*, whereof the sum of 75,000*l.* is payable by instalments in manner therein mentd: AND WHEREAS an instalment of 10,000*l.*, part of the sd last-mentd sum, will become payable to the C. Coy on the — day of — next:

NOW IT IS HEREBY AGREED as follows:

The A. Com-
pany to allot
1,000 shares;

1. The A. Coy shall, on or before the — day of — next, allot to the C. Coy 1,000 shares of 10*l.* each in the A. Coy, which shares

shall be deemed, for all purposes, to be fully paid up, and shall be numbered in the books of the A. Coy with the numbers --- to --- inclusive.

Form 54.

to be deemed
fully paid up:

2 The C. Coy shall accept the said shares in full satisfaction and discharge of the sd instalment of 10,000/., and of all claims and demands in respect thof.

and to be
accepted by
the C. Com-
pany instead
of cash.

IN WITNESS, &c.

As the instalment is not presently payable, this agreement requires to be filed under sect. 88 of the Act of 1908. If the instalment were presently payable, the transaction would amount to a payment for the shares in cash, and it would not be necessary to file the agreement. *Spargo's case*, L. R. 8 Ch. 407; *Laroche v. Beauchemin*, (1897) A. C. 358. See *supra*, p. 68. But even then it would be expedient to file it for the benefit of transferees, who would thereby secure the preservation of evidence that the shares were in fact paid up in cash. See *supra*, p. 71. Where paid-up shares are to be issued in satisfaction of a debenture not yet due, a contract should be filed. *Appleyard's case*, 18 C. D. 587; *Kent's case*, 39 C. Div. 259. And see the notes on sect. 88 of the Act of 1908, *supra*, p. 65.

AGREEMENT by SUBSCRIBER to MEMORANDUM of ASSOCIATION to
SELL his SHARE and HOLD IN TRUST.

Form 55.

AN AGREEMENT made the --- day of ---, between A. B. of ---, of the one pt, and the C. D. Coy, of --- (huftr called "the American coy"), of the other pt. WHEREAS the N. Coy. Limtd (huftr called "the English coy"), was registered under the Cos Acts, 1862 to 1900, in the month of April, 1905. AND WHEREAS the said A. B. subscribed the memdum of asson of the English coy for one 10/ share. AND WHEREAS the sd A. B. is willing to sell the sd share to the American coy.

Agreement
for sale of
share and to
hold in trust.
Recitals.

NOW THEREFORE IT IS HEREBY AGREED as follows:

1. The sd A. B. shall sell, and the American coy shall purchase, the sd share in the English coy subscribed for by the sd A. B. as afd. **Sale of share.**

2. The consen for the sd sale shall be the sum of 10s. paid on the share. **Price.**
exon hof, the receipt of which sum the sd A. B. hby acknowledges.

3. Until the sd share shall have been transferred to the American coy or its nominee as huftr provided, the sd A. B. shall stand **Vendor to hold in trust.**
possessed thof in trust for the American coy, and shall from time to time exercise all rights incident to the ownership of the sd share in such manner as the American coy shall from time to time direct, and shall account to the coy for all dividends and other sums payable in respect of the sd share.

Form 55.Purchaser to
indemnify.Signature of
transfer.

Notice.

4. The American coy shall indemnify the sd A. B., his executors, administrators and assigns from and against all liabilities incident to the holding of the sd share.

5. The American coy shall be at liberty at any time to authorize any person to sign in the name and on behalf of the sd A. B. a transfer of the sd share to the American coy, or to a nominee or nominees of the American coy, and the American coy may delegate the authority hby conferred to any person or persons as it may from time to time think fit.

6. Any notice to the said A. . . may be given by sending the same through the post addressed to him at —, and any notice so given shall be deemed to be served on the day following that on which it is posted.

IN WITNESS, &c.

It is a misfeasance for a director to hold his qualification shares in trust for the promoter of the company. *London and S. W. Coal Co.*, (1911) 1 Ch. 346.

Form 56.

AGREEMENT to take QUALIFICATION SHARES in PROPOSED COMPANY.

No. of Certificate—.

Cos (Consolidation) Act, 1908.

Contract to
take qualifica-
tion shares
in a proposed
company.

Contract by directors to take and pay for qualification shares in —, Limtd, to be signed and filed pursuant to sect. 72 (1) (2) of the Cos (Consolidation) Act, 1908.

Presented for filing by —.

To the Registrar of Cos.

We, the undersigned, having consented to act as directors of the —, Limtd, do hby agree to take from the sd coy and pay for the — shares of — each, being the number of shares prescribed as the qualification for the office of director of the sd coy:—

Signatures.	Address.	Description.

Dated —.

Witness to the above signatures —.

Where upon the formation of a company (other than a private company) the articles appoint the first directors and require them to hold a share qualification, it is necessary before registration to comply with the requirements of sect. 72 of the Act of 1908. Accordingly, the directors must either subscribe the memorandum of association for the requisite qualification, or "sign and file with the Registrar a contract in writing to take from the company and pay for his qualification shares (if any)." The section does not say with whom the contract is to be made, but the Registrar is satisfied with a contract or document framed as above.

The instrument cannot well be treated as a contract with the Registrar, but it would seem to be a contract by the signatories with one another, each signing in consideration of the others signing. Whether the company is entitled to enforce the contract is open to question, for the contract is not made with the company or with a trustee for the company. See *supra*, pp. 7, 8. To justify the position and effectually bind the directors, it is sometimes deemed expedient to make a contract with a trustee for the proposed company as below.

AN AGREEMENT made the — day of —, between A. of —, B. of —, C. of —, and D. of — (hereinafter called "the proposed directors"), of the one part, and M. as trustee for the company proposed to be formed as hereinafter mentioned, of the other part. WHEREAS it is proposed forthwith to register under the Companies (Consolidation) Act, 1908, a company limited by shares, to be called the — Coy. Limited, with a capital of £ — divided into — shares of £ — each. AND WHEREAS the articles of association of the said company have been prepared and have been approved by the parties hereto, and by the said articles the said A., B., C. and D. are named as the first directors, and by such articles it is declared that the qualification of a director is to be the holding of shares in the company of the nominal value of £ —.

Form 56a.

Contract with trustee to take qualification in proposed company.

NOW THEREFORE IT IS AGREED as follows:

1. Each of the proposed directors shall take from the company and pay for his qualification shares as aforesaid, and the company shall be at liberty to allot the same to him.

2. If the company shall not within — weeks from the date hereof become entitled to commence business, either of the proposed directors or the said M. may by notice in writing to the other parties hereto rescind this agreement.

3. The said M. shall use his best endeavours to procure the adoption hereof by the company.

AS WITNESS, &c.

Form 56b.

Agreement to take qualification shares by director not appointed by articles but named in prospectus.

AN AGREEMENT made the — day of —, between A. of —, B. of —, C. of —, and D. of —, of the one pt, and the — Coy. Limtd (huftr called "the coy"), of the other pt. WHEREAS the sd A., B., C. and D. have been duly appointed by the subscribers to the memorandum of asson of the coy to be directors thof. AND WHEREAS by the arts of asson of the coy the qualification of a director is declared to be the holding of — shares; AND WHEREAS the coy is about to issue a prospectus inviting subscriptions for pt of its shares shares:

NOW THEREFORE IT IS AGREED as follows:

1. Each of them the sd A., B., C. and D. shall take from the coy and pay for his qualification shares asfd.
2. The coy shall allot the sd shares when and so soon as the shares taken up on the footing of cash payment plus the shares hby subscribed shall together amount to the minimum subscription on which the directors may proceed to allotment, and not before that time.
3. The proposed directors shall pay for their sd shares as to £ per share on allotment, and as to the balance by the instalments following, that is to say:
4. This agreement is provisional, and shall not be binding on the coy unless and until the coy shall be entld to commence business.

AS WITNESS, &c.

This agreement must be filed before the publication of the prospectus. (Companies Act, 1908, s. 72.) Such a contract should certainly be made with the company, and not merely between the directors. As to the appointment of directors by the subscribers of the memorandum, see p. 717, *infra*.

Form 57.

AGREEMENT on behalf of ORDINARY SHAREHOLDERS in a COMPANY for SALE to ANOTHER COMPANY of all the ORDINARY SHARES in an EXISTING COMPANY.

Parties.

Agreement on behalf of holders for the sale of ordinary shares and control of company
Definition of owner.

AN AGREEMENT made the — day of —, between A. B. & Co. of — (huftr called "the firm"), on behalf of themselves and all the other owners of ordinary shares in the N — Co., Limtd. (huftr called "the Coy"), of the one pt, and the J. K. Coal Co., Limtd., of the other pt: WHEREBY IT IS AGREED as follows:

1. Throughout this agreement "owner of shares in the coy" includes not only any owner who at the time he ratifies is the registered holder of any ordinary shares in the coy, but any equitable owner who at the time he ratifies is entitled to any ordinary shares in the coy, and words importing the singular number shall be taken to

include the plural, and *vice versa*, and words importing the masculine gender include the feminine, and words importing persons include corporations.

Form 57.

2. The firm and each of the other owners of ordinary shares in the coy shall sell, and the purchasers shall purchase the whole of the ordinary shares in the coy of such vendor on the terms following

3. The price to be paid for the ad ordinary shares shall be 50%. Price.
per share

4. Any owner of shares who desires to ratify this agreement must ratify the same in writing, and deliver such ratification to the firm on or before the day of but any owner of shares who prefers may abstain from ratification, but in such case shall be excluded from the operation of this agreement accordingly. How ratification to be made.

5. Unless by the day of the owners of ordinary shares in the coy shall have ratified and delivered such ratifications as aforesaid, then this agreement and any ratifications herof shall be void, unless the purchasers shall give notice in writing to the firm not later than the of that they desire the agreement and any ratifications aforesaid to remain in force. In absence of ratification agreement to be void.

6. As regards each of the owners of shares in the coy who shall have ratified this agreement as aforesaid, the purchase and sale as regards his shares shall be completed at the office of the firm, No Street, in the City of London, on the day of , when and where the purchasers are to pay the cash price aforesaid to the firm on behalf of the vendor, and the vendor or his agent is to hand over to the purchasers the certificate or certificates of title to the shares so sold, and to execute and procure all necessary parties to execute in favour of the purchasers, or in favour of their nominees, a proper and sufficient transfer of such shares. If for any reason other than default on the part of the vendor the purchase is not completed on that day, the purchase-money shall bear interest at the rate of 5 per cent. per annum from that date until completion, and the purchasers shall pay such interest accordingly to the vendor or to the firm on his behalf. Completion.

7. The ratifying owners of ordinary shares in the coy and the firm are respy to use their best endeavours to procure each of the members of the present advisory committee to resign his office as such member, and the purchasers shall pay or procure to be paid to each resigning member of the advisory committee of the company, the sum of £— as compensation for loss of office, and he shall accept the same in full satisfaction of all claims on the coy in respect of such loss of office. The resignation of the advisory committee shall not take effect until new provisions have been made for the appointment of directors or other officers to carry on the business, and the firm and the other ratifying members shall use their best endeavours to procure such alterations in the articles of asson of the coy as the purchasers shall reasonably require. Resignation of directors.

Form 57.

Employés to
continue.

Agent to
continue.

Condition of
agreement.

Firm to com-
municate with
shareholders.

8. The purchasers shall procure that all employés of the coy and of the firm shall be employed by the coy, and no employé who shall have been more than 10 years in the service before the — day of — and shall be under the age of — years shall be dismissed by the coy except for misconduct or incompetence for five years from that date unless reasonable compensation to be fixed in case of difference by arbitration shall be paid to him for his loss of office.

9. As far as practicable the present agents of the coy shall be retained.

10. This agreement is conditional:—

- (1) On the firm on completion resigning their office as managers of the coy; and
- (2) On the firm having entered into an agreement in writing with the purchasers in the terms of the agreement already approved by the parties hto to the effect that the firm shall not nor shall any member of the firm for a period of 10 years complete [&c.].

11. The firm shall communicate the terms of this agreement to the shareholders of the coy in so far as practicable, and shall recommend its ratification.

The firm shall forthwith after receipt thof communicate to the purchasers the several ratifications thof from time to time received by the firm and shall furnish the purchasers with such information as the firm may possess as to the respective ownership of the shares of such ratifying owners.

AS WITNESS, &c.

Circular Letter to the Members of the Company in relation to the above Agreement.

SIR OR MADAM,—We have the pleasure to inform you that we have received from — an offer to purchase the whole of the ordinary shares in the — Company, Limited, at the price of 50/. per share. As these terms are satisfactory, we have thought it desirable to embody them in a provisional agreement expressed to be made between ourselves on behalf of the shareholders of the one part, and — of the other part, so that all the shareholders who are satisfied with the terms may be in a position to ratify the agreement so far as their respective holdings are concerned, and thus become entitled to take the benefit of it.

A printed copy of the agreement is enclosed, and you will see that in order to ratify the agreement you must do so in writing and deliver such ratification to us before the — day of —, but that you are under no obligation to ratify, and, accordingly, that you may abstain from ratification as you think fit, in which case you will be excluded from the operation of the agreement. You will also observe that the agreement is conditional on our entering into an agreement with — binding ourselves not to be interested as managers or directors in any competing business. . . .

You will observe, &c. [*disclosure of the advantages the firm obtains*].

We consider that it would be desirable for all the shareholders to ratify the

agreement inasmuch as the terms are liberal, and we intend ourselves individually to do so. If you desire to ratify the agreement you will be so good as to sign the form of ratification enclosed with print of the agreement in the place indicated, and return the same to us by post forthwith.

Form 57.

Form of Ratification.

I (or we) hereby ratify the agreement dated the — day of —, and made between — & Co. on behalf of themselves and all other holders of ordinary shares in the — Co., Ltd., of the one part, and — of the other part, for the sale of my (or our) ordinary shares in the — Co., Ltd.

Signature —.

Address —.

Description —.

Signature —.

Address —.

Description —.

In case of joint holdings all should subscribe.

Agreements for the Acquisition of Control over a Company.

Cases not infrequently occur in which it is desired by some person, firm or company to acquire control over another company, *e.g.* :—

- (1) In the case indicated in Form 57. Here it is supposed that Company A. desires to acquire the control over Company B., which is carrying on a rival business, or one which can best be worked in conjunction with the other. Company A. has debentures and preference shares of large amount, and it is not desired to interfere with them. The ordinary shares are also of large amount, and are worth in the market a considerable premium. The agreement therefore provides for the acquisition of the ordinary shares or the great bulk of them at a premium sufficient to attract ratifications, and it is subject to the ratification of the holders of ordinary shares or holders of, say, three-fourths of them, and there is to be power to rescind if less than, say, three-fourths ratify within a specified time. Assuming that three-fourths ratify, Company A., as owner of three-fourths of the shares, will have an effective control over Company B., assuming that the preference shareholders have no votes or a restricted vote which is not likely to cause inconvenience, and thus the two concerns will work in friendly alliance.
- (2) Another common case is that Company A. wants to acquire the shares in Company B., which is entitled to a concession of great value, and which is not transferable without the approval of a foreign government, and there is grave reason to apprehend difficulties in obtaining that concession unless upon onerous terms. It has preference shares, ordinary shares, and debentures outstanding. Company B. desires to acquire all the shares or the great majority thereof, and an agreement is accordingly prepared for the sale of all the shares at the market price and something beyond. The consideration to be satisfied by the issue of paid-up preference shares and paid-up ordinary shares in Company B., or it may be by the issue of debentures of Company B., or partly cash. The requisite majority ratify and the agreement is carried through, and thus the alliance is completed.

Form 57.

- (3) Sometimes Company A. desires to acquire several other concerns which it is considered could be worked with additional success if united, but it is desired to keep each concern as a separate concern, and not to disclose to the public the fact that they are united in interest. Accordingly, a provisional agreement is made for the acquisition of the ordinary shares in each for a cash price, and when the ordinary shares in each of those companies have been so acquired and have been transferred to nominees of the acquiring company that company will have effective control.

In most cases the terms of acquisition are provisionally arranged between the directors of the one concern and the directors of the other concern. It may be that what is desired will be ensured if the acquiring company acquires the whole of the ordinary shares in the other concern or the great bulk of them. Sometimes it is considered essential to acquire all the ordinary shares, and sometimes to acquire all the shares outstanding of whatever class, and the agreement has to be framed accordingly.

Several notable transactions of the kind have been carried through during the last few years. The plan has been in use for many years, and has the advantage of keeping alive the company over which it is desired to obtain control. Moreover, where the alternative is a sale under sect. 192, a plan for the acquisition of the shares, or the great bulk of them, is more elastic than a proceeding under sect. 192, seeing that under that section any shareholder who does not come in must, if he requires, be bought out by paying him arbitration value.

Again, where the company over which it is desired to obtain control has a large amount of loan capital at moderate rates of interest, it may be extremely desirable to avoid a reconstruction or amalgamation by sale and winding-up, seeing that in the result the debenture debt would mature whereas, if the control is obtained merely by the acquisition of the shares or the ordinary shares or the bulk of them the debenture debt is left undisturbed.

Again, it is convenient that if in the result the acquiring company gets nearly all the ordinary shares it will be in a position, where it is considered necessary to obtain the rest, to offer the holders more favourable terms and so complete the transaction.

Form 57a. AGREEMENT for TRANSFER of LIGHTING ORDER to NEW COMPANY.

AN AGREEMENT made the — day of —, between the Urban District Council of D., in the County of E. (hereinafter called the council), of the one part, and the — Company, Limited (hereinafter called the company) of the other part. WHEREAS the council being the local authority for the purposes of the Electric Lighting Acts, 1882 and 1888, are applying to the Bd of Trade for a provisional order, to be called the D. & C. order, 1912 ("the order") to authorize the supply of energy as therein defined within the area of the urban district of D. & C. (hereinafter called "the area of supply") and contain, *inter alia*, the following provisos: power to transfer at any

Form 57a.

time within one year after commencement of this order or such extended period not exceeding in the whole 15 months as the B. of T. may allow, the undertakers may, with the consent of, and subjt to such terms and condons, and for such periods as may be approved by the B. of T. by deed, to be approved by the Board, transfer the undertakg authorized by this order to a coy to be regd under the Cos (Consolidation) Act, 1908, to be called the D. Electric Co., Ltd., and on such transfer the rights, powers, authorities, obligons, and liabilities of the undertakers in respect of the undertakg shall, subjt to the provons contd in the deed of transfer, be transferred and may be exercised by and shall attach to that coy who shall, subjt to the provons of this order, become the undertakers for the pposes of this order as if the coy had been named thrin as the undertakers. AND WHEREAS the coy is about to promote and register a limited coy to be called, &c. ("the Electric Co.") for the ppose, amongst other things, of supplying electric energy for public and private pposes within the area of supply. Now IT IS AGREED by and betwn the parties hto as follows, that it is to say:—

1. The council shall do everything necessary in their pver to obtain the issue by the B. of T. and the subsequent confirmon by Parliament of the order, and the before recited provons thrin with respect to transfer, and shall employ as their Parliamentary agents in the matter persons of, &c.

2. The council shall within six calendar months after date of confirmon by Parliament of the order, or if the B. of T. so requires prior to the grant of the order, promote and form the Electric Co. with such a subscribed capital as may satisfy the council and the B. of T. that the Electric Co. will be able to carry this agmt into effect; and the council, at the request of the coy, shall render to the coy any reasonable assistance and facility, other than pecuniary, in their power towards the formation of the coy and the establishmt of the undertakg.

3. The coy shall in any event, and whether the necessary consents and sanctions of the B. of T. and Parliamt resply shall be obtained, or whether the transfer (unless the same shall be prevented by the unreasonable action of the council) hnfr provided shall be made or orwise, pay all the costs, chges, and expes incurred or to be incurred in connection with the applicon to the B. of T. for the provisional order and its confirmon by Parliamt togr with any costs incurred by the council in connection with this agmt, such paymts to form and be the consn for the transfer of the order as hnfr provided.

4. Upon the negotiation and formation of the Electric Co. with such subscribed capital asfd and upon payment of all the sums of money referred to in cl. 3 of this agreemt, and subject to the issue and confirmon of the order as asfd (including the sd provon as to transfer of the order), and to the approval of the B. of T., the council

Form 57a. shall execute, and the Electric Co. shall take a transfer of all that the undertakg of the council under the order and the deed of transfer shall be in the form approved by the B. of T., and shall contain all the provons usual in such deeds, and in addition (subjt as next hnfr provided) the provons set forth in the schedule hto.

5. Provided, however, that if the B. of T. shall refuse to approve the deed of transfer containing all or any of the provons in the sd schedule the council and the coy shall be bound by such refusal, and the terms of this agreemt and of the sd deed shall be varied acedgly: Provided further, that, in any such case, the council and the Electric Co. shall, as a condon precedent to, and as a consen for the transfer of the order, enter into a supplementary agreemt under their respive common seals to carry out the several matters and things on their respive parts as in the sd schedule provided, and not contained in the sd deed: Provided also that, if for any reason (other than the unreasonable conduct of the council) the sd transfer shall not be made within the period allowed therefor by the order, neither the coy nor the Electric Co. shall have any claim whatever agst the council either for the transfer of the undertakg or costs or expenses or otherwise, nor shall the council have any claim agst the coy or the Electric Co., but the order and the undertakg shall be and remain the ppty of the council as fully and effectually as if the order had contd no provon as a transfer and this agreemt had not been entered into.

THE SCHEDULE above referred to.

Here set out the provisions mentd at end of clause 4.]

Sometimes the consideration or part of the consideration for a sale is the issue of debentures to registered holders as below.

Form 58.

Registered
debentures,
one of a
series.

THE ——— LIMITED.

Issue of £—— debentures (— debentures of £—— each) carrying interest at the rate of ——— per cent per annum.

No. ———.

£——.

Debenture.

1. For valuable consideration already received the ——— Coy, Limited (hereinafter called the company) will on the ——— day of ——— or on such earlier day as the principal moneys hereby secured become payable in accordance with the condons indorsed hereon

pay to — of — or other the registered holder for the time being **Form 58.**
the sum of £—.

2. The company will during the continuance of this security pay to such registered holder interest on the said sum of £— at the rate of — per cent. per annum by half-yearly payments on the day of — and — day of — in each year, and the first of such half-yearly payments will be made on the — day of — next.

3. The company hereby charges with such payments its undertaking and all its property, present and future, including its uncalled capital.

The above words create what is called a floating charge, which, as it were, hangs over the whole of the property charged but leaves the company at liberty to deal with it in the ordinary course of business until the charge crystallizes by the appointment of a receiver or the commencement of a winding up. See *Re Panama, &c. Co.* (1870), L. R. 5 Ch. 318; *Government Stock Co. v. Manila Railway Co.*, (1897) A. C. at p. 97; *Wheatley v. Silkstone Co.*, 29 C. D. 715.

1. This debenture is issued subject to and with the full benefit of the conditions indorsed hereon, which are to be deemed part of it.

GIVEN, &c.

The Conditions within referred to:

1. This debenture is one of a series of debentures of the company **Conditions.** for securing principal sums not exceeding in the aggregate at any one time £—. The debentures of the said series, whether original or not, are all to rank *pari passu* as a first charge on the undertaking of the company without any preference or priority one over another, and such charge [save as regards the specifically mortgaged premises comprised in the indro below mentioned] is to be a floating security. If so desired, say: but the company shall not be at liberty to create any mortgage or charge ranking in priority to or *pari passu* with the charge hereby created.]

A floating charge operates as an immediate and continuing charge on the property charged, subject only to the company's power to deal with the property in the ordinary course of its business. *Florence Land Co.*, 10 C. D. 541; *Standard Manufacturing Co.*, (1891) 1 Ch. 627. Unless otherwise agreed, the floating charge leaves the company at liberty to create specific mortgages or charges ranking in priority to the floating charge (*Wheatley v. Silkstone Co.*, (1885), 29 C. D. 715; *Castell v. Brown*, (1898) 1 Ch. 315), but a floating charge does not take priority over an execution creditor where the execution is levied before the charge crystallizes. *Evans v. Rival Granite Quarries*, (1910) 2 K. B. 979. Nevertheless, it takes priority over the general creditors whether in a winding-up or otherwise. *General South American Co.*, 2 C. D. 337. Where there is a prohibition against mortgaging or charging in priority, a mortgagee who takes without notice of the prohibition may, nevertheless, obtain priority. *English and Scottish, &c. Trust v. Brunton*, (1892) 2 Q. B. (C. A.) 799; *Castell v. Brown*, (1898) 1 Ch. 315.

Form 58.

Sect. 112 of the Act of 1908 qualifies the operation of a floating charge where a winding-up commences within three months after its creation. See that section and *Columbian Fire-Proofing Co.*, (1910) 1 Ch. 758, and *Orleans Motor Co.*, (1911) 2 Ch. 41.

2. A register of the debentures will be kept at the company's registered office wherein there will be entered the names, addresses and descriptions of the registered holders and particulars of the debentures held by them respectively, and such register will at all reasonable times during business hours be open to the inspection of the registered holder hereof and his legal personal representatives and any persons authorized in writing by him or them.

3. Save as in these conditions provided, the registered holder hereof or his legal personal representatives will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accordingly, and the company shall not be bound to enter in the register notice of any trust, or, save as herein otherwise provided and except as ordered by some Court of competent jurisdiction or as by statute required, to recognize any trust or equity affecting the title to this debenture or the moneys hereby secured.

4. Every transfer of this debenture must be in writing under the hand of the registered holder hereof, or his legal personal representatives. The transfer must be delivered at the registered office of the company, with a fee of 2s. 6d., and such evidence of identity or title as the company may reasonably require, and thereupon, if this debenture remains registered in the name of the transferor, the transferee will be recognized as having become entitled to the benefit of this debenture free from any equities, set-off, or cross-claims which, but for this provision, the company would be entitled to set up against the transferor, and the transfer will be registered, and a note of such registration will be indorsed hereon. The coy shall be entitled to retain the transfer.

5. In the case of joint registered holders, the principal moneys and interest hereby secured shall be deemed to be owing to them on a joint account.

6. No transfer will be registered during the seven days immediately preceding either of the half-yearly days by this debenture fixed for payment of interest.

7. In respect of each half-year's interest on this debenture, a warrant on the company's bankers, payable to the order of the registered holder hereof, or in case of joint holders to the order of that one whose name stands first on the register, as one of such joint holders, will be sent by post to the registered address of such registered holder, and the coy shall not be responsible for any loss in transmission, and the payment of the warrant, if purporting to be duly indorsed, shall be a good discharge to the company.

8. The principal moneys and interest hereby secured will be paid, and such moneys are to be transferable as aforesaid free from and without regard to any equities between the company and the original or any intermediate holder hereof, or any set-off or cross-claims, and the receipt of the registered holder hereof, or his legal personal representatives, for such principal moneys and interest shall be a good discharge to the company for the same.

Form 58.

Prima facie a debenture being a chose in action is only assignable subject to all equities between the company and the original subscriber (*Mangles v. Dixon*, 3 H. L. C. 702; *Lyell v. Rowles* (1748), 1 Ves. 348; Judicature Act, 1873, s. 25 (6)), but this rule yields where the intention that the chose in action should be assignable free from and unaffected by such equities is made clear. *Agra, &c. Bank* (1865), 2 Ch. 397. Accordingly, a clause as above is effective.

9. The company may at any time give notice in writing to the registered holder hereof, or his legal personal representatives, of its intention to pay off this debenture, and upon the expiration of six calendar months from such notice being given the principal moneys hereby secured shall become payable.

10. The principal moneys hereby secured shall immediately become payable:—

- a) If the company makes default for a period of six calendar months in the payment of any interest hereby secured, and the registered holder hereof, or his legal personal representatives, before such interest is paid, by notice in writing to the company calls or call in such principal moneys; or
- (b) If an order is made or an effective resolution is passed for the winding-up of the company.

11. At any time after the principal moneys hereby secured become payable, [or after the security constituted by the indenture below mentioned becomes enforceable] the registered holder of this debenture may from time to time, [with the consent in writing of the holders of the majority in value of the outstanding debentures of the said series, appoint by writing any person or persons] [approved by the trustees or trustee of the said indenture] to be a receiver or receivers of the property charged by the debentures of this series and not comprised in such indenture, and may [with the like consent] remove any such receiver, and such appointment or removal shall be as effective as if all the holders of debentures of the same series had concurred therein. And a receiver or receivers so appointed shall have power—

- (1) To take possession of, collect, and get in the property charged by the debentures, and for that purpose to take any proceedings in the name of the company or otherwise as may seem expedient.

Form 58.

- (2) To carry on or concur in carrying on the business of the company, and for that purpose to raise money on the premises charged in priority to the debentures or otherwise.
- (3) To sell or concur in selling any of the property charged by the debentures after giving to the company at least seven days' notice of his intention to sell, and to carry any such sale into effect by conveying in the name and on behalf of the company.
- (4) To make any arrangement or compromise which he or they shall think expedient in the interests of the debenture holders.

And all moneys received by such receiver or receivers shall, after providing for the matters specified in the first three paragraphs of clause 8 of sect. 24 of the Conveyancing and Law of Property Act, 1881, and for the purposes aforesaid, be applied in or towards satisfaction *pari passu* of the debentures [or paid over to the trustees or trustee of the said indenture to be held on the trusts by that indenture declared of and concerning the moneys to arise from the execution of the primary trust for conversion as therein defined.] [And the foregoing provisions in this condition shall take effect as and by way of variation and extension of the provisions of sects. 19 to 24 of the said Act, which provens so varied and extended shall be regarded as incorporated herein.]

Such a provision as above is effective. *Henry Pound, Son & Hutchins* (1882), 42 C. D. 402 (C. A.).

12. [The holders of the debentures of the above issue are, and will be, entitled *pari passu* to the benefit of and subject to the provisions contained in an indenture dated the — day of —, and made between the company of the one part and — and — of the other part.]

This clause should be omitted if there is no trust deed.

13. [Where there is no trust deed it is usual to insert here a clause enabling a majority of three-fourths to bind the whole class of debenture holders.]

14. The principal moneys and interest hereby secured will be paid at the — Bank, Limited, No. —, — Street, London, or] at the registered office of the company.

This clause gives the holders an option. *Thom v. City Rice Mills* (1889), 40 C. D. 357.

15. A notice may be served by the coy upon the registered holder of this debenture by sending it through the post in a prepaid letter addressed to such person at his registered address, and shall be

deemed to have reached such holder on the day following that on **Form 58.** which it is posted, and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post-office.

See Part III. of this work as to the law and practice relating to debentures and debenture stock, with forms.

AGREEMENT for FUNDING ARREARS of DIVIDEND on PREFERENCE SHARES. (No clause in Articles of Association for modifying rights of any class of shareholders.) To be sanctioned by the Court under sect. 120 of the Act. Form 58a.

AN AGREEMENT made on the --- day of ---, 19---, between Parties. A. B., on behalf of all the holders of preference shares in the B. Coy. Limtd (hntfr referred to as "the coy"), of the first pt, C. D., on behalf of all the holders of ordinary shares in the coy of the second pt. and the B. Coy. Limtd, afsd, of the third pt. AND WHEREAS Recitals. there are large arrears of preference dividend on the company's preference shares, and it is desired to fund the sd arrears as hntfr provided.

NOW THEREFORE IT IS AGREED as follows:

1. The coy shall, when this agreemt has been sanctioned as hntfr provided, issue to each holder of preference shares a funding certificate for so much of the arrear of dividend afsd as shall be owing in respect of the preference shares held by him, or at his option several funding certificates each for a portion of such amount afsd, and every such funding certificate shall be framed in the terms set forth in the schedule hto, and the principal sums specified in every such certificate shall be a sum equal to the amount of the arrear afsd in respect of which such certificate is issued, and such certificate or certificates shall be in satisfaction of the sd arrears, and the sd arrears up to the --- day of --- shall be cancelled. Issue of funding certificates.

2. The principal sum specified in each such certificate shall carry Interest. interest at the rate of 3 p.c.p.a., but such interest, as regards each year, shall be payable exclusively out of the surplus profits of the coy of that year which shall remain after paying the dividend on the preference shares in the coy to the close of such year, and shall not be cumulative.

Form 58a.Rights in
winding-up.

3. In the event of a winding-up of the coy, the principal sum mentd in the sd certificates shall be pd off out of the surplus assets of the English coy which shall remain after paying off the capital pd up on the preference shares in the original capital, and shall rank for payment in priority to any return of capital on the ordinary shares.

4. This agreemt is conditional on the same being sanctioned by the Court as an arrangement under sect. 120 of the Companies (Consolidation) Act, 1908, and if it is not so sanctioned before the — day of — it shall on that day become void.

See further, *supra*, p. 380.

AS WITNESS, &c

SCHEDULE

See next Form.

Sometimes instead of issuing funding certificates the arrears are extinguished. It is now allowable to issue paid-up shares in satisfaction of the arrears. *Fanning Co. v. Bury*, (1910) A. C. 439.

Form 59.Funding
certificate.

THE — COY, LIMTD.

Funding Certificate.

Issue of funding certificates not exceeding 22,500*l.*, carrying interest at 3 p.c.p.a. subject as below mentd.

Funding certificate for the principal sum of £—

1. This certificate is issued in respect of the preference shares in the coy, numbered — to — inclusive, and in satisfaction of an arrear of dividend thereon up to the — of —, 19—.

2. The sd principal sum above mentd carries interest at the rate of 3 p.c.p.a., payable half-yearly on the — day of —, and the — day of —, out of the surplus profits of the coy of each year which shall remain after paying or providing for the payment of the dividend on the preference shares in the coy at the close of each year, and such interest is not to be cumulative.

3. In the event of the winding-up of the coy, the principal sum mentd in this certificate will be pd off. &c. as in clause 3 of the agreemt.

1. This certificate is issued to —, of —, and he, or other the registered holder for the time being hof., will be entld to the benefit thof.

Form 59.

5. This certificate is issued subject to the conditions indorsed hereon, which shall be deemed part of it
Given, &c.

The conditions within referred to:

Here provide for a register of the certificate holders, and as to forms of transfer, majority, &c., somewhat on the lines of a registered debenture. See Form 58, *supra*.

See further as to arrangements with classes of shareholders, "Arrangements," Chapter XXIII., *infra*.

**AGREEMENT for satisfying PREFERENCE DIVIDENDS for a TERM
by the issue of DEBENTURE STOCK where a MAJORITY CLAUSE
is in ARTICLES.**

Form 60.

AN AGREEMENT, made the — day of —, between A. B., of, &c., Parties.
on behalf of the holders of the preference shares in the coy below
mentd of the first pt, the sd A. B. on behalf of the holders of the
ordinary shares in the sd coy of the second pt, and the — Coy,
Limtd (huftr called "the coy") of the third pt. WHEREAS the Recital
capital of the coy is 500,000L., divided into 25,000 preference shares
of 10L. each and 25,000 ordinary shares of 10L. each: AND WHEREAS
all the sd shares have been issued and are fully pd up: AND WHEREAS
by paragraph (c) of Article 110 of the arts of asson of the coy, the
directors thof have power, before recommending any dividends, to
set aside, out of the profits of the coy, such sum as they think proper
as a reserve fund for the purposes therein mentd. and such reserve
fund may, with the sanction of the coy in general meeting, be in whole
or in part distributed by way of bonus among the members in such
manner as such general meeting shall determine: AND WHEREAS by
Article 113 of the sd arts of asson, the net profits of the coy in each
year shall be applicable, first, in payment of a cumulative preferential
dividend of 6 p.c.p.a. upon the amount credited or pd up on the pre-
ference shares of the coy, and subject thereto, shall be applicable in
payment of dividends upon the amount credited as pd up on the
ordinary shares of the coy: AND WHEREAS by Article 72 of the sd arts
of asson, it is provided that if at any time, by the issue of preference

Form 80.

shares or otherwise, the capital is divided into shares of different classes, all or any of the rights and privileges belonging to any class may be affected, altered, modified, or dealt with in any manner with the sanction of an extraordinary resolution as defined by sect. 69 of the Cos (Consolidation) Act, 1908, passed at a separate general meeting of the members of that class, and that to any such general meeting all the provisions of the *sd* articles shall *mutatis mutandis* apply, but so that the necessary quorum shall be one-tenth in number of the members of the class holding or representing by proxy one-tenth of the capital *pd* or credited as *pd* on the issued shares of the class: AND WHEREAS the *sd* cumulative preferential dividend in respect of the *sd* preference shares has been *pd* up to the 10th day of January, 19—: AND WHEREAS the *sd* cumulative preferential dividend is payable in equal half-yearly instalments on the 10th day of January and 10th day of July in each year: AND WHEREAS the *coy* has been so far successful in its business as to have *pd* out of its profits, in addition to the above dividend, in respect of the *sd* preference shares, an average dividend per year since its incorporation in 18—, of more than 8 p.c. on the capital *pd* up on its ordinary shares: AND WHEREAS it has become the practice in the district in which the *coy* carries on business for brewery *cos* to make advances to saloon keepers and others with a view to obtaining or keeping their custom, and the *coy* has been compelled to adopt this custom, and has found the adoption thereof advantageous to its business: AND WHEREAS it is necessary to continue this practice, and for the purpose the *coy* requires further working capital: AND WHEREAS in present circumstances it is not practicable to raise such further working capital from outside sources except on onerous terms: AND WHEREAS it is considered that the most economical mode of providing the amount required is to retain in hand a sufficient part of the *coy*'s accruing income, which would otherwise be available for dividend: AND WHEREAS in the circumstances it is considered that it is desirable to make provision for funding for a limited period the accruing dividend on the preference shares *afsd*

NOW THEREFORE IT IS AGREED as follows:

Next dividend
may be satisfied
as debenture stock

1. The *coy* shall satisfy the dividend on the preference shares which will become payable on the 10th July, 19—, as and declared, by issuing to each of the holders of preference shares debenture stock of the *coy* to the amount of such dividend and so any fraction of a shilling shall be *pd* in cash

So as to
subsequent
dividends.

2. The *coy* shall as regards each of the five next full yearly dividends on the *sd* preference shares, if the directors *coy* or the majority of them shall in the interests of the *coy* consider expedient, be at liberty to satisfy such dividend, as and when decided in like manner.

3. The debenture stock aforesaid shall be part of the £100,000/- p.c. debenture stock of the Coy which is forthwith to be constituted and secured by deed poll framed in accordance with the above which has already been approved by the parties hereto.

Form 60.

Sum of
debenture
stock.

4. Whenever the Coy shall have to the extent satisfies any half-year's dividend on any preference shares by the issue of debenture stock as aforesaid it shall be precluded from paying any dividend for such half year on its ordinary shares.

Dividend
ordinary
shares.

5. This agreement is intended to bind the shareholders in the Coy and their shares in the capital of the Coy and also their respective successors in title, owners for the time being of their shares.

Whom to
bind.

6. The Coy shall have the custody of this agreement, and shall, as soon as the same becomes absolute, cause a note to be indorsed thereon of the fact of the same having become absolute.

Custody

7. This agreement will become absolute

When ab-
solute.

1. If before the 31st day of October 19... separate general meetings of the holders of the said preference shares and the ordinary shares shall sanction the same by extraordinary resolution in accordance with clause 69 of the said Memorandum of Association.

2. If before the 31st day of October, 19... aforesaid, a special resolution of the Coy shall have been passed sanctioning this agreement.

IN WITNESS whereof the said A. has hereunto set his hand, and the Coy has caused its common seal to be affixed the day and year first above written.

AGREEMENT by DEBENTURE HOLDERS to extend TIME for PAYMENT where no MAJORITY CLAUSE.

Form 61.

AGREEMENT made the... day of..., between the... Coy, Parties.
1 (herein called "the Coy"), of the one pt, A. B., on behalf of
holders of the debentures of the Coy for 20,000/- now outstanding,
in other pt. WHEREBY IT IS AGREED as follows:

The time for payment of the ppal monies secured by the said out-
standing debentures of the Coy shall be extended to the... of
1935, and all the said debentures shall from henceforth be...
and construed and take effect as if that date were substituted thereon
for the 20th December, 1912, being the date originally fixed therein
for payment.

Time
extended

2. The Coy shall use its best endeavours to procure all the holders
of the said debentures to ratify this agreement, and it shall be binding
on those who ratify so far as concerns their debentures aforesaid respy.

Ratification

Form 61.

Avoidance.

3. Unless within -- days from the date of the holders of nine-tenths in value of the sd debentures shall ratify this agreement, it shall thereupon become void.

Debentures to be indorsed.

4. Each debenture holder and who ratifies this agreement must forthwith give up his debenture to the coy in order that a memorandum referring thereto may be indorsed thereon.

AS WITNESS the common seal of the coy and the hand of the sd A. B. the day and year, &c.

An agreement as above having been sealed by the company and signed by A. B. (not sealed by him), printed copies can be sent out to the debenture holders, and they can be asked to sign at the foot a note as follows:

Ratification.

"I, — of —, being a holder of debentures of the coy for £—, numbered —, do hereby ratify the agreement of which the above is a copy."

Each debenture holder should then send in his debenture to be endorsed, and a memorandum should be put thereon as follows:—

"*Memorandum.*—That by an agreement dated the — day of —, and made between the above company of the one part, and A. B., on behalf of all the then holders of debentures of the company for 20,000/. (including the then holder of this debenture), of the other part, it was agreed that the time for payment of the said debentures of the company, including the within debenture, should be extended to the — day of —, 1935, and that the said debenture should be read and construed and take effect as if that date had been substituted for the 20th December, 1912, originally therein fixed as the time for payment, and such agreement was duly ratified by —, the then holder of the within debenture."

Form 62.

AGREEMENT by DEBENTURE HOLDERS allowing creation of PRIOR LIEN DEBENTURES and making INTEREST on existing DEBENTURES payable for FIVE YEARS out of PROFITS only (*majority clause*).

Debentures now constantly contain a clause enabling a certain majority by resolution to bind the rest to a compromise or modification of their rights in this way: but an agreement is useful to recite and explain the circumstances giving occasion to the resolution. See *infra*, p. 413; *Precedents*, vol. III., p. 373.

Parties.

AN AGREEMENT made the — day of —, 19 —, between A. B. on behalf of the holders of the original debentures hereinafter mentioned, of the one pt. and the — Coy. Limtd (hereinafter called "the coy"), of the other pt. WHEREAS the coy was incorporated in the year 19 —, and has a nominal capital of 500,000/., divided into 50,000 shares of 10/ each, all of which shares have been allotted and are fully paid up

Recitals.

Form 62.

AND WHEREAS the coy has issued 270,000*l.* of debentures, hntfr referred to as the original debentures, and such debentures are secured by an indenture, hntfr referred to as the existing trust deed, dated the --- day of ---, 19---, and made between the coy of the one pt and C. and D. of the other pt: AND WHEREAS the said debentures carry interest at the rate of 5 p.c.p.a. payable half-yearly on the --- day of ---, and --- day of ---: AND WHEREAS the business of the coy has not been successful, and the net revenue from such business is wholly inadequate to pay the interest on the sd existing debentures, moreover the coy has lost a considerable portion of its pd-up capital and it is taking steps to cancel the same: AND WHEREAS the coy is in urgent need of further funds, to the extent of 50,000*l.* or thereabouts, for carrying on its business, and unless such further funds can be raised the coy will have to stop, and stoppage would, it is apprehended, disastrously affect the security of the holders of the existing debentures: AND WHEREAS it is considered impossible to raise such further funds except upon the security of debentures ranking in point of security in priority to the existing debentures, and upon the footing that the rights of the holders of the existing debentures shall be modified as hntfr provided, so that the coy may have an opportunity of working and developing its business and bringing it into a paying condition without depleting its resources by paying the interest on the existing debentures out of capital.

NOW THEREFORE IT IS AGREED as follows:

1. The coy shall, as soon as this agreemnt shall become absolute, as hntfr provided, be at liberty to issue further debentures to the aggregate amount of 50,000*l.*, carrying interest at such rate, not exceeding 5 p.c.p.a., as the coy may fix, and having priority in point of charge on the undertaking and assets of the coy over the sd existing debentures of the aggregate amount of 270,000*l.* and the securities for the same. Each of the sd further debentures shall be framed in accordance with the form set forth in the schedule hto. Prior lien debentures may be created.
2. The sd further debentures shall be secured by a trust deed (hntfr called "the new deed"), framed in accordance with the draft which is already prepared and approved of by the parties hto, and expressed to be made between the coy of the first pt, the said C. and D. of the second pt, and E. and F. of the third pt, and the trustees of the existing deed shall concur in and execute such new deed. How secured.
3. The interest on the existing debentures due the 1st of July, 1908, shall be released, and the holders of the existing debentures shall resply surrender to the coy to be cancelled the coupons referring to such interest. Interest when payable.
4. For the term of five years, as from the 1st July, 19---, the interest payable on the sd existing debentures shall be payable exclusively out of the profits of the coy as follows, that is to say, the net profits Out of profits.

Form 62. of the coy for the half-year ending the 31st of December next, and for each succeeding half-year, shall be ascertained by a profit and loss account which shall be made out as soon as practicable after the close of each half-year, and in ascertaining such net profits the account shall be credited with the gross profit, and shall be debited with all outgoings for rates, taxes, wages, and other outgoings necessary or properly incurred in carrying on the business, and with a reasonable deduction for depreciation of plant, machinery, and patents, and with the interest on the new debentures, and with any other current interest except the interest on the existing debentures, and the credit balance, if any, shall be regarded as the net profit of the half-year for purposes *hof*. And such credit balance shall be applied in or towards the payment of the interest on the existing debentures for the half-year comprised in such account, and if such credit balance shall be insufficient to pay such interest in full, the interest for the half-year shall be reduced accordingly; and if there shall be no credit balance for such half-year there shall be no interest on the debentures for that half-year.

Accounts. 5. The coy shall, with all convenient speed after the close of such half-year *afsd*, furnish the *treas* or *trce* of the existing trust deed with a full and correct profit and loss account, showing the amount of net profit for such half-year ascertained as *afsd*, and shall procure such account to be certified as correct by the auditors of the coy, and such certificate shall be conclusive.

Indorsement. 6. If this agreemt becomes absolute, notice thereof shall, as soon as such extraordinary resolution as is *hntf* mentd shall have been passed, and the new deed shall have been executed, be indorsed on each of the said existing debentures, and the holders *thof* shall deliver the same to the coy for the purpose of such indorsement being made accordingly.

Operation. 7. If this agreemt becomes absolute, it shall take effect and operate by way of modification of the rights of the holders of the existing debentures, and of the provisions contained in the existing trust deed. And the *treas* shall concur with the coy in executing a supplemental trust deed in the terms of the draft which has already been prepared by Messrs. —.

Extra-ordinary resolution. 8. This agreemt shall become absolute as soon as it shall be sanctioned by an extraordinary resolution, as defined in the third schedule to the *ppal* indenture, passed at a meeting of the holders of the existing debentures, as therein provided, and if it does not become absolute within — days from the date *thof*, this agreemt shall thereupon become void.

Consideration. 9. In conson of the premises the coy shall use its best endeavours to procure the passing of the *sd* extraordinary resolution, and the placing of the *sd* 50,000*l*. new debentures.

As witness the common seal of the coy, and the hand of the sd **Form 62.**
A. B., the --- day, &c.

THE SCHEDULES above referred to.

The above is a specimen of an agreement made with a view to binding debenture holders by majority provisions in the trust deed securing the same. See Part III. As a general rule it is convenient and desirable to deal with such matters by provisional agreement, and then to pass an extraordinary resolution (see Companies (Consolidation) Act, 1908, s. 69 (1)) ratifying the agreement. See Form in Part III. The reason is that the agreement affords an opportunity of placing on record the circumstances on which the resolution is passed.

Sometimes the quorum under the deed is too large, or for other reasons it is thought better to proceed under sect. 120 of the Companies (Consolidation) Act, 1908. In any such case a clause will be substituted for clause 8 making the agreement conditional on the same being sanctioned as an arrangement under sect. 120 of the Act, and then application will be made to the Court to direct the calling of meeting. See *infra*, "Arrangements," Chapter XXIII.

AGREEMENT to SATISFY BONUS by ISSUE of PAID-UP SHARES. **Form 63.**

AN AGREEMENT made, &c. between the ---, Limtd (herein called "the coy"), of the one part, and A., of ---, on behalf of himself and all the other holders of ordinary shares in the capital of the coy and as trustee for them, of the other part. WHEREAS, at an extraordinary general meeting of the coy, held on the 24th day of January, 1908, it was resolved as follows, that is to say:—

Agreement to satisfy declared bonus in paid-up shares.

That it is desirable to capitalize the sum of 100,000*l.*, being part of the undivided profits of the coy standing to the credit of the coy's reserve fund, and accordingly that a bonus of 10*s.* per share free of income tax on each of the issued ordinary shares be and the same is hereby declared, and that the directors be and they are hereby authorized to satisfy such bonus by the distribution amongst the members holding ordinary shares rateably of 100,000 of the unissued 1*l.* ordinary shares in the coy, credited as fully paid in satisfaction of such bonus.

AND WHEREAS, pursuant to clause --- of the coy's arts of association, the said A. has been duly authorized by the directors of the coy, on behalf of the holders of the ordinary shares aforesaid, to enter into this agreement: AND WHEREAS the names of the holders of ordinary shares in the coy are specified in the schedule hto:

Form 63.

NOW THEREFORE IT IS AGREED as follows:

Allotment.

1. The coy shall allot and issue to each of the persons named in the schedule hto the number of new ordinary shares of 1*l*. each (part of the sd 100,000 ordinary shares) set opposite his or her name in the second column of the same schedule, and where in such schedule several persons are bracketed as joint holders they shall be considered one person for the purposes of this clause.

Numbering.

2. The said shares shall be numbered — to — inclusive, and shall be credited as fully paid up.

Fractional certificate.

3. The coy shall also allot to each of the said holders the fractional certificate (if any) set opposite his or her name in the third column of the same schedule, and each of the said fractional certificates shall be framed so that the bearer of every two of them shall be entld on presentation thof to the coy within — weeks from the date hof to call for an allotment of one fully pd-up ordinary share in the capital of the coy.

Satisfaction.

4. The sd shares so credited and fractional certificates shall be accepted in satisfaction of the sd bonus.

AS WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

Names of shareholders, joint holders being bracketed.	Number of shares to be allotted to each.	Number of fractional certificates (if any to be allotted.

Form 64.

Agreement as
to requisition
and general
meeting.

AN AGREEMENT made the — day of —, between A. B., on behalf of all the shareholders in the above-named coy (huftr called "the coy"), except the present directors thof, and C. D., E. F. and G. H., huftr mentd, of the one pt, and C. D. of —, E. F. of —, and G. H., of —, of the other or second pt.

WHEREBY IT IS AGREED as follows:-

1. The sd C. D., E. F., and G. H. are to use their best endeavours to procure the signature by the requisite number and proportion of shareholders in the coy of the requisition for a general meeting, framed in accordance with the form set forth in the schedule hto which is now in course of signature, and shall, when such requisition has been so signed, deposit the same at the registered office of the coy.

Form 64.

2. If the directors of the coy do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists or the majority of them in value are to convene the same, and the sd C. D., or failing him the sd E. F., or failing him the sd G. H. is to be considered to be appointed by the requisitionists for the purpose of signing the requisite notice convening such meeting to be held within three months from the date of such deposit.

3. Each member who ratifies this agreement shall, if so required by the sd C. D., E. F., and G. H., sign the requisition and also two proxy forms (one for each of the two meetings), and shall be deemed to authorize the secretary to fill up the blanks therein.

4. Should any resolution be passed at the meeting aforesaid, whether convened by the board of directors or by the requisitionists, which in order to have effect requires to be confirmed as a special resolution, and the directors do not convene the meeting within seven days from the date of the passing of the first resolution, then and in such case the sd C. D., E. F., and G. H. shall convene the same, and for that purpose the sd C. D., or failing him the sd E. F., or failing him the sd G. H., is to be considered to be appointed by the requisitionists for the purpose of signing the requisite notice convening such meeting.

As witness the hands of the parties hto this day of —.

THE SCHEDULE above referred to [see next Form].

See sect. 66 of the Companies (Consolidation) Act, 1908, giving a statutory right to holders of the issued share capital to have a general meeting called.

As to blank proxies, see Form 251, note to clause 81.

THE ——— COMPANY, LIMITED.

Form 65.

To the Directors of the above-named coy.

Take notice that we, the undersigned shareholders in the above-named coy, holding in the aggregate not less than one-tenth of the issued capital of the sd coy upon which all calls or other sums due have been pd, do hereby require you to convene an extraordinary general meeting of the above-named coy for the objects following, that is to say:

- (1.) To pass a resolution to the effect that the meeting is dissatisfied with the conduct of the directors and calls on them to retire, and determines that it is inexpedient that they should be allowed to act any further as directors of the coy.
- (2.) To pass a resolution to the effect that no sale of the coy's patents is to be made without the sanction of a general

Requisition
for extraordinary
general
meeting.
Sect. 66 of
Act of 1908.

Form 65.

meeting, and in particular that the proposed sale to Mr. L— F—, a shareholder in the coy, is not to be made without such sanction.

- (3.) To select — shareholders in the coy to act as a protective committee and to pass a resolution appointing such persons to be a committee and vesting in them such powers as may seem to the meeting expedient in the interests of the coy.
- (4.) To pass a resolution or resolutions pursuant to clause — of the arts of asson removing all or such one or more of the directors now in office as to the meeting may seem expedient.
- (5.) To appoint such person or persons as the meeting may think fit to be directors of the coy.
- (6.) To pass a resolution altering clause 90 of the arts of asson by substituting the word "seven" for the word "five" therein

See Companies (Consolidation) Act, 1908, s. 66.

It should be seen that the articles allow such matters to be dealt with. See *infra*, p. 747.

Form 66. AGREEMENT *by* BONDHOLDERS *in* AMERICAN RAILWAY CO. *to*
DEPOSIT *their* BONDS *with a view to* UNITED ACTION.

**Bond deposit
agreement.**

AN AGREEMENT made this — day of —, between A. B., of —, on behalf of himself and all the other holders of bonds of the — Coy (a coy constituted in &c., and huftr called the American coy), of the one pt, and the — Corporation (huftr called the corporation), of the other pt: WHEREAS the American coy issued a series of first mortgage bonds for \$1,000,000, and such bonds are still outstanding unredeemed: AND WHEREAS the American coy has become involved in financial difficulties, and has made default in payment of the interest on the sd bonds; and its undertaking is now in the hands of a recr, appointed in an action of, &c.: AND WHEREAS the bulk of the sd bonds are, it is believed, held by persons residing in the United Kingdom: AND WHEREAS it is necessary to take steps to protect the interests of the holders of the sd bonds, and with a view thereto it is desirable to procure the co-operation of the bondholders or the bulk of them: AND WHEREAS the corporation is willing to act as trees for the purposes thof.

Recitals.

NOW THEREFORE IT IS AGREED as follows:—

**Interpreta-
tion.**

1. In these presents—

"The bonds" means the bonds afd:

"Bondholder" means a holder of any of the bonds:

"The certificates" means the certificates issued under clause 4 hof and for the time being outstanding:

Form 88.

"The certificate holders" means the holders for the time being of the certificates.

2. Each bondholder who ratifies this agreement is forthwith to deposit his bonds with the corporation upon the footing of this agreement, and is to receive in return a certificate as hnftr provided.

3. The object of the deposit and registration of the bonds of the within-mentd series is to invest, and a party depositing and registering the same is to be regarded as thereby investing, the corporation with the following powers, that is to say:—

Effect of deposit.

- (a) To act as if it were the absolute owners thof, and to exercise all rights and powers extending to the ownership of such bonds
- (b) In particular, without derogating from the generality of the foregoing power, to advance and support claims and enforce the rights of the bondholders; to negotiate, conclude, and carry out any compromise with the American coy; to prosecute, defend, intervene in, and compromise legal or other proceedings in relation to the bonds; to concur in referring any question to arbitration, and to carry out any awards; to bid at any sale or sales of the mortgaged ppty, and in the event of the corporation becoming a purchaser, to manage, work, and re-organize the same; to lodge the bonds deposited with any banker, broker, lawyer, or safe deposit coy or agent in the United Kingdom or America; to sell or exchange the bonds deposited for cash or for shares, bonds, debentures, or other securities; to sell, lease, or concur in any sale or lease of the ppty mortgaged; to release, postpone, or modify the mortgage or charge securing the bonds; to concur in any re-organization, re-construction, or arrangement; to appoint and employ agents, legal and other advisers, and assistance, and, if thought fit, to adopt and act on their advice; to apply to any municipalities, authorities, or governments for any rights, powers, interests, or privileges, and for any legislative or governmental decrees; and to receive and give discharges for any money or securities receivable in respect of the sd bonds, whether according to the tenor thof or according to any such arrangement or compromise as afd or otherwise, and to apply and distribute any such moneys or securities according to the rights of the bondholders; and generally to act in all things as the corporation may think expedient in the interests of the holders of certificates (hnftr called "the certificate holders").
- (c) To delegate any of the sd powers and authorities and discretions to any person or persons, or coy or cos, and on such terms and in such manner as to the corporation may from time to time seem expedient.

Form 66.
Certificate.

4. The corporation is to issue to each depositor a certificate representing each bond deposited by him, and entitling the bearer to the rights arising from the deposit, subject to these conditions; and each certificate holder shall be bound at any time, and from time to time, on notice from the corporation, to execute such power of attorney and other authorities in favour of the corporation, or any nominee or nominees of the corporation, as the corporation may require.

Contribution.

5. In order to provide the necessary funds for the purposes of the corporation, a cash contribution, equal to 1 p.c. of the nominal amount of the bonds deposited, must be paid by each depositor upon making the deposit; and if the corporation shall at any time, by writing under its seal, certify that more funds are required for the purposes of the corporation, then the corporation may raise such further funds on the security of the bonds, at such rate of interest, not exceeding 5 p.c. as the corporation may arrange; and the corporation may pay off such advances out of any moneys arising out of the bonds; and before any bond can be withdrawn by the holder of the certificate representing the same, he must, if so required, pay to the corporation a proportionate part of such further assessment.

**Application of
contribution.**

6. The contributions and advances aforesaid shall be applied by the corporation in manner following, that is to say:—

- (1) To the payment of the past and future expenditure of the corporation, of and incidental to, or connected with, the deposit of the bonds, and of the doing of all such things as the corporation may think it expedient to do in the interests of the certificate holders.
- (2) To the payment of the remuneration of the corporation.
- (3) Any surplus shall, when the labours of the corporation in relation to the bonds shall have been completed, be divided amongst the certificate holders in proportion to the amount of the bonds represented by certificates held by the subscribers.

**Remunera-
tion.**

7. The corporation shall be entitled to such remuneration for its services in relation to these presents as it shall determine, not exceeding one-half p.c. of the nominal value of the bonds deposited.

Meeting.

8. The corporation may at any time convene a meeting of the certificate holders. At least seven days' notice by advertisement in three London daily newspapers shall be given of such meeting. A quorum of any such meeting shall be at least ten persons holding certificates for at least £— of the bonds deposited.

9. At every such meeting the bearers of the certificates aforesaid shall be regarded as exclusively entitled to vote in respect of the bond or bonds represented thereby, and upon the voting for every £100 of principal owing in respect of any such bond or bonds shall confer one vote on the corresponding certificate holder.

**Power of
majority.**

10. A general meeting of certificate holders convened as aforesaid shall have full power by resolution passed by a majority of the votes given

upon the question to sanction and approve any course of action which the committee may recommend. **Form 66.**

11. If a poll is demanded, it shall be taken in such manner and at such time and place as the chairman of the meeting directs, and either at once or after an interval or adjournment or otherwise, and the result of the poll shall be deemed to be the resolution of the meeting at which such poll was demanded.

12. The chairman of any such meeting may, with the consent of the meeting, adjourn the same from time to time and from place to place, but no business shall be transacted at an adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

13. Any poll duly demanded on the election of a chairman of a meeting or on any question of adjournment shall be taken at the meeting without adjournment. **When no poll.**

14. Notice to the certificate holders or any of them may be given by advertising the same in three London daily newspapers, and shall be deemed to be served on the day following that on which the last of such advertisements shall be published. **Notice.**

15. Minutes of all resolutions and proceedings of any meeting of the corporation or of the bondholders shall be made and duly entered in books to be provided by the corporation, and any such minutes, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, shall be conclusive evidence of the matters therein stated; and until the contrary is proved, every such meeting in respect of the proceedings of which minutes have been made, shall be deemed to have been duly held and convened, and all resolutions passed thereat, or proceedings had, to have been duly passed and had. **Minutes.**

16. The corporation does not guarantee the genuineness of the bonds in respect of which the certificates are issued, and it reserves to itself the right to call in any certificate upon returning to the holder of such certificate the bond or bonds deposited with it, and the corporation shall not be bound to assign any reason for exercising the power so reserved. **No guarantee.**

17. The certificate in each case is to be regarded for all purposes as a negotiable instrument and as conclusively evidencing the title of the bearer for the time being and from time to time to the bond or bonds therein mentioned and all persons are invited by the corporation and the owners thereof to act on that footing, and neither the corporation nor any holder or depositor shall be affected by any notice to the contrary, and no depositor or holder shall be required or liable to deliver up or otherwise deal with such bond or bonds except upon the terms of the corporation, and the certificate holder is not to be at liberty to withdraw his bond or bonds until the corporation shall have certified in writing under its seal that its relations to the bonds are complete. **Negotiability of certificates.**

Form 66.
Condition.

18. This agreemt is conditional on its being ratified in writing by the holders of all the bonds or by the holders of such proportion, being not less than one-fourth in value thereof, as the corporation may consider sufficient, and if this agreemt does not become absolute before the — of —, it shall on that day become void, and the deposited bonds shall be returned to the certificate holders on demand.

19. [Indemnity to coy. &c.]

Form 67. AGREEMENT *that* DIRECTORS *shall take up* LEASES *and shall grant*
SUB-LEASES *to* COMPANY.

Agreement
for directors
to take leases
and grant
sub-leases to
company.

Agreemt: coy (1) and A., B., and C. (directors) (2).

Recitals to the effect that the coy carries on business on certain leasehold premises, and has negotiated with the landlords for new leases, but that they will only grant the same to substantial individuals and not to the coy, and that the coy has requested the directors to take up the leases and grant sub-leases to the coy on similar terms, and that the directors are willing to do so, and that the forms of the leases are annexed.

NOW IT IS HEREBY AGREED as follows:

1. The directors shall use their best endeavours to obtain the sd leases, and after execution thof the coy shall grant the sub-leases and the coy shall execute counter-parts of the sub-leases.

2. At the same time the coy shall concur with the directors in executing a trust deed by way of security to the directors in the terms of the draft annexed hto.

3. In taking up the sd leases the sd directors are not to be considered as trustees for the coy, and the coy's only rights in the demised premises are those which shall be conferred by the sub-leases afsd and accordingly the lessees or other the persons or person for the time being entitled to the premises in reversion expectant on the sd sub-leases are to have full powers, rights and remedies as the absolute owners or owner of the sd reversions resply.

4. This agreemt is conditional on the same being sanctioned and approved by a resolution of the coy in general meeting.

IN WITNESS, &c.

THE SCHEDULES

A limited company, it has been decided is a "respectable and responsible person" within the meaning of a covenant by a lessee not to assign without

the consent of the lessor (such consent not to be withheld in the case of a "respectable and responsible person"). *Willmott v. London Road Car Co.*, (1910) 2 Ch. 525. **Form 67.**

AGREEMENT as to SALE of GOODS by a MANUFACTURING COMPANY to a FIRM as INTERMEDIARY for supplying RETAIL TRADERS and the PUBLIC: MINIMUM PRICES. **Form 68.**

AN AGREEMENT, made, &c., between the — Manufacturing Coy, Ltd (hereafter called "the coy"), of the one pt. and A., of —, B., of —, and C., of —, carrying on business as, &c., at, &c., in partnership under the style of, &c. (hereafter called "the firm"), of the other pt.

WHEREBY IT IS AGREED as follows:—

1. The coy shall supply to the firm, and the firm shall purchase and act as intermediaries for the sale, distribution and supply to the trade and to the public of —, &c., and similar goods manufactured by the coy, and the firm shall use their best endeavours to promote such sale and distribution. The prices at which goods shall be supplied by the coy to the firm shall be those specified for such goods in the current price list for the time being of the coy for the United Kingdom (hereafter called "the coy's current price list") less the discount mentioned in clause 18 hereof. **Company to supply goods.**

2. Save as provided by clause 3 hereof, the firm shall not without the express consent in writing of the coy supply for any purpose whatever goods of the kinds specified or referred to in clause 1 hereof manufactured and supplied by the coy at less prices than those specified in the coy's current price list, nor shall the firm without such consent allow any rebate, bonus, allowance, or reduction of any kind on such price either directly or indirectly. **Minimum prices.**

3. The firm shall at the commencement of each season prepare a retail pattern book of — and other goods, and shall therein price their goods in conformity with the next following clause hereof. **Discount limited.**

4. The minimum and maximum scale for pricing in the said retail pattern book shall be fixed at the beginning of each season by the vote of a majority of a committee consisting of two of the directors for the time being of the coy and the acting members of the committee established under clause 20 hereof. The firm shall not ticket or sell any goods at a less price than the committee shall in writing approve. **Scales for pricing.**

5. Subject to clause 2 hereof the firm shall be at liberty to quote their own net prices for stock orders. **Firm's liberty to quote.**

6. The firm shall not pay the carriage, except in the following cases, namely, &c. **Carriage.**

Form 68.

Issue of
new season
price book.
Terms of
settlement
to be allowed
by firm.
Terms of
settlement
to be allowed
by company.
Dates of
delivery of
new season's
goods for
purpose of
accounts.
Extra dis-
count to firm
for cash pre-
payments.

Goods to be
supplied for
firm's busi-
ness.
Company not
to be liable
for strikes,
fire, &c.
Discount
where pay-
ment on
delivery.

When com-
pany to pay
carriage.

7. No new season retail priced pattern books shall be issued within the United Kingdom by the firm or the coy prior to the — day of — in each year.

8. Terms of settlement to be allowed by the firm shall not exceed the following rates, namely, &c.

9. Terms of settlement to be allowed by the coy to the firm shall be as follows, &c.

10. New season's goods delivered between September 1st in any year and the next succeeding 28th February to be dated for the purposes of the accounts mentioned in the last preceding clause as of the 1st day of the month of March following such delivery.

11. In the case of new season's goods supplied by the coy to the firm and paid for in cash before the payment of the monthly account for such goods becomes due the coy shall allow the firm an extra cash discount at the rate of 5l. p.e.p.a. from the date of payment until the date when the payment of such monthly account becomes due, such discount to be deducted after deduction of the discount allowed under clause 9 hof.

12. All goods to be supplied by the coy to the firm shall be supplied by the coy solely for the firm's business at —, or at such other address as the coy shall in writing approve, and with all reasonable expedition, regard being had to other pending orders for goods to be supplied by the coy to other customers, but the coy shall not be liable for any damage which may be caused by any strike of workmen or any lock-out of workmen, or any fire or other accident, or generally for anything beyond the control of the coy in the ordinary course of its business, and the coy may at any time require payment in cash against delivery of goods, but in that case shall allow discount at the rate of 5 p.e.p.a. from the date of payment until the date when the payment of the monthly account for such goods becomes due in the same manner as is provided under clause 11 hof in the case of new season's goods; and the coy shall not be bound to supply to the firm any [specify kind of goods], the supply of which may be confined by the coy to any dealer or firm of dealers, or any place or district, but the firm shall have the right to be supplied by the coy with any goods represented in the coy's pattern sets of any manufactory acquired or taken over by the coy, and now supplying the firm directly with stock represented in the firm's pattern books.

13. The coy shall, on stock orders from the firm to the coy of the value of £—— net or upwards, pay the carriage to the firm's asfd place of business, or subject to the provisions of clause 12 hof to any railway station in the United Kingdom, provided that the coy shall have the right to refuse to pay the carriage in any circumstances which the coy may consider exceptional.

14. The firm shall not without the consent in writing of the coy stock or cut up patterns, or issue in their pattern books or sell for stock any *specify kinds of goods*, other than those manufactured by the coy.

Form 66.

Restriction on firm's dealings outside the company.

15. The firm shall, on the written request of the coy, desist from supplying goods for such period as the coy shall require to any dealer or purchaser to whom the coy may decline or be unwilling to supply goods.

When firm not to supply to particular persons.

16. The firm shall not in each year start travelling or soliciting, or take stock orders on new patterns until the date which shall be fixed by the coy in each such year for the coy to take orders on new patterns. So far as practicable patterns shall be sent to the firm a week earlier than such last-mentd date.

As to travelling for orders.

17. The firm shall not supply the coy's goods for the purpose of being sold by auction.

Auctions.

18. In conson of the premises the coy shall allow the firm a discount of 10 per cent. on the amount pd by the firm to the coy *class of goods* purchased by the firm direct from the coy at the price of the coy's current price list, but this discount shall not apply to goods of earlier seasons than the season of 1909—1910.

Special discount to firm for particular goods.

19. In the event of any infringement by the firm of the provisions of, except as to clause 14 hof, the committee hnftr mentd shall have power to suspend the discount payable or allowed under clause 18 hof for such period and in such manner as the committee shall think fit, and the decision of the committee, or of the majority of its members, shall be accepted by the firm as final, and the coy shall further have the right, immediately on such infringement, to cease to supply any more goods to the firm. Provided that, without limiting the rights and powers mentd in this clause, the firm shall before such discount is suspended, and before the coy cease such supply, be allowed to state to the committee or some of its members within fourteen days after notice from the committee or some of its members so to do the firm's reasons for such infringement.

Suspension of discount to firm where infringement.

20. The committee shall consist of —, —, —, and — and of the directors for the time being of the coy. The acting members of the committee other than the directors shall, in the event of any of the first five named or of any one nominated in succession to them dying or declining to act, have power to appoint a successor or successors in office, but so that the number of the committee other than the directors of the coy shall not at any time exceed five.

Committee.

21. In the event of any infringement of any of the provisions of clause 14 hof, the provisions of clause 19 hof shall not apply to such infringement, but the coy shall in addition to its other remedies have the right immediately on such infringement to cease to supply any more goods to the firm.

Infringement of Clause 14.

Form 66.

No issue of
pattern book
to small
buyers.

22. The coy shall not issue a retail priced pattern book to small buyers hntfr defined. Provided that the coy shall be in no way restricted from carrying on or extending the businesses (whether of dealers or otherwise) as now existing and carried on by any firms or cos which may be acquired or taken over by the coy, and in particular it is declared that this clause shall not prevent the coy from sending retail priced pattern books to any customer or customers to whom any of the firms or cos whose business shall be acquired or taken over by the coy have sent such pattern books since the month of —, 19—.

This agree-
ment to bind
successors of
the parties.

23. This agreeent shall be binding on and enure for the benefit of the persons for the time being carrying on business in succession to the parties hto of the second part, notwithstanding any changes which during the continuance of this agreeent may occur in the constitution of the firm by the death or retirement of any partner or partners or the addition of any partner or partners.

Duration of
agreement.

24. This agreeent shall remain in force for seven years from the — of —, 19—. Provided that the coy shall have power to determine the agreeent on the 31st of December, 19—, by three calendar months' notice in writing addressed to the firm. Provided further that the coy shall until the 31st of December in the year in which this agreeent is determined or expires continue to supply to the firm for pattern book orders only goods, the supply of which by the coy to the firm for such orders is herein provided for.

Services of
notices on
firm.

25. Any notice under this agreeent may be given to the firm by sending the same through registered post to the firm at their last known or usual place of business, and any notice so sent shall be deemed to have been served on the firm on the day following that on which it is posted.

IN WITNESS, &c.

A manufacturer who sells goods can make it one of the conditions of sale that they shall not be resold at less than a specified price. *Elliman & Son v. Carlington & Sons*, (1901) 2 Ch. 275; *McFrucker v. Pilcher*, (1904) 2 Ch. 306; *United Shoe Machinery Co. of Canada v. Brant*, (1908) A. C. 330. Such a condition will not run with the goods so as to bind a purchaser with or without notice (*Tadley & Co. v. Sterious & Co.*, (1904) 1 Ch. 351), unless indeed the goods are patented and the sale is made by the owner of the patent rights. *Prima facie* a sale by him implies a licence to sell the patented goods, but if, on the sale, this implied licence is qualified, a sub-purchaser, with or without notice of the qualification, is bound to keep within the licence. *Badiach Anton and Soda Fabrik v. Isler*, (1906) 1 Ch. 605.

Where a manufacturer sells to A. subject to the condition that he shall not sell to B., and B. induces A. to commit a breach of the contract, B. is liable in damages to the manufacturer for the tort. *National Phonograph Co. v. Edison Bell, &c. Co.*, (1908) 1 Ch. 335.

See *supra*, p. 330.

AGREEMENT by COLD STORAGE KEEPERS to pool GROSS EARNINGS Form 69.
and fix MINIMUM RATES for STORAGE of PRODUCE during a
term of years.

AN AGREEMENT made the -- day of -- between the several Parties,
 coys, firms, and persons named in the first schedule hto, whereby it
 is agreed as follows:—

1. In these presents, unless there be something in the subject or Interpretation
 context inconsistent therewith:

“The signatories” means the parties hto.

“The committee” means the committee for the time being constituted as hereafter provided.

“The authorized premises” means the premises specified in the second column of the first schedule hto.

“The gross earnings” means the whole income arising from the storage of frozen goods and for services incidental thereto.

“Year” means some calendar year commencing with the 1st January.

“Month” means calendar month.

2. For the period of -- years from the -- day of -- the signatories shall pool their gross earnings on the storage of frozen produce at Banchester and services incidental thereto, and the total amount thereof shall as hereafter provided be divided between the signatories in accordance with the percentages set opposite their respective names in the first schedule hto, and during the said period each of the signatories shall, for cold storage and incidental services, charge not less than the minimum rates in that behalf specified in the second schedule hto or other the minimum rates from time to time fixed in accordance with clause 9 hereof.

Gross
earnings to
be pooled

3. Within twenty-eight days of the expiration of each year commencing with the year -- each of the signatories shall furnish to the committee a proper detailed account of the gross earnings of such signatory during the preceding year, and the committee shall be at liberty to employ an accountant or other expert to examine such account and certify as to the correctness thereof, and such signatory shall afford to the committee or any such accountant or expert all reasonable facilities for verifying the accuracy of the account.

Accounts.

4. Within seven days of the commencement of each calendar month each of the signatories shall pay into a banking account to be opened by the committee, or to be under their control, 60 p.c. of the gross earnings of such signatory during the preceding month.

Monthly
payments
in bank.

5. The committee may from time to time, out of the moneys paid to the said account, advance to the signatories, or any of them, on account of the proportion of total proceeds to which such signatories or

Advance

Form 60. signatory are or is as hntfr mentioned resply entitled, such amounts as the committee may think fit.

Payment of balance.

6. As soon after the expiration of each year as the gross earnings of each signatory shall have been ascertained by the committee under the provisions of clause 3 hof, the committee shall call upon each of the signatories to pay the balance (if any) of the gross earnings of such signatory into the sd banking account, and upon such payments being made the committee shall divide the total amount so pd into the sd banking account amongst the signatories in due proportions, regard being had to any sums in regard to which the signatories resply shall be in default, and any sums advanced to them resply as afsd so that the gross earnings may be divided in conformity with clause 1 hof.

Division of available balance amongst signatories.

Information.

7. Full information to be given to committee. &c.

reach of agreement.

8. As to each of the signatories, if such contributory fails to make any monthly or other payment herein provided to be made within seven days after being duly required by the committee so to do, or to comply with any other requirement from the committee properly made by them, or shall commit any other breach of the obligations of such signatory hereunder whereby any damage shall in the opinion of the committee accrue to any other of the signatories, such signatory shall forthwith become liable to pay such amount as the committee in their uncontrolled discretion shall certify to be the sum which in their opinion represents the fair measure of the damage so caused to such other signatories, and the amount so certified shall be recoverable from such signatory by the other signatories as liquidated damages, irrespective of and without inquiry as to the actual damages sustained, and any amount so recovered shall be divisible among the said other signatories according to their respective proportions of proceeds, unless the committee shall by any certificate under their hands or the hands of any three of them prescribe any other proportions.

Special obligations of signatories.

9. The following provisions shall have effect, namely:

- (a) [Not to part with authorized premises.]
- (b) [Not to be concerned in any other cold storage concern]
- (c) [Not to extend authorized premises without consent of committee.]
- (d) [To maintain authorized premises in good order and condition.]
- (e) [Provision for case of destruction or damage to authorized premises.]

Committee.

10. There shall be a committee for the purposes hof. Each of the signatories shall be entld to appoint two persons as members of the committee. [Power to fill up Vacancies—Procedure—Quorum Powers—Minutes, &c.]

11. The signatories shall be bound by the decisions of the committee upon all matters which under the provisions hereof are placed under the control of the committee or declared to be subject to its decision.

Form 69.

Decisions of committee.

12. The committee shall, if and whenever required so to do by any one or more of the signatories, consider and decide on the question whether the rates or conditions specified or set forth in the second schedule hereof shall be increased or reduced or modified either generally or in particular cases, and if so, subject to what (if any) special conditions, and their decision shall be binding on the signatories.

Revision of rates and conditions.

13. Subject to the last preceding clause hereof, no commissions, advantages, allowances, concessions, bonuses or reductions, direct or indirect, shall be paid, given or allowed by any of the signatories or any agent or employee thereof to any merchants, brokers or other persons whomsoever, but the rates for the time being in force hereunder shall be equally charged to all persons by all the signatories, it being of the essence of this agreement that all the signatories shall charge the same rates in the fullest and widest sense of that expression, subject to the provisions of clause 12 hereof.

No rebates except as per schedule, &c.

14. All the costs and expenses of and incidental to the preparation and execution of this agreement, or in any way incurred by the committee in connection with the meetings or other proceedings thereof, or in obtaining expert assistance, or for secretarial or other purposes, or otherwise for carrying out the provisions hereof, shall be paid out of the said banking account, and so borne by the signatories, in accordance with the proportions in which they are to share the total amount of the gross earnings.

Expenses.

15. [Provisions for arbitration.]

Arbitration.

IN WITNESS, &c

THE SCHEDULES above referred to

First Schedule.

Names and Addresses of Signatories.

Premises authorized.

Proportion of proceeds to be reserved by each Signatory

Form 69.

Second Schedule.

Description of Frozen Produce.

Dates and Conditions.

Sharing gross returns, as above, does not, it is apprehended, constitute a partnership (Pollack on Partnership, p. 5; and Partnership Act, 1890, s. 2 (2)), but it is sufficient to justify a restraint as regards selling prices, and is not unreasonable.

Form 70. AGREEMENT for SALE of DEBENTURE STOCK to CAPITALISTS who intend later on to OFFER SAME for PUBLIC SUBSCRIPTION.

Agreement for sale of debenture stock to capitalists, who may offer same for public subscription

AN AGREEMENT made, A.D. between the Coy. Limited (here called "the coy."), of the one pt. and A. and B. (here called "the contractors") of the other pt. WHEREAS the coy. is about to create and issue 200,000/ 5 p.c. debenture stock. AND WHEREAS such debenture stock is to be constituted and secured by a trust deed framed in the terms of the draft which has already been prepared and a copy of which has, for the purpose of identification, been subscribed by X., a solicitor of the Supreme Court. AND WHEREAS the contractors are willing to purchase the said stock subject to and on the terms here set forth

NOW THEREFORE IT IS AGREED as follows:

Sale of stock and payment by instalments.

1. If the said trust deed shall be executed within seven days from the date hereof, the coy. shall sell, and the contractors shall purchase the said 200,000/ debenture stock, to be secured by such deed at the price of £— for every 100/ of such stock, that is to say, the sum of £— in all. The sd price shall be paid by the instalments following, that is to say

p.c. on the day of
p.c. on the day of
p.c. on the day of ; and
p.c. on the day of

Interest on instalments.

2. The contractors shall be entitled to interest at the rate of — p.c.p.a. on the amount of the sd instalments for the time being pd as from the payment thereof resp'y, and the coy. shall pay such interest accordingly

3. The contractors shall be entitd to pay each of the instalments afcd or any pt thof before the day fixed for the payment thof at a discount, that is to say, interest at the rate of — p.c. from the period between the date when such instalment shall actually be paid and the date when the same becomes due may be deducted.

Form 70.

Discount if
payment in
advance.

4. If the directors shall determine to offer all or any part of the ad 200,000/ debenture stock by a prospectus for public subscription, or to sell or dispose of the same in any other manner, the coy shall, at the expense of the contractors, supply the contractors with all such information as the contractors shall reasonably require for the purpose of any such prospectus, and shall furnish such information in such manner to the contractors as the contractors may reasonably require.

Company to
supply infor-
mation if
contractors
make public
offer of stock.

5. The coy shall pay all stamp duties payable in respect of the creation of the ad debenture stock, and the costs of stamping the trust deed and securing the same, and the costs of the contractors and the trees of and in relation to the ad trust deed.

Company to
pay stamp
duties as to
creation of
stock and
trust deed.

6. On payment by the contractors of the first instalment of — p.c. afcd, the coy shall issue to the contractors or their nominees scrip certificates representing in the aggregate the right to the issue of the full amount of the stock hby agreed to be sold, and such certificates shall be for such amounts as the contractors may direct, and the amount of the contractors to the issue of the stock hby agreed to be sold shall be considered to be attached to the scrip certificates afcd, or to any certificates issued in substitution for the same.

Scrip certi-
ficates on
payment of
first instal-
ment.

7. If any scrip certificate holder afcd makes default for more than — days in the payment of any sum payable in accordance with the terms of the scrip certificate, the coy shall, in exercise of the power so far as may be reserved by the scrip certificates, forfeit the stock comprised in such scrip certificate, and all moneys pd in respect thereof and shall, by notice in writing to the contractors, call on them to make good such default within — days, and the contractors shall make good such default accordingly, and shall thereupon receive a fresh scrip certificate from the coy relating to the forfeited stock credited with the sum pd prior to the forfeiture, and with any sums pd by the contractors in accordance with such notice.

Forfeiture
when default
of certificate-
holder, and
contractors to
make good the
same and get
fresh certifi-
cate.

8. Payment to any scrip certificate holder of any interest in accordance with the terms of such certificate shall be credited as in satisfaction, *pro tanto*, of the interest payable to the contractors under clause 2 *h* of

Interest to a
certificate
holder
equivalent to
interest under
clause 2.

9. Whenever the holder of any scrip certificate afcd shall, in respect of the stock comprised therein, elect to pay any instalment payable thereon in advance at a discount, the contractors shall be deemed to elect to make the like payment in advance at a discount in respect of the same stock, and shall forthwith pay the amount to the coy accordingly.

Discount to
certificate-
holder
equivalent to
discount
under clause 3.

Form 70.
Definitive
certificates
when scrip
paid up.

10. When and so soon as any of the scrip certificates shall have been pd up in full, the coy shall register as stockholders the registered holders of such scrip certificates, and shall issue definitive certificates to them accordingly, and such registration and issue shall be regarded as a completion, *pro tanto*, of the sale of the stock to the contractors.

Contractors
to receive
the moneys
from the
certificate
holders.

11. Although the stock certificates are to be issued in the name of the coy, the sums payable by the holders in accordance with the terms hof are to be pd over to the contractors, but without prejudice to their obligations to pay the coy the full instalments payable in respect of the sale hby agreed to be made in accordance with clause 1 hof.

IN WITNESS, &c.

In the case of a going company which desires to dispose of a block of debentures or debenture stock or preference shares it is sometimes thought expedient to sell the issue to some capitalist and to leave him to offer it to the public at his own risk and discretion. One advantage of this plan is, that if the purchaser is not a person who has been engaged or interested in the formation of the company, a prospectus issued by him, on his own account, is exempt from the onerous requirements of sect. 81 of the Companies Act, 1908. See *supra*, p. 167. Accordingly, as long as the prospectus is an honest one, the purchaser is not bound to make any special disclosures as to contracts, &c.

Form 71. AGREEMENT for the APPOINTMENT of a MANAGER by a COMPANY.
*Remuneration, Salary, and Share of Profits. Compensation
in Case of Dismissal.*

Parties. AN AGREEMENT, &c. Parties: (1) the coy; (2) B.

WHEREBY IT IS AGREED as follows:—

Appointment
to office

1. The sd A. shall be and he is hby appointed the first general manager of the coy, and as such general manager shall perform the duties and exercise the powers which from time to time may be assigned to or vested in him by the directors of the coy.

Term.

2. The sd A. shall hold the sd office, subject as hnftr provided, for the term of — years from the date hof.

A. to perform
duties.

3. The sd A., unless prevented by ill-health, shall, during the sd term, devote the whole of his time, attention, and abilities to the business of the coy, and shall obey the orders from time to time of the board of directors of the coy, and in all respects conform to and comply with the directions and regulations given and made by them, and shall well and faithfully serve the coy and use his utmost endeavours to promote the interests thof.

4 There shall be pd to the sd A., as such general manager, a **Form 71.**
salary which shall be as follows, namely: The sum of 300*l.* for the **Salary.**
first year, the sum of 400*l.* for the second year, and the sum of 500*l.*
for each succeeding year, and so in proportion for any less period.

5 The sd salary shall commence from the date hof, and shall be pd **When to be**
quarterly on the — day of —, &c., the first quarterly payment to **paid.**
be made on the — day of — next.

6 In addition to his afo*sd* salary, the sd A. shall, during his tenure **Besides share**
of office afo*sd*, be entld to the share in the profits of the coy which, **of profits as**
under the arts of asson thof, is payable to the general manager for **per articles.**
the time being of the coy.

7 The sd A. shall be at liberty to resign the sd office at any time **A. may**
upon giving to the coy three calendar months' notice of his desire **resign.**
so to do.

8 If, before the expiration of — years from the date hof, the **Compensa-**
coy is wound up, or if by any other means, except the death or **tion to A. in**
resignation of the sd A., his tenure of the sd office shall be deter- **case of wind-**
mined, the coy shall pay to the sd A. the sum of 2,000*l.* as liquidated **ing up, &c.**
damages for his loss of office.]

IN WITNESS, &c. (a).

Sometimes a clause is inserted in an agreement with an employé to the effect
that all inventions in relation to the manufacture of — made by such employé
whilst in the employment of the company, and the benefit of all patents,
whether at home or abroad, obtainable in respect thereof, shall belong to the
company: and such employé shall, upon the request and at the expense of the
company, do whatever the company may reasonably require for giving to the
company the full benefit of the provision.

Form 72.
AGREEMENT for the APPOINTMENT of a SECRETARY by a
COMPANY. Leave of Absence. Power to Rescind.

THIS AGREEMENT, &c. Parties: (1) the coy; and (2) B. WHEREAS Parties
the capital of the coy is £—, divided into — shares of £— each. **Recital.**
AND WHEREAS the directors of the coy are, by the arts of asson thof,
empowered to appoint a secretary of the coy, either for a fixed term
or otherwise as therein mentd, and to fix and determine his remunera-
tion, which may be by way of salary or otherwise as in the sd articles
mentd

NOW IT IS HEREY AGREED as fo*l*lows:-

1 The sd B. shall be secretary of the coy for a term of — years, Appointment
to be computed from the date hof.

(a) See *infra*, p. 441, as to appointment of officers.

Form 73.**Salary.**

2. There shall be pd by the coy to the sd B., as such secretary as afd, a salary at the rate of £ — per annum. Such salary shall commence from the date hof. and shall be payable quarterly on every — day of —, — day of —, — day of —, and — day of —; the first of such quarterly payments to be made on the — day of — next.

3. The sd B. shall, unless prevented [*supra*, p. 430, cl. 3].

B. entitled to leave of absence.

4. The sd B. shall, during his tenure of the sd office, be entld to leave of absence for a period in each year not exceeding — weeks, and, unless otherwise arranged between the board of directors of the coy and the sd B., such leave of absence shall be granted in each year as follows, namely, from the — day of — to the — day of —, &c., &c. The afd salary of the sd B. shall continue notwithstanding such leave of absence.

Shares to be allotted to B.

5. In — of the premises, the coy shall forthwith allot and issue to the sd B. ten of its shares of £ — each, which shall be numbered in the books of the coy — to — both inclusive, and shall be deemed for all purposes fully pd up.

Power to rescind.

6. Either of the parties hto may at any time after the — day of — determine this agreemt by giving to the other not less than — calendar months' notice in writing, and upon the expiration of the period specified in such notice the sd B. shall cease to be secretary of the coy.

IN WITNESS, &c.

The following clauses are occasionally used:

Form 73.**Commission on surplus profits.**

"Whenever the profits of the company made during the financial year or other period comprised in the accounts submitted to the ordinary general meeting in each year are more than sufficient to pay a dividend on the paid-up capital of the company for such period at the rate of 5 per cent. per annum, the said —, in addition to his salary aforesaid, shall be paid a sum equal to 25 per cent. of the excess. The certificate in writing of the company's auditor as to the amount of such excess or as to there being none shall be conclusive."

Commission on profits.

Sometimes an employé is given as part of his remuneration a commission on or share of profits. Such arrangements should be carefully expressed, and it is generally desirable to make the auditor's certificate conclusive. *Righton v. Grissell*, 5 Eq. 326; and *Franks v. Balfour & Co.*, (1891) 1 Ch. 140. The clauses may run thus:

"In addition to his salary aforesaid, the said — shall be entitled to a commission of 10 per cent. on the profits made during the financial year or other period comprised in the accounts submitted to each ordinary general meeting of the company."

As to profit-sharing schemes, see pp. 1017, 1031.

Form 74.**Commission on dividends.**

"Whenever a dividend is declared by the company in general meeting, and such dividend, together with the dividend or dividends, if any, previously paid, amounts to more than 5 per cent. per annum on the capital of the company for the time being paid up, as from the incorporation of the company to the time of

the declaration of such dividend, then and in such case the said — shall, in addition to his aforesaid salary, be entitled to a commission equal to 10 per cent. of the excess, such commission to be paid when the dividend becomes payable " As to the appointment of officers, see p. 441.

Form 74.

AN AGREEMENT made the — day of —, between the — Coy, Limited (hereafter called "the coy"), of the one pt, and L., of — merchant, of the other pt. WHEREBY it is agreed as follows:—

Form 75.

1. The coy hereby appoints the sd L. to be the sole agent of the coy in the Republic of — for the sale of all the coal and other products of the coy, and for the purchase of such materials and goods required by the coy as the coy may instruct him to purchase, and for the chartering of all ships on behalf of the coy.

Agency
agreement
for foreign
country.
Appointment
of agents

2. The sd L. shall manage the sale of all the coy's coal and other products, and the purchase of all goods and materials which he may purchase for the coy, and arrange the chartering of all ships which the coy may require, and shall use his best endeavours to promote the interests of the coy, and on all sales of the coy's coal or other products through the sd L. he shall be taken to guarantee to the coy the payment in due course of the purchase money for the same.

What they
are to do

3. As remuneration for these services, and as conson for the guarantee aforesaid, the coy shall pay or allow to the sd L. a commission of — p.c. on the selling price of all the coy's coal and other products sold, but so that from the amount of money received in respect of sales there shall be deducted only the usual and proper disbursements, the sd — p.c. being a sale and guarantee commission, and no allowance shall be made to the sd L. for rent or office expenses or salaries of clerks or assistants, or, where a sub-agent is employed, such sub-agent's commission, which is to be paid by the sd L.

Remunera-
tion.

4. On all purchases made on behalf of the coy the sd L. shall be allowed the customary and usual commissions in similar cases. On charters effected by the sd L. for the coy he shall be entitled to recover from the shipowners a commission not exceeding $2\frac{1}{2}$ p.c. on the amount of freight, and he shall make no charge against the coy in respect of such charters, but shall account to the coy for any commission and allowance beyond $2\frac{1}{2}$ p.c. which he may recover.

Allowances

5. The sd L. shall keep the coy duly advised of all sales and purchases and charters effected by him, and will in due course render proper accounts of the same, and from time to time remit or pay to the coy the amounts which shall be due to the coy on the accounts current.

Advice to
company

6. The sd L. shall keep in proper books full and proper records of all the coy's business passing through his hands, and the sd records and all documents relating to the premises in the possession or under

Accounts

Form 75. the control of the sd L. shall at all reasonable times be open to the inspection of the coy or their agents, who shall have full liberty to make copies or extracts of or from the same or any of them.

Instructions. 7. The sd L. shall at all times during the continuance of this agreement observe all the directions and instructions which may be given by the coy relating to the premises, and in the absence of special instructions shall act in such manner as he shall deem most beneficial to the coy.

Interpretations. 8. The expression "L." hnbfore used means and includes the sd L. personally and all persons who may be in partnership with him in the sd Republic whom he may from time to time nominate in writing in his behalf and their successors in business, and this agreement shall be binding on and operate for the benefit of the sd L. and his partners as above mentd and their successors in business, whatsoever changes may occur in the constitution of the firms by the addition of any new partner or partners, or death or retirement of any partner, or otherwise howsoever.

Duration. 9. This agreement shall remain in force for a fixed period of years from the incorporation of the coy, but in the event of the bankruptcy of the sd L. or his firm as above mentd, or any liquidation of their affairs for the benefit of their creditors, it shall as from the commencement of the sd bankruptcy or liquidation cease and determine.

10. *Arbitration clause, supra, p. 367; and add service clause 15, at p. 362, supra.]*

IN WITNESS, &c.

Form 76. *AGREEMENT to employ AGENT to go ABROAD and EXAMINE
TITLE to and CHARACTER of MINING PROPERTY*

Parties. AN AGREEMENT, &c., between A. B., of the one pt, and Limtd (hnbtr called "the syndicate"), of the other pt. WHEREAS " has been represented that there exists in the empire of C., about 200 miles N.N.W. of D. and about 3,000 feet above sea level, an area of over nine square miles, containing a virgin matrix of diamonds of the finest quality, yielding an average of one carat to the cubic metre of the ground, and lying at about fifty to seventy feet below the surface, and that the present owner or owners of this ppty is or are willing to treat for the sale thof, and it has been arranged that the sd A. B. shall proceed to D., with a view to inquiring into the matter, and if possible obtaining on behalf of the syndicate an option for the purchase of the sd ppty or some interest therein: AND WHEREAS it has been further arranged that the parties hto shall enter into the agreement hnbtr contained in relation to the premises

NOW THESE PRESENTS WITNESS AND IT IS HEREBY AGREED as follows:

Form 76.

1. The sd A. B. shall proceed to D. by the outgoing mail steamer starting on the _____ day of _____, 19____, and shall on his arrival in D. in the first place, after ascertaining that the owner or owners of the ppty is or are willing to treat for the sale thof or for some interest therein, procure an investigation into the title of the present owner or owners of the ppty above referred to by one or more competent D. lawyers, who are to report in writing thereon. If he shall consider such reports unsatisfactory or that the business does not warrant him in incurring further expense, he shall forthwith communicate such news to the syndicate, and shall, unless he shall receive other instructions by letter or cable from the syndicate, forthwith return to London.

A. B. to go abroad

2. If the sd A. B. shall consider such reports as satisfactory, or if he shall not so consider, but the syndicate shall by letter or cable require him so to do, he shall immediately proceed to make personal inspection and examination of the ppty, and shall cause the same to be fully prospected, and shall make inquiries and obtain reports as to the truth of the above-recited representations as to the ppty, and shall, if he consider that the results of such inquiries justify him in so doing, or if he shall not so consider, but the syndicate shall by letter or cable require him so to do, use his best endeavours to obtain from the owner or owners of the sd ppty a contract giving the syndicate the option of acquiring the same or some interest therein on the most favourable terms that he can arrange, and shall thereupon return forthwith to London.

To prospect.

3. The sd A. B. shall, whilst in D., acquire all such information as he can with regard to the ppty in question, its surroundings, and geographical and other characteristics, and the means of access thereto, and as to the mining and other laws of D. so far as they shall affect the working and development of the ppty in question, and the winning and exporting of diamonds therefrom, and generally all such information in relation to the premises as he may think advantageous or useful to the syndicate.

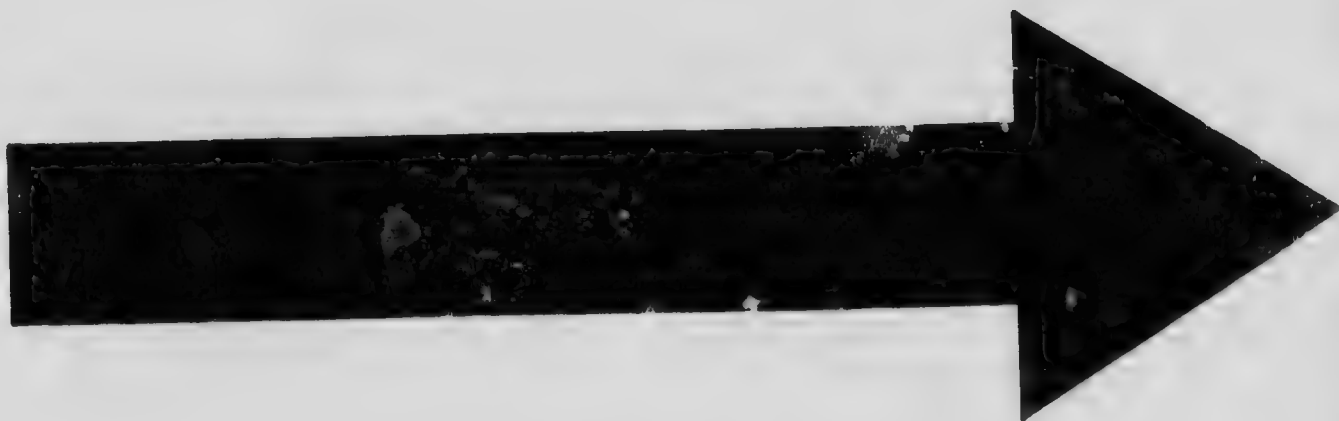
Gather information.

4. All reports and information, and all contracts, agreements, and arrangements which the sd A. B. may make or obtain in relation to the premises shall be on behalf of and for the benefit of the syndicate alone, and shall at all times be their absolute ppty, and shall be communicated by the sd A. B. to the syndicate at the earliest opportunities, and the sd A. B. shall not disclose such information, reports, contracts, agreements, or arrangements to any person other than the members, officers and servants for the time being of the syndicate.

Rights of syndicate

5. The syndicate shall, prior to the departure of the sd A. B. place to his credit with a bank or mercantile house in London the sum of 6000/., which is to be drawn on by him as he shall require for the purposes of defraying his necessary and proper disbursements contemplated in clause 1 hof

Advances to A. B.



Form 76.Further
advances.

6. If the sd A. B. and the syndicate shall consider that the inquiries, investigations, and reports under clause 2 are satisfactory, the syndicate shall place at his request to his credit with a bank or mercantile house in England a further sum of 1,400*l.*, to be drawn on as the sd A. B. shall require for the purpose of defraying his necessary and proper disbursements in connection with the further investigations and business contemplated under clauses 2 and 3 *hcf*.

A. B. to
account.

7. The sd A. B. shall account to the syndicate for all moneys drawn by him on the sd credits, and shall keep full and true accounts of all his drawings on the sd credits, and of his expenditure *thof*, under clauses 5 and 6 *hcf*, and shall, if and when required by the syndicate, duly vouch such accounts, and the syndicate shall not be under any obligation to advance to him for the purposes of such clauses or otherwise any moneys in excess of the sums of 600*l.* and 1,400*l.* therein resp'y named.

Remunera-
tion of A. B.

8. If the sd A. B. shall obtain from the owner or owners of the sd ppty a contract which shall be accepted by the syndicate, giving the syndicate the option of acquiring the sd ppty or some interest therein, then the sd A. B. shall be pd for his services in connection with this business a sum of 1,000*l.*, but if no such option shall be obtained and accepted by the syndicate, the sd A. B. shall not be entld to claim from the syndicate any remuneration whatever.

IN WITNESS, &c.

Form 77. AGREEMENT *continuing the* APPOINTMENT *of a* PERSON *who has been* EDITOR *of a* COMPANY'S NEWSPAPER, *and has become* a DIRECTOR.

AN AGREEMENT, made the — of —, between the — Coy, Limtd, of the one part, and A. B., of — (*hnfr* referred to as Mr. B.), of the other part.

WHEREAS Mr. B. is the editor of "The — Newspaper," which is owned by the coy. AND WHEREAS it is proposed that Mr. B. shall continue to act as such editor upon the terms *hnfr* mentd.

NOW IT IS HEREBY AGREED as follows:—

A. B. to be
editor.

1. For a period of five years from the — of —, Mr. B. shall act as the editor of "The — Newspaper" owned by the coy.

Policy and
conduct of
this news-
paper.

2. Subject to the general control of the board of directors of the coy the policy of the sd newspaper, and the manner in which the same shall be conducted, shall be determined by Mr. B. and the managing director for the time being of the coy jointly, and any point in difference between the sd A. B. and the managing director

shall be referred to the board of directors of the coy, and Mr. B. and the managing director shall act in accordance with the decision of the board. **Form 77.**

3. Mr. B. shall be just and faithful to the coy in all things. He shall preserve the coy's secrets, and in particular shall use his best endeavours to prevent any libellous matter from appearing in the said newspaper. He shall also carefully refrain from commenting upon any legal proceedings while in progress in such manner as to commit a contempt of Court. Fidelity and secrecy, and caution as to libel, &c.

4. Mr. B. may pledge the coy's credit in any one transaction to the extent of 100%, but subject as in this clause mentd Mr. B. shall not pledge the credit of the coy in any manner. Limited liberty to pledge company's credit.

5. The coy shall pay to Mr. B., by way of remuneration for his services, the sum of £— per annum, which shall be deemed to accrue from day to day, and shall be pd as nearly as may be by twelve equal monthly instalments of £— each, commencing as from the — day of —. Provided always, that if in any year the profits of the coy available for dividend shall be less than the sum of £—, Mr. B. shall receive in respect of that year the sum of £— only, and shall repay any such amount beyond that sum which he may have received in respect of the year in question. The certificate of the auditor of the coy shall be conclusive as to the amount of the profits of the coy available for dividend in each year, or as to there being none. Remuneration by fixed salary with abatement where profits low.

6. If Mr. B. shall be guilty of any wilful act of misconduct in the course of his employment, or if he shall become bankrupt or compound with his creditors, the coy may by notice in writing to Mr. B. terminate his engagement. Notice by company to determine for wilful misconduct, bankruptcy, &c.

7. If Mr. B. shall be unable for a consecutive period of six calendar months to perform his duties owing to illness, lunacy or unsoundness of mind, the coy may, by notice in writing to Mr. B., terminate this agreement. Notice by company to determine for incapacity.

8. If this agreement shall be terminated under clauses 6 or 7, or if the said A. B. shall leave the coy's service during the said period of five years in breach of the agreement on his pt herein contained, Mr. B. shall — for a period of — years from the date of such event, engage or be concerned, either directly or indirectly, in the production or publication of any daily newspaper in England other than "The — Newspaper" aforesaid or any other newspaper owned by the coy. A. B. not to be interested in other newspapers in certain events.

As witness, &c.

Form 78. AGREEMENT to APPOINT TWO DIRECTORS as GENERAL MANAGERS of a COMPANY'S BUSINESS, with DELEGATION of DIRECTORS' POWERS—COMPANY to SHARE any NEW BUSINESS OF MANAGERS' FIRM—REMUNERATION of MANAGERS out of SURPLUS PROFITS, RESERVE FUND, TRANSFER FEES, &c. SPECIAL PROVISION as to SETTLEMENT of ACCOUNTS in WINDING-UP or TERMINATION of this AGREEMENT.

AGREEMENT, dated —, between The — Coy, Limtd (hnfr called "the Coy"), of the one pt, and A., of —, and B., of — (hnfr called "Messrs. —") of the other part.

Recital of registration of coy. Capital, £— and shares, and that Messrs. — carry on business as, &c. under the style of "— Brothers." AND WHEREAS by the arts of asson of the coy Messrs. — were appointed two of the directors of the coy. AND WHEREAS it is deemed expedient that Messrs. — should be managers of the business of the coy upon the terms hnfr appearing.

NOW IT IS HEREBY AGREED as follows:—

Firm to be managers.

1. Messrs. — shall be the managers of the business of the coy for the term hnfr specified, and if either of them during such term ceases to be one of the managers, the other shall become the sole manager of the business of the coy, and they or he, as such manager or managers, are hnfr referred to as "the managers or manager."

Term of office and extension and power to terminate.

2. The managers or manager shall hold office for a term of ten years from the registration of the coy, but with power for them or him at any time during the sd term, by notice in writing to the coy, to extend such term for a further period of three years, and if, during the continuance of this agreemt, the managers or manager shall be incapacitated by ill-health, or shall discontinue in office, or shall find that they or he cannot satisfactorily continue with the coy or other directors of the coy, or if the arts of asson shall be altered by the coy without their or his consent, such managers or manager shall have power, by notice in writing to the coy, to terminate this agreemt.

Managers to supply office and staff, &c.

3. The managers or manager shall during their or his tenure of office provide and maintain for the coy suitable office accommodation in London and a secretary, and grant to the coy the assistance of their or his staff in London and South America resply for the purpose of carrying on the coy's business, as may reasonably be required, and in conson of the services of the managers or manager, including the services to be rendered to the coy under this clause, the coy shall pay to the managers or manager reasonable working expenses, and such payments shall be in addition to the remuneration of the managers or manager prescribed by clause 7 hof.

4. The managers or manager shall manage and conduct the business of the coy according to the best of their or his judgment, and subject to such regulations, general or special, as the directors of the coy may from time to time make, and shall for that purpose, subject as aforesaid, have full control over the assets of the coy, and the power to use its seal, and to make contracts of all kinds within the objects of the coy, and generally to exercise for the purposes aforesaid all the powers, authorities, and discretions of the directors under the arts of assent of the coy capable of being delegated to managers.

Form 78.

Delegation of directors' powers to managers.

5. Without prejudice to the generality of the foregoing provisions, the managers or manager shall on behalf of the coy have power to—

Special powers.

- (a) Make and effect all such purchases and sales of ppty and claims as they or he may think proper.
- (b) Make all such loans and advances as they or he may think proper.
- (c) Transact all general contango business for the benefit of the coy.
- (d) Invest moneys of the coy in stocks, funds, shares, bonds, debentures, debenture stock and other securities, and deal in options.
- (e) Sell, exchange, and deal with any such stocks, funds, shares, bonds, debentures, debenture stock, and other securities, and to give options for the purchase thereof.
- (f) Generally to carry out such transactions as they or he consider expedient in the interest of the coy.

6. Subject as aforesaid the managers or manager shall, whilst they or he hold office, procure the firm of L— & Co. as the same shall from time to time be constituted to offer from time to time to the coy 33 p.c. at least of such firm's interest in all new business from time to time undertaken or proposed to be undertaken by the said firm including the interest in any new business which may arise out of any business in which the said firm are at present interested, but excluding for the benefit of the said firm their ordinary market transactions.

Managers to offer company a percentage of their firm's new business.

7. As regards their or his services as managers or manager of the business the coy shall during their or his term of office aforesaid pay to the managers or manager as regards each financial year of the coy:

Remuneration of managers by share of profits, transfer fees, &c.

- (1) A sum equal to one quarter of the profits of the coy of such year after provision is made thereout (a) for any depreciation, (b) for reserve fund or any addition thereto as may be determined by the directors, (c) for the payment of dividends accrued up to the close of such year on any shares ranking in priority to the ordinary shares of the coy, and (d) for a minimum dividend for that year at the rate of 5 p.c. on the ordinary shares, and

Form 78.

- (2) A sum equal to one quarter of such pt (if any) of the reserve fund as shall, in respect of such year, be distributed by way of bonus or dividend amongst the shareholders; and
- (3) The amount of all fees during such year received on the transfer of any of the shares in the coy's capital and on the transfer of any debentures or debenture stock which may be created by the coy, and on the conversion of share warrants and share certificates and *vice versa*, and on the conversion of debentures or debenture stock into shares.

A balance-sheet in winding-up or on other determination of this agreement.

8. Upon the winding-up of the coy whilst the managers or manager are or is in office, or upon the managers or manager vacating office whether by reason of death or ill-health or effluxion of time or otherwise as hnbefore provided, a balance-sheet of the coy shall be made out as on the day of the commencement of the winding-up of the coy, or on the day of such vacating of office, and if it shall appear that the value of the coy's assets exceeds the amount of the coy's debts and liabilities including pd-up capital, then the managers or manager or their or his legal personal representatives shall be entitled to one quarter of the value of such excess. In making out such a balance-sheet assets shall be taken at their market value, and all assets not having a market value shall be taken at the fair value. All disputes with reference to the sd balance-sheet shall be determined by arbitration, and the Arbitration Act, 1889, shall apply.

Final settlement between the parties in the winding-up or other determination.

9. In the event of the winding-up of the coy the managers or manager shall be pd their or his share of the value of the surplus to be ascertained as asfd *pari passu* with the other persons entld to share therein, and at the same time. But if the managers or manager shall vacate office for any of the above-mentd reasons before the winding-up of the coy they or he shall receive their or his share of the value of the surplus so ascertained as asfd at the option of the coy either (a) by a cash payment for the whole amount due to them or him, or (b) by transfer to them or him of such aliquot part of each kind of asset of the coy as shall together represent the amount due to them by him, except where any assets of the coy shall not consist of cash, stocks, funds, shares, bonds, debentures, or debenture stock, then the value of the aliquot part of such assets shall be pd to them or him in cash. The coy shall within one month from the date of the balance-sheet referred to in clause 8 give notice in writing to the managers or manager in which of the sd ways the coy intends to account to them or him for their or his share of the value of the surplus, and immediately upon receipt of such notice the managers or manager shall be entld to a statement of account. If the coy shall fail to give such notice the manager or managers shall be entld to an immediate settlement in cash.

IN WITNESS, &c.

Appointment of Officers and Agents.

The articles of a company often purport to make appointments of managers, secretaries, agents, solicitors, and others; but it is generally expedient, after the incorporation, for persons so appointed to enter into an agreement in writing with the company defining the terms and conditions of the appointment; for though the articles in such a case operate as an authority by the shareholders to the directors to appoint the person named in the articles, they do not constitute a contract between the company and the appointee on which the appointee can rely. *Eley v. Positive Government, &c. Co.*, 1 Ex. Div. 88; *Rotherham Co.*, 25 C. Div. 103; *Empress Engineering Co.*, 16 C. Div. 125; *Browne v. La Trinidad*, 37 C. D. 1; *Ex parte Beckwith*, (1898) 1 Ch. 324, 326; *Re International Cable Co.*, 66 L. T. 254; *Swabey v. Port Darwin Gold Co.* (1889), 1 Meg. C. C. 385; and *infra*, p. 635. As to what is evidence of an appointment of an officer by the company, see *Browning v. Great Central Mining Co.*, 5 H. & N. 856; 29 L. J. Ex. 399.

Appointment of officers by articles of association. An agreement should be executed.

Moreover, if the agreement is not to be performed within a year, it is necessary to have an agreement in writing, by reason of sect. 4 of the Statute of Frauds. *Eley v. Positive Government, &c. Co.*, 1 Ex. Div. 20; S. C. 88. However, the signature of the secretary of a company to a minute recording a resolution for his appointment may be sufficient. *Jones v. Victoria Graving Dock Co.*, 2 Q. B. Div. 314; and see *Gibson v. Barton*, L. R. 10 Q. B. 332; *Reeve v. Jennings*, (1910) 2 K. B. 522; *Hanau v. Ehrlich*, (1911) 2 K. B. 1056, in which case it has been held that a contract for service for a period exceeding one year with power to determine on either side by six months' notice was a contract not to be performed within the year.

Specific performance of a contract for personal services will not be ordered. *Stocker v. Brocklebank*, 3 M. & G. 250; *Brett v. East India, &c. Co.*, 2 H. & M. 404; *Mair v. Himalaya Tea Co.*, 1 Eq. 411; Fry, Specific Performance, 6th ed. Nor of a contract to procure the performance of services. *Ryan v. Mutual Tontine Assoc.*, (1893) 1 Ch. 116. But where there is a negative stipulation that the employé will not engage elsewhere, the Court will grant an injunction to restrain a breach thereof. *Lumley v. Wagner*, 1 D. M. & G. 604. In that case A. had agreed to sing at B.'s theatre for a certain period, and not to sing elsewhere without his consent in writing. At the instance of B. an injunction was granted restraining A. from singing elsewhere; and see *Star Newspaper Co. v. O'Connor*, (1898) W. N. 114, 122; and *Metropolitan Electric Supply v. Ginder*, (1901) 2 Ch. 799. But it seems that, in order to obtain such an injunction, it is necessary to put in the contract a clear negative covenant, or words amounting thereto (*Whitwood Chemical Co. v. Hardman*, (1891) 2 Ch. 416), and that even the words "act exclusively for" are not sufficient (*Mutual Reserve Fire v. New York Life, &c. Co.*, 75 L. T. 528, C. A.); at the same time, words though positive in terms may in substance be negative. *Catt v. Tourle*, 4 Ch. 654. But doubt has been expressed whether an injunction will be granted where there is only an implied negative. *Davis v. Foreman*, 43 W. R. 168. See, however, what was said in *Wolverhampton, &c. Ry. Co. v. L. & N. W. Ry. Co.*, 16 Eq. 433; followed in *Re Cary Elwes' Contract*, (1906) 2 Ch. 143.

Specific performance.

Injunction.

In the absence of express provision an employé is entitled to reasonable notice of dismissal or compensation. *Green v. Wright*, 1 C. P. D. 592; *Illustrated Newspaper Corporation*, 16 T. L. R. 157; *African Association v. Allen*, (1910) 1 K. B. 396. In the case last mentioned power was reserved for the employer to

Notice before dismissal.

determine at any time, but it was held that this did not dispense with reasonable notice. But he may be dismissed without notice for wilful disobedience of any lawful order of the employer. *Shaw v. Arnott*, 2 Stark. 250; *Callo v. Brouneclear*, 4 C. & P. 518; *Amor v. Tesson*, 9 A. & E. 548; *Turner v. Mason*, 11 M. & W. 112. Moral misconduct, whether in relation to money affairs or otherwise, is enough. *Callo v. Brouneclear*, *supra*; *Brown v. Croft*, 6 C. & P. 16; *Pearce v. Foster*, 17 Q. B. D. 536. So is taking a bribe. *Boston Deep Sea Co. v. Russell*, 39 C. D. 339; *Baillie v. Kell*, 4 Bing. N. C. 638.

It is sufficient, it was said in the former of these cases, if a valid reason for dismissal existed at the time though the master was not aware of it. Disclosure of a company's accounts to a person connected with another company will justify dismissal. *East Anglian Rail. Co. v. Lythgoe*, 2 L. M. & P. 221; *Merces v. Whall* (1845), 5 Q. B. 447. So will habitual negligence or conduct calculated to prejudice the employer's business (*Rokner v. Anderson*, 3 Esp. 235; *Ridgway v. Hungerford Market Co.*, 3 A. & E. 171; *Smith v. Thompson*, 8 C. B. 44); or incompetence or permanent disability (*Harmer v. Cornelius*, 5 C. B. N. S. 236); or stock exchange speculations (*Powers v. Fooks*, 17 Q. B. D. 537); or getting a list of customers for his private purposes from a receiver and manager who is carrying on the business of the company (*Measures Brothers, Ltd. v. Measures*, (1910) 2 Ch. 248); even a single act of forgetfulness having, or calculated to have, serious results, may justify dismissal without notice (*Baxter v. London and County Printing Works*, (1899) 1 Q. B. 901).

A fortiori where an employé undertakes as one of the terms of his employment to use his best endeavours to promote the interests of the company and commits a breach thereof the company may dismiss him. *Arding v. Lomas* (1854), 24 L. J. Ex. 80.

As to absence through illness, see *Davies v. Ebbw Vale Urban Council*, 27 T. L. R. 543.

If an employer makes out a *prima facie* case of misconduct, the onus is on the employer to prove the innocence of the transaction. *Federal Supply and Cold Storage v. Angerren*, 103 L. T. 150.

Incompatible offices. An officer who accepts an incompatible office vacates *prima facie* his original office. *Eales v. Cumberland Lead Co.*, 6 H. & N. 481; *Iron Ship Co. v. Blunt*, L. R. 3 C. P. 484; *Melwood v. Thatcher* (1892), 2 T. R. 81; *Reg. v. Tidy*, 2 Q. B. 179.

Trade secrets. An employé or ex-employé may generally be restrained by injunction from revealing trade secrets. *Merryweather v. Moore*, (1892) 2 Ch. 518; *Robb v. Green*, (1895) 2 Q. B. 1; affirmed on appeal, (1895) 2 Q. B. 315. See also *Louis v. Smellie*, W. N. (1895) 115; *Lamb v. Evans*, (1893) 1 Ch. 218; *Helmores v. Smith* (No. 2), 35 Ch. D. 449; *Summers v. Boyce*, 23 T. L. R. 724.

Agreement to pay specific sum for loss of office.
Logan's case. It is very common expressly to fix by agreement the compensation to be payable to the agent in case his agency shall be terminated by the company. Thus, in *Logan's case*, 9 Eq. 149, L. was by the articles appointed managing director of a company, at 800*l.* per annum and a commission on profits. It was also provided that: "In the event of the said L. being at any time deprived of or removed from his office for any other cause than gross misconduct, the directors shall pay to him as compensation for loss of office a sum equal to three years' salary. . . ." The company was ordered to be wound up, and L. was held entitled to prove for three years' salary. See also *Shirreff's case*, 14 Eq. 417.

But where an order had been made to wind up a company of which T. was an officer, one of the terms of his engagement being, that "5,000*l.* be paid to him if the company discontinue to employ him," it was held by Lord Cairns that "T. was not entitled to prove for the 5,000*l.*, as there was no voluntary,

active, and intelligent discontinuance by the company of the employment of T. *Albert Life Assurance Co., Tait's claim*, 16 Sol. J. 46.

As a rule, an agent or servant, appointed for a term at a salary, will, subject to deductions, be entitled to prove in the winding-up for the value of his salary for the unexpired residue of the term, for the winding-up is a breach of the contract of employment. *Measures Brothers, Ltd. v. Measures*, (1910) 2 Ch. 248; *Yelland's case*, 4 Eq. 350; *Ex parte Clark*, 7 Eq. 550; and see *Macdonell, Master and Servant*, 2nd ed., 129. But when, in addition to his salary, an agent is to have a commission on business done, he is not, upon a winding-up, entitled to prove for what he might have otherwise earned. *Ex parte Maclure*, 5 Ch. 737. This was a case of a voluntary winding-up, and the same rule must a fortiori apply in a compulsory winding-up. See *Sovereign Life, Salter's claim*, 7 T. L. R. 602; and see cases below.

As to proof in winding-up.

Yelland's case
Agent cannot prove for future commission

Important questions sometimes arise as to how far a discontinuance of a business, whether by winding-up, sale or otherwise, is a breach of an agreement for employment or for the payment of remuneration out of profits.

Sale or discontinuance of business when a breach of agreement

Where an agreement had been made between A. and B. that B. should be sole agent at Liverpool for the sale of A.'s coal during a term of years at certain commission, A. to have control of the prices with power for him to rescind if B. did not sell a certain minimum, and A. sold his colliery before the expiration of the term, it was held by the House of Lords, that an action by B. against A. for damages for breach of the agreement occasioned thereby would not lie, for that the agreement did not bind A. to keep his colliery or send any coal to Liverpool. *Rhodes v. Forwood*, 1 App. Cas. 256.

But where tobacco merchants contracted with a retail dealer that, in consideration of his purchasing direct from them and agreeing to continue to buy, display and sell their goods and not to sign any agreement with any other firm which would prevent him from carrying out this contract—they would for the next four years distribute to such of their customers as purchased direct from them their entire net profits on goods sold in the United Kingdom, and also the sum of 200,000*l.* a year, to be distributed every three months in proportion to the purchases, and soon afterwards the manufacturers sold their business, and went into voluntary liquidation: the House of Lords held that there was an express contract to pay to the retail dealer his due proportion of 200,000*l.* a year for four years, and that he was entitled to damages for breach of that contract, the merchants having put it out of their own power to carry on the business. *Ogdens, Ltd. v. Nelson*; *Ogdens, Ltd. v. Telford*, (1905) A. C. 109, 11*l.* (E.).

Again, where a business was sold to a company on the terms that the purchase-money should be paid to A. out of the profits of the business, and before payment the company resold the business to the exclusion of A., it was held that he was entitled to damages. *Telegraph Despatch Co. v. McLean*, 8 Ch. 658; discussed *Re Railway and Electric Co.*, 38 Ch. D. 504. Compare *Spanish Prospecting Co.*, (1911) 1 Ch. 92; *Inchbald v. The Western Neilygherry Co.*, 17 C. B. N. S. 733; and *Railway and Electric Co.*, 38 C. D. 597; *Hamlyn v. Wood*, (1891) 2 Q. B. 488; *Hotel and General Advertising Co. v. Wickenden*, 14 T. L. R. 480; and *Hirsch & Co. v. Burns*, *supra*, which all illustrate the difficulty of reading in implied restrictions; and see *Turner v. Goldsmith*, (1891) 1 Q. B. 544; and *Churchward v. The Queen*, L. R. 1 Q. B. 173 (commission).

Where a company has not sold its business and is not in liquidation, it is liable for damages for prospective commission if it repudiates. *Lockett v. Lagunas Nitrate Co.*, Times, 22 March, 1900.

But an agreement to employ a man does not oblige the employers to provide him with work. *Turner v. Sawdon & Co.*, (1901) 2 K. B. 653; and see *Midland Counties District Banking Co. v. Attwood*, (1905) 1 Ch. 357.

When
winding-up
a dismissal.

A compulsory winding-up order is equivalent to a dismissal of a company's servants. *Chapman's case* (1866), 1 Eq. 346. This case was decided on the ground that the winding-up order which is advertised in the newspapers is notice to all the world of the winding-up, and accordingly the applicant was held entitled to prove for his salary on the footing of having had notice of discharge on the day the order was made. And this decision has never been overruled. Per Chitty, J., *Macdowall's case* (1886), 32 C. D. 366, 368; and see *Reid v. Explosives Co.* (1886), 10 Q. B. D. 264, in which it was held that the appointment by the Court of a receiver and manager in a debenture holder's action also operates as a dismissal of the company's servants. It was also held in *Shirreff's case*, 14 Eq. 417, that the same rule applied in a voluntary winding-up. "I am of opinion," said Lord Romilly in that case (1872), "that the resolution to wind up the company *ipso facto* put an end to Mr. Shirreff's employment as manager, and was equivalent to his dismissal." No doubt this also was decided on the ground that there would be notice of the passing of the resolution advertised in the "Gazette" in accordance with sect. 132 of the Companies Act, 1862 (now sect. 185 of the Companies Act, 1908), and the decision has ever since been acted on without question until the decision of Warrington, J., in *Midland Counties District Bank v. Attwood*, (1905) 1 Ch. 357. In that case the question was whether a former employé of the company could be restrained from committing a breach of the covenant that he would not within a year of the termination of agreement, whether by notice or under the terms of a special clause, enter into the service of another bank carrying on business within certain districts. The company had passed a resolution to wind up, and the defendant contended that as this was a wrongful dismissal he was not bound by the restrictive covenant. The learned judge held that the resolution for winding-up did not operate as a discharge of the servants, thus overruling *Shirreff's case*, *supra*. The ground of the decision was, that regard being had to sect. 131 of the Act of 1862 (sect. 184 of the Companies Act, 1908), the corporate existence and corporate powers of the company subsisted, notwithstanding the winding-up, and that as the liquidator was appointed by and is an officer of the company, there is no such change in the personality of the employer as to dismiss the servants. On the other hand, the learned judge considered that in the case of a compulsory winding-up there was a change of personality, seeing that the business, as from the date of the winding-up order, was carried on by the Court for the purpose of liquidation with the assistance of the official liquidator, an officer of the Court. It seems, however, doubtful whether this distinction can be maintained, seeing that the corporate existence subsists in a compulsory winding-up as much as in a voluntary winding-up. *Chapman's case* was decided on the ground of notice, not of change of personality, and there is notice given in the case of a voluntary winding-up. No doubt, in a sense, the liquidator in a compulsory winding-up is an officer of the Court; but, as pointed out by James, L. J., in *Ex parte Watkin*, 1 C. D. 130, he is appointed by the Court to act for the company, and acts as agent for and on behalf of the company, subject to the control of the Court.

Damages
against third
party procur-
ing breach of
contract.

In the case of service contracts, if a third party, without justification, induces either of the contracting parties to commit a breach of the contract and damage ensues, such third party is liable to an action for damages (*Lumley v. Gye*, 2 E. & B. 216; *Bowen v. Hall*, 6 Q. B. D. 339; *South Wales Miners' Federation v. Morgan Coal Co.*, (1905) A. C. 239); and, as the case last mentioned shows, the principle is not confined to service contracts. See also *National Phonograph Co. v. Edison Bell, & Co.*, (1908) 1 Ch. 335. Very commonly, interference with service contracts arises by the action of trade unions, and it was held in *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants*, (1901) A. C.

426, that a registered trade union might be sued in its registered name in respect of wrongs done on its behalf. But this principle was virtually abrogated by the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), by which "No Court" is now "to entertain any action . . . against a trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union."

The following are some of the leading cases in relation to breach of contract procured by trade unions:—*Allen v. Flood*, (1898) A. C. 1, in which the defendant neither uttered nor carried into effect any threat, but simply warned the employers what the men without his persuasion were determined to do; *Read v. Friendly Society of Operative Stonemasons*, (1902) 2 K. B. 732; *Giblan v. National Amalgamated Labourers' Union*, (1903) 2 K. B. 600; *Huttly v. Simmons*, (1898) 1 Q. B. 181; *Leatham v. Craig*, 2 Ir. R. 667; *Ajello v. Worsley*, (1898) 1 Ch. 274. But by far the most important is the decision of the House of Lords in *South Wales Miners' Federation v. Morgan Coal Co.*, above referred to. In that case all the previous cases were considered, and the principle was clearly laid down that procuring a breach of contract is an actionable wrong unless there be justification for interfering with the legal right. There miners, employed in collieries without giving notice to their employers and in breach of their contracts, abstained from working on certain days under the direction or order of the Federation of Miners by their Executive Council. The federation and council acted honestly and without malice or ill-will against the employers. Indeed, they considered what they were doing would be for the benefit of the employers, and their only object was to keep up the price of coal by which the wages were regulated. But it was held that an action for damages lay by the employers against the federation and its officers, no justification for their action being shown.

MEMORANDA OF ASSOCIATION.

CHAPTER VI.

INTRODUCTORY NOTES.

SECTIONS 2 and 3 of the Companies Act, 1908, are as follows:

Memorandum of Association

2. Any seven or more persons (or, where the company to be formed will be a private company within the meaning of this Act, at least two or more persons) associated for any lawful purpose may by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability (that is to say), either—

- (i) A company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed a company limited by shares); or
- (ii) A company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed a company limited by guarantee); or
- (iii) A company not having any limit on the liability of its members (in this Act termed an unlimited company).

3. In the case of a company limited by shares—

(1) The memorandum must state—

- (i) The name of the company, with "Limited" as the last word in its name;
- (ii) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate;
- (iii) The objects of the company;
- (iv) That the liability of the members is limited;
- (v) The amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount;

(2) No subscriber of the memorandum may take less than one share;

(3) Each subscriber must write opposite to his name the number of shares he takes.

For form of such a memorandum, see *infra*, p. 490.

As to when the word "limited" may be omitted, see Form 81.

Memorandum
of association
of company
limited by
guarantee.

As to the memorandum of a company limited by guarantee, sect. 4 of the Act of 1908 is as follows:—

4. In the case of a company limited by guarantee—

(1) The memorandum must state—

- (i) The name of the company, with "Limited" as the last word in its name;
- (ii) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate;
- (iii) The objects of the company;
- (iv) That the liability of the members is limited;
- (v) That each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for the payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges, and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

(2) If the company has a share capital—

- (i) The memorandum must also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount;
- (ii) No subscriber of the memorandum may take less than one share;
- (iii) Each subscriber must write opposite to his name the number of shares he takes.

As to the memorandum of an unlimited company, sect. 5 of the Act provides as follows:—

Memorandum
of association
of an un-
limited
company.

5. In the case of an unlimited company—

(1) The memorandum must state—

- (i) The name of the company;
- (ii) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate;
- (iii) The objects of the company.

(2) If the company has a share capital—

- (i) No subscriber of the memorandum may take less than one share;
- (ii) Each subscriber must write opposite to his name the number of shares he takes.

For form of such a memorandum, see *infra*, p. 503.

As to the signature and stamping of the memorandum of a company limited or unlimited, sect. 6 runs thus:—

Stamp and
signature of
memorandum.

6. The memorandum must bear the same stamp as if it were a deed, and must be signed by each subscriber in the presence of at least one witness who must attest the signature, and that attestation shall be sufficient in Scotland as well as in England and Ireland.

With regard to the registration of the memorandum of association, it is provided by sect. 15 of the Act of 1908 that:

15. The memorandum and the articles (if any) shall be delivered to the registrar of companies for that part of the United Kingdom in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them.

244.—(1) There shall be paid to the registrar in respect of the several matters mentioned in Table B. in the first schedule to this Act the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct.

(2) All fees paid to the registrar in pursuance of this Act shall be paid into the exchequer.

Copies of Tables B. and C. will be found *infra*, in the Appendix.

As to the effect of registration, sect. 16 of this Act provides that:

16. (1) On the registration of the memorandum of a company the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

As to the stamp, signature, and effect of memorandum, sect. 14 of the Act of 1908 provides as follows:

14.—(1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company, and in England and Ireland be of the nature of a specialty debt.

With regard to the several clauses contained in the memorandum of association:

As to the *NAME*:—

This clause is required in every memorandum. The choice of the name rests with the subscribers of the memorandum. They are free to select, subject to sect. 20 of the Act, any name they like, so, nevertheless, that the word "limited" shall, in case of a company limited by shares or by guarantee, form the last word of the name. See, however, *infra*, p. 498, n.

Sect. 8.

Sect. 8 provides as follows:—

8.—(1) A company may not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires.

(2) If a company, through inadvertence or otherwise, is without such consent as aforesaid, registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling it as to be calculated to deceive, the first-mentioned company may, with the sanction of the registrar, change its name.

(3) Any company may, by special resolution and with the approval of the Board of Trade signified in writing, change its name.

(4) Where a company changes its name, the registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case.

(5) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

Improper use
of name.

Sect. 8 is designed to prevent similar names getting on the register, but the registration of a company by a name which is calculated to deceive by reason of its identity with or resemblance to the name used by some unregistered company, partnership, or person, will not prevent the Courts from intervening, in a proper case, by injunction, to protect the rights of such last-mentioned company, partnership, or person.

Principle for
intervention
of Court.

The principle on which the Court interferes in such cases is, that one person is not to be permitted to represent the business which is carried on by another as carried on by him (*Levy v. Walker*, 10 C. Div. 436), or to represent his goods as being the goods of another man, or to enable his customers to make a false representation to some one who is the alternative purchaser. *Reddaway v. Banham*, (1896) A. C. 199 (explained in *Lever Bros. v. Beddingfield*, 80 L. T. 100); and see *Reddaway v. Ahlers*, 19 R. P. C. 12; *Croft v. Day*, 7 Beav. 84. And see *J. & J. Cash, Limited v. Cash*, 82 L. T. 655; 86 L. T. 211; *Jamieson v. Jamieson*, 15 Rep. Pat. Cas. 193; *Valentine Meat Juice Co. v. Valentine Extract Co.*, 83 L. T. 259; 16 T. L. R. 522, where the defendants were using their own names; also *S. Chivers & Sons v. S. Chivers & Co., Limited*, 17 R. P. C. 420. And this principle applies equally to companies.

Fraudulent
intention or
not.

It is not necessary to prove any fraudulent intention on the part of the defendants: it is sufficient if in the circumstances of the particular case the name adopted by them will be likely to mislead. *Singer Machine v. Wilson*, 3 App. Cas. 376; *Merchant Banking Co. of London, Limited v. Merchants' Joint Stock Bank, Limited*, 9 C. D. 560; *Guardian Fire and Life Assurance Co. v. Guardian and General*

Insurance Co., 43 L. T. 791; *Hendriks v. Montagu*, 17 C. Div. 638; *Tussaud v. Tussaud*, 44 Ch. D. 678; *F. Pinet et Cie. v. Maison Louis Pinet, Limited.* (1898) 1 Ch. 179; *Montreal Lithographing Co. v. Sabiston*, (1899) A. C. 610; *Société Panhard v. Panhard Levassor Co.*, (1901) 2 Ch. 513; *Aerators, Limited v. Tollit*, (1902) 2 Ch. 319; *British Vacuum Cleanser Co. v. New Vacuum Cleanser Co.*, (1907) 2 Ch. 312; *Electromobile Co. v. British Electromobile Co.*, 97 L. T. 196; *Cash (J. & J.), Limited v. Cash*, 82 L. T. 655; *Valentine Meat Juice Co. v. Valentine Extract Co.*, 83 L. T. 259; *Manchester Brewery Co. v. North Cheshire and Manchester Brewery Co.*, (1899) A. C. 83. In that case in 1897 two companies existed, called the Manchester Brewery Company and the North Cheshire Brewery Company. The former had its brewery and a large business in Manchester. The latter had its brewery in Macclesfield and its business chiefly there, but to some small extent also in Manchester. In that year (1897) the business of the latter company was sold to persons who started a new company named "The North Cheshire and Manchester Brewery Company." The House of Lords, affirming the Court of Appeal, held that though it did not appear that there was any fraudulent intention, they must be restrained from trading under that name, as it was calculated to deceive the public into thinking that the new company was carrying on the business of the Manchester Brewery Company. The Court of Appeal had laid down that there is no rule that a name is not so like another as to be calculated to deceive when the words common to the two names come first in the one and last in the other. (1898) 1 Ch. 539.

See also *Premier Cycle Co. v. Premier Tube Co.*, 12 T. L. R. 481; and *John Brinsmead and Sons v. T. E. Brinsmead and Sons, Limited.* (1897) 1 Ch. 49, 413, where an injunction was granted restraining the use of the name of Thomas Edward Brinsmead and Sons, Limited, or the word "Brinsmead" by the defendants in connection with the manufacture, sale, or hire of pianos without adding thereto an express statement that the company was distinct from, and had no connection with, the old firm of John Brinsmead & Sons; and *Sarlechner v. Apollinaris Co.*, (1897) 1 Ch. 893; *F. Pinet & Co. v. Maison Louis Pinet, Ltd.*, (1898) 1 Ch. 179; and Chap. XIX., *infra*; *Army and Navy Co-operative Society v. Army, Navy and Civil Service Co-operative Society of South Africa*, 19 R. P. C. 575. As Lord Bowen once said, "The world is wide, and there are many names."

The fact, however, that the defendants have not only adopted a name resembling that of the plaintiff, but have set up, or propose to set up, business in the same street, or have issued deceptive circulars, goes far to show a fraudulent intention. See *Lee v. Haley*, 5 Ch. 161; *Merchant Banking Co. v. Merchants', &c. Bank*, *ub supra*.

The Court has great difficulty in interfering where the name adopted is merely descriptive of the character of the defendant's

Name descriptive of business.

business, and accordingly, in each of the three following cases an injunction was refused:—*London and Provincial Law Assurance Society v. London and Provincial Joint Stock Life Assurance Co.*, 17 L. J. Ch. 37; *Colonial Life Assurance Co. v. Home and Colonial Assurance Co., Ltd.*, 33 Beav. 548; *The London Assurance Corporation v. The London and Westminster Assurance Corporation, Limited*, 9 Jur. N. S. 843. But see now *Reddaway v. Banham*, (1896) A. C. 199; and *British Vacuum Cleanser Co. v. New Vacuum Cleanser Co.*, (1907) 2 Ch. 312; *Electromobile v. British Electromobile Co.*, 98 L. T. 258; and *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, (1899) A. C. 83.

And a company cannot, merely by registering as its name, or part of its name, a common word from the English language, whatever its nature and however attractive—e.g., "Aerators"—monopolise that word as its name so as to prevent its use in the name of a subsequently registered company. *Aerators, Limited v. Tollit*, (1902) 2 Ch. 319; *Duvall Ceylon Estates v. Ura Ceylon Rubber Estates*, 103 L. T. 416.

**More
similarity
of name.**

Mere similarity of name is not in itself enough to give a right to an injunction; for there is no right of property in the name. "In this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of the name by a stranger." *Du Boulay v. Du Boulay*, L. R. 2 C. P. 441. Hence, if persons chose to carry on business, say as ironmongers, under the name of Day and Martin, the well-known blacking makers could not restrain them.

**Where
businesses
are different.**

The plaintiffs must go further and show that they have carried on some trade or business under the particular name, and that the defendants' conduct may lead to their securing by deception part of the plaintiffs' business. If, then, the defendants are carrying on, or propose to carry on, a different kind of business, there can be no danger of deception, and therefore no legal injury. See *Day v. Brownrigg*, 10 C. Div. 304.

There is, for example, in law no absolute monopoly in the name of a newspaper. To entitle the proprietors of a newspaper to an injunction to restrain the publication of another newspaper with a similar name, they must show that the use of that name is calculated to lead to the belief that the defendants' newspaper is the plaintiffs', and that the use of such name is injurious to them. *Outram v. London Evening Newspaper Co.*, 27 T. L. R. 231 (1911).

**Where no
danger of
deception.**

And even where the business is of the same character, and the name adopted very similar to that of the plaintiffs', the circumstances may be such as to show that there will not in fact be any danger of deception: e.g., when the defendants propose to carry on business in a different district or place. *Merchant Banking Co. v. Merchants Joint Stock Bank*, 9 C. D. 560; *Lee v. Haley*, 5 Ch. 155; *Turton v.*

Turton, 42 C. Div. 128. But see *North Cheshire, &c. Co. v. Manchester Brewery Co.*, *supra*.

As to evidence as to how the existing company had used its name, see *Daimler Motor Co. v. British Motor Traction Co.*, 18 R. P. C. 465.

As to evidence other than the judge's own ocular view, see *London General Omnibus Co. v. Lavell*, (1901) 1 Ch. 135, with which compare *Parton & Co. v. Snelling, Lampard & Co.*, (1901) A. C. 308, 311.

Not only may a registered company be restrained from carrying on business as above, but promoters may be restrained from registering a company with a name calculated to deceive. Thus, in *Hendriks v. Montagu*, 17 C. D. 638, the registration of a company as "The Universe Life Assurance Association, Limited," was restrained at the instance of an unregistered company known as the "Universal Life Assurance Society."

The prohibition against similarity of name does not apply where an existing company is in course of being dissolved and testifies its consent to the satisfaction of the registrar. See Companies Act, 1908, s. 8 (1). The power thus given is frequently exercised, especially in cases of reconstruction or amalgamation. See Chap. XXI., *infra*.

An inadvertent omission on the part of a limited company to publish its corporate name will not disentitle it to have the use of its trade name protected by injunction. *Randall, Ltd. v. British and American Shoe Co.*, (1902) 2 Ch. 354; and see *Pearks, Gunston & Co., Ltd. v. Thompson, Talmey & Co.* (1901), 18 R. P. C. 185.

Where a company purchases the goodwill of an existing business, it has, in the absence of agreement to the contrary, a right to carry on business under the trade name previously used in connection with such business; for the goodwill includes the right to use the name. *Lepp v. Walker*, 10 C. D. 436; see p. 150, *supra*; and the fact that no one bearing the name is connected with the company does not affect its right to protection. *Croft v. Day*, 7 Beav. 84.

As to carrying on business in the name of a dissolved company the business of which has been purchased by another company, or the name of a dissolved partnership, see *Montreal Lithographing Co. v. Sabiston*, (1899) A. C. 610; *Burchell v. Wilde*, (1900) 1 Ch. 551.

A foreign trader who has no English agency, but whose goods are in fact frequently imported into England, has a sufficient English market to enable him to restrain piracy of his trade name. *Collins Co. v. Brown* (1857), 3 K. & J. 423, followed; *La Société Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Co., Ltd.*, (1901) 2 Ch. 513.

In the last case Farwell, J., held that where a company is formed for a fraudulent purpose, the signatories to the memorandum are guilty of a fraudulent conspiracy to effect that purpose. In that case the name itself was enough to show fraud. A motor-car manufacturing company had been registered in a name colourably resembling

Company
purchasing
goodwill.

that of existing motor-car manufacturers with the fraudulent intention of obtaining the benefit of their reputation in that business, and the company and the signatories to the memorandum, who were the only directors and shareholders, were restrained from using the name in connection with that business, and the signatories were further restrained from allowing the company to remain registered under that name.

Purchasing businesses carried on by persons of the name of X. and Y. as a colourable device for enabling a man to have some appearance of right to use the name of X. and Y., a firm known as manufacturers of an article, will not protect the purchaser from an injunction. *Abel Morrall, Ltd. v. T. Hessin & Co.*, 19 R. P. C. 557.

As to the word
"Royal."

It may be well here to draw attention to a rule made some years ago by the Board of Trade, viz., that the registrar shall not register any memorandum of association for the incorporation of a company by a name of which the word "Royal" or "Imperial" forms part, unless there be special circumstances for relaxing the rule, *e.g.*, where the word "Royal" has been used in connection with property which the company is to acquire, or where permission to use the word has been granted by the Home Office.

Where the royalty referred to is not British, the Board of Trade is not so punctilious.

In some cases it may, in order to avoid delay, be desirable to apply to the Home Office for liberty to use the word "Royal."

As to the penalties for unauthorized use of the Royal Arms, or of any "device, emblem, or title" suggesting employment by the Royal Family, see sect. 68 of the Trade Marks Act, 1905.

Before finally settling on a name and getting documents printed, it is generally desirable to ascertain from the Registrar of Joint Stock Companies that no objection exists to the proposed name.

As to change of name, see Chap. X., *infra*.

Change of
name.
Omission of
word
"limited."

As to omitting the word "limited." In some cases a company may by licence of the Board of Trade be registered as a limited company without using the word "limited" as part of its name. These cases are specified in sect. 20 of the Companies Act, 1908. See *infra*, p. 498.

It has been held (*F. Stacey & Co. v. Wallis* (1912), 28 T. L. R. 209) that the abbreviation "Ltd." may in the case of a bill of exchange be used. But the Legislature has persistently enacted that the word "limited" shall be used, and it is not easy to justify the decision, seeing that the enactment is for the benefit of the public. See sects. 63, 67 of the Act.

As to the registered office of the company:—

Registered
office of
company.

Clause 2 of every memorandum must state in which part of the kingdom the registered office is proposed to be situate. This determines where the company is to be registered, and also the jurisdiction to which it will be subject. See sects. 15 and 134 of the Companies

Act, 1908; and sect. 131 (2) (—). And the company must, under penalties, have a registered office (sect. 62). It must also give notice of the situation of the office for the time being to the registrar (sect. 62), the object being to have an address at which the company can always be found. And where the company is limited by shares or by guarantee it must paint up its name outside the office, and engrave its name on its seal and its documents (sect. 63).

As to the objects of the company:—

Clause 3 of the memorandum is to state the objects of the company, and that clause must be framed with great care.

The statement of the objects is not a mere record of what is contemplated by the subscribers, without operative effect. On the contrary, the statement has a twofold operation—

- (1) It affirmatively determines what shall be the powers of the company; for the objects by being stated confer on the company all powers reasonably requisite to the attainment thereof;
- (2) It limits and restricts the powers of the company to those thus conferred, save so far as other powers are given by statute.

Objects
clause :
its operation.

Hence as it rests with the subscribers to declare the objects, it follows that the subscribers are by the Act furnished with the means, not merely to bring into existence a statutory corporation, but to endow that body with such powers (not illegal) as they, in their absolute discretion, think fit. This is their statutory right, and its importance cannot be exaggerated.

To apply and illustrate these principles:—

If a company is formed, for example, "to buy, sell and deal in coal," it may, *for the purpose of carrying out its objects*, not only buy, sell and deal in coal, but may—(1) purchase or take on lease stores; (2) open shops and agencies; (3) buy and hire trucks, carts, horses; (4) employ labour; (5) draw and accept bills of exchange; (6) borrow and give security; (7) incur debts; (8) make contracts for purchase or supply; (9) have banking account; (10) bring actions and take proceedings; (11) compromise actions and disputes (*Bath's case*, 8 Ch. D. 334); (12) employ agents; (13) pay bonuses and pensions to employes, for these things are fairly incidental to and consequential on the object to "buy, sell, and deal in coal."

What powers
implied.

Such a company may also pay all "expenses incurred in getting up and registering the company," and it may pay dividends out of profits, and may provide for payment, even out of capital, of interest on capital paid up in advance of calls, for clauses 71 and 17 of Table A (substituted for clauses 55 and 7 of the original Table A.) treat such outgoings and expenses as properly dealt with by the articles, and what Table A. authorizes is not to be treated as *ultra vires*. *Lock v. Queensland Mortgage Co.*, (1896) A. C. 461.

**Necessity of
amplifying
objects
clause.**

Wide as the powers thus vested are, experience has shown that they are not wide enough to cover many of the transactions which are found necessary or convenient in the course of a company's business, irrespective of the fact already alluded to, that an over-concise statement of objects leaves, in the opinion of business men, too much to implication of law, thereby necessitating constant resort to legal advice, and also hampering business by the doubts it induces amongst outsiders, as to the company's capacity to engage in a given transaction. See further, *supra*, p. 458 *et seq.*

Hence the objects clause of by far the greater number of existing companies is expressed in considerable detail (see p. 458 *et seq.*), and specifies, in most cases at any rate, some objects which might be—to a lawyer—implied.

**Specimen
clauses; why
inserted.**

The following are the clauses most commonly found in memoranda of association:—

1. A clause authorizing the company to carry on the particular business which it is proposed to carry on, and also to carry on various other businesses which it may probably or possibly be desirable to carry on in conjunction therewith or in lieu thereof.

The object of this is to avoid the necessity for going to the Court (under sect. 9 of the Act of 1908) to extend the objects, and also to give the company full freedom for developing its business.

2. A clause empowering the company to acquire any other business similar to its own, for it is extremely difficult to imply such a power from the memorandum. *Ernest v. Nicholls*, 6 H. L. C. 401.

3. A clause empowering the company to enter into any agreement for sharing profits, joint adventure, reciprocal concession, or other arrangement of a like nature with other persons or companies carrying on any similar business; for very clear powers are necessary to justify such transactions. *Ex parte British Nation, &c. Association*, 11 Ch. D. 704.

4. A clause empowering the company to take shares in other companies having similar objects, &c. Such a power is commonly wanted, and not easily implied. *Barned's Banking Co.*, 3 Ch. 105; *Lands Allotment Co.*, (1894) 1 Ch. 630.

5. A clause empowering the company to promote other companies for any purpose calculated to benefit the company. This power, though often required, cannot be implied. *Joint Stock Discount Co. v. Brown*, 8 Eq. 381.

6. A power generally to acquire property and rights which the company may think necessary or convenient for the purpose of its business. In dealing with outsiders, it is found useful to have an express power like this, and so preclude any question of capacity.

7. A power to lend money and guarantee the performance of contracts by customers and others. These loan and guarantee transactions are constantly called for in business, and yet the power is one not easily implied.

8. A power to borrow or raise money by the issue of debentures, debenture stock or otherwise; for, although a *trading* company has an implied power to borrow and to give security to a reasonable amount, it is found in practice highly desirable to have an explicit power in the memorandum. Some doubt, too, exists whether debenture stock of a permanent character can be raised without express power. See now, however, sect. 103 of the Act of 1908.

9. A power to draw, make, accept, indorse, discount, and issue promissory notes, bills of exchange, debentures, and other negotiable or transferable instruments. This is very desirable; for, although a trading company has implied power to make and accept promissory notes and bills of exchange for the purpose of its business (see *In re Peruvian Rails. Co.*, L. R. 2 Ch. 623), the fact that various kinds of companies have been held not to possess any such implied power clouds the implication with a most inconvenient uncertainty. See *infra*, p. 509.

10. A power to sell and dispose of the undertaking of the company for shares, debentures, or securities of any other company having objects altogether, or in part, similar to those of this company. This is effective. See *Colton v. Imperial, &c. Co.*, (1892) 3 Ch. 454; *Grant v. United Switchback Co.*, 40 C. D. 135. Sale of the undertaking or any part was one of the objects. *New Zealand &c. Co. v. Peacock*, (1894) 1 Q. B. 622, in which it was distinctly held by the Court of Appeal that a sale under the power in the memorandum was valid. So too in *Foster v. Borar Co.*, (1901) 1 Ch. 326; and *Virian & Co.*, (1900) 2 Ch. 624. Lindley on Companies, 6th ed., 256. In the absence of an express power like this, a company cannot sell or dispose of its whole business (*Simpson v. Westminster Palace Hotel Co.*, 8 H. L. C. 712). According, however, to *Bisgood v. Henderson's Transeal Estates*, (1908) 1 Ch. 743, the power to sell for shares cannot be exercised if winding-up and distribution among the shareholders of the proceeds of sale is in contemplation. But this view is commonly considered erroneous. See further, *infra*, p. 511.

11. A power to apply for an Act of Parliament for any purpose which may seem expedient. Without such an express power a company cannot apply its funds in promoting a Bill to effect any modification in its constitution. *Munt v. Shrewsbury, &c. Rail. Co.*, 13 Beav. 1; *Simpson v. Dennison*, 10 Hare, 51; *Vance v. East Lancashire Rail. Co.*, 3 K. & J. 50.

12. A power to sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with, all or any part of the property and rights of the company. Although a trading company has an implied power to deal with its property for the purpose of its business (see *In re Patent File Co.*, L. R. 6 Ch. 13), it is in practice found highly desirable to have express and explicit powers on such matters, and so preclude all question and doubt. See *Kingsbury Collieries*, (1907) 2 Ch. 259.

As regards legality, the following rules are applicable:—

- (a) The objects must not include anything in contravention of the Act. For example, a limited company cannot legally issue shares at a discount, and accordingly, to make the issuing of its shares at a discount one of the objects of such a company is not allowable. *Ooregum Co. v. Roper*, (1892) A. C. 125. Again, it is not a lawful object to provide for a limited company dealing in its own shares, for that is in contravention of the Act.
- (b) The objects stated must not include anything in contravention of the general law. For example, it is not a lawful object "to keep a gambling house in the United Kingdom," or "to establish and work lotteries in England," or "to work and develop inventions for importing tobacco into the United Kingdom free of duty," or "to work a scheme for debasing the coinage," or to facilitate the commission of burglaries—for all these objects are contrary to the general law.
- (c) The objects must not include any which would render the company a trade union, for to register a trade union under the Companies Act, 1908, is illegal. See Trade Union Acts, 1871 and 1876, and sect. 294 of the Companies Act, 1908.

The
subscribers'
discretion.

Subject to these restrictions the subscribers of a company's memorandum of association have complete freedom to frame the objects as they choose. It is for them to say whether the objects shall be wide or narrow, cautious or speculative, wise or ridiculous, reasonable or unreasonable, congruous or incongruous, diffuse and rambling, or concise and definite, whether they shall be concurrent, or independent, or substitutional, or contingent, or in the alternative.*

* No doubt some persons have argued that what the Legislature really intended was that the principal objects should be specified—not the powers by which those objects are proposed to be attained—and proceeding from this premise maintain that once a main or primary "object" is specified it is improper to set out in the memorandum further objects which merely confer "powers." But there is nothing in the Act to give colour to this contention, or to show an intention to discriminate between main objects and objects merely conferring powers. Every object stated, whether main or auxiliary, in effect endows the company with a power or powers. To exclude objects conferring powers is to nullify the Act.

Besides these critics there is another class who complain of what may be called the multifariousness of the contents of a memorandum of association. The objects clause, according to their view, ought to specify the leading objects, be they one or many; and that is enough! To go on and specify as an object anything which is implied or may possibly be implied as incidental, on a reasonable construction of the leading object or objects, is irregular and improper. There ought to be no overloading, overlapping, repetition or surplusage. But here

The limitation of a company's powers is a characteristic which distinguishes all statutory companies incorporated for specified purposes, and there is no need to seek for and find in the Act or the constitution of the company any words prohibiting the company from transgressing its specified objects, for it is now settled that the limitation is inherent in the constitution of the company. There is a difference of opinion as to whether this limitation of the powers of such companies exists (1) because they are to be regarded as being incorporated *only* for the specified objects, or (2) because they are to be regarded as being expressly or impliedly prohibited from transgressing those objects. But in *Ashbury Co. v. Riche*, L. R. 7 H. L. 693, Lord Selborne said: "I only repeat what Lord Cranworth, in *Haekes v. Eastern Counties Rail. Co.*, 5 H. L. C. 331, when moving the judgment of this House, stated to be settled law, when I say that a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act. The present and all other companies incorporated by virtue of the Companies Act of 1862 appear to me to be statutory corporations within this principle. The memorandum of association is, under the Act, their fundamental and (except in certain specified particulars) their unalterable law: and *they are incorporated only for the objects and purpose expressed in that memorandum*. . . . And it seems to me far more accurate to say that the inability of such companies to make such contracts (*i.e.*, beyond their objects) rests on an original limitation and circumscription of their powers by the law and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do."

Limitation of powers a common feature of statutory companies.

Ashbury Co. v. Riche in support of view

This view is in accordance with the opinions expressed by Lord Langdale, M. R., in *Colman v. E. C. Rail. Co.*, 10 Beav. 41; and in

Other cases to like effect.

again the answer is that it is a matter for the subscribers' discretion. If they deem it desirable to set out the objects in greater detail than some experts would consider necessary, there is nothing in the Act to prevent them, and there is much to be said from the common-sense point of view in favour of the practice. Take, for instance, borrowing powers of a company. It is unnecessary, any critic might say, to include a borrowing power in the objects of a trading company, for such a power is, according to the decisions, implied; and so it is to the trained lawyer familiar with the authorities; but the person to whom a memorandum of association is addressed are in the main men of business, not lawyers, and for these it is expedient that the powers of the company should be made manifest by adequate objects, and should not be left as far as possible to inference or implication. This principle has been extensively and almost universally acted on during the last thirty years, and has been sanctioned by the authority and example of the greatest masters of company law, including Lord Macnaghten, Lord Davey, and the Lords Justices Chitty, Rigby, and Farwell, when at the Bar. In the result cases of *ultra vires* with reference to a company's objects have been almost banished from the Courts.

Salomons v. Laing, 12 Beav. 339; and with the law laid down in *East Anglian Rail. Co. v. Eastern Counties Rail. Co.*, 11 C. B. 775, 21 L. J. C. P. 23, where Jervis, C. J., said: "It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the Act, and that their funds can only be applied for the purposes directed and provided by that statute"—a case to which Lord Selborne referred as an authority in *Ashbury Co. v. Riche*, *ubi supra*. So, also, when *Baroness Wenlock v. The River Dee Co.* 36 C. Div. 674, was before the Court of Appeal, the Court (Lord Esher, M. R., and Cotton and Bowen, L. JJs.) were all of opinion that, in the case of a statutory corporation, it is not necessary to seek for a prohibition, for such a corporation only has such powers as are conferred on it expressly or by implication.

Contrary
opinions.

Nevertheless, the advocates of the other view, viz., that statutory corporations are to be regarded as endowed with full powers, but as prohibited from using those powers otherwise than for their specified objects, can cite various dicta in favour of that view, e.g. per Patke, B., afterwards Lord Wensleydale, in *South Yorkshire Rail. v. G. N. Rail. Co.*, 9 Ex. 55; per Lord Cranworth, *Shrewsbury Rail. Co. v. N. W. Rail. Co.*, 6 H. L. C. 113; and per Lord Blackburn, in *Att.-Gen. v. G. E. Rail. Co.*, 5 App. Cas. 473. In the last case his Lordship, referring to *Ashbury v. Riche*, *ubi supra* said, "That case appears to me to decide, at all events, this, that when there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose what it does not expressly or impliedly authorize is prohibited."

Sect. 7 of
Act.

In the case, however, of companies subject to the Consolidation Act, 1908, replacing sect. 12 of the Act of 1862, it is not necessary to resort to either of the above reasons; for, as we have seen, sect. 7 of the Act expressly provides that, save as therein mentioned, "A company may *not* alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act"; and it is well settled that these words, *inter alia*, prohibit the company from doing anything in contravention of the conditions thereof. *Ashbury v. Riche*, 7 H. L. 653; *Trevor v. Whitworth*, 12 App. Cas. 409.

Powers.

A company under the Act has the following powers:

- (1) Power to do whatever it is necessary to do with a view to the attainment of the objects (see *supra*, p. 458) stated in its memorandum, and also whatever may fairly be regarded as incidental to and consequential on the stated objects.
- (2) Power to do whatever else is authorized by the other clauses of its memorandum.
- (3) Power to do such other things as it is allowed to do by the Act of 1908 or by any other statute.

That the powers of a registered company were dependent on and governed by its stated objects was recognized in an early case decided on the Joint Stock Companies Act, 1856, the immediate forerunner of the Companies Act, 1862. The Act of 1856 contained provisions as to formation almost identical with those subsequently adopted in the Act of 1862. In particular the Act required that the memorandum should state the objects of the proposed company, and it prohibited any alteration of the conditions contained in the memorandum of association. It was in relation to a company formed under this Act that *Simpson v. Westminster Palace Hotel*, 8 H. L. C. 712, was decided in 1860. In that case the memorandum stated that "the objects for which the company is established are the purchase of leasehold lands in the City of Westminster, the erection, furnishing and maintenance of an hotel thereon, and the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise conducive to the attainment of these objects." The directors, whilst the hotel was in course of being built, agreed to let off for a stipulated period— a few years— a large portion of the building to the head of a Government Department for the business of his office, and evidence was given that such a letting was calculated to be productive of advantage to the company in its intended business. The case went to the House of Lords, and it was decided that the letting was not *ultra vires*, on the ground that it was temporary and preliminary, and conducive to the ultimate object of the whole being devoted to the proper purpose of the hotel. The Lord Chancellor (Lord Campbell), in his opinion, said: "The funds of a joint stock company established for one undertaking cannot be applied to another. If an attempt to do so is made the act is *ultra vires*, and although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a Court of Equity will interpose on his behalf by injunction. A railway company cannot apply its funds to make a line of railway different from that described in the Act by which the company was constituted. A company established for granting fire and life insurances cannot engage in marine insurance. A company established to make a railway and exercise the trade of carriers upon the line from one town in England to another cannot add to it the trade of a steam-packet company; and no company can ever abandon the business for which it was established and undertake another. . . . I agree that the case depends upon the fair construction of the third clause of the Memorandum of Association. There is a difficulty in saying that the letting of so large a portion of the hotel to the India Board for so long a time is carrying on the usual business of an hotel or tavern therein; but I conceive that it is in the words of the third clause, 'doing a thing otherwise conducive to the attainment of' the described objects of the undertaking. An hotel to be used as such still remains in the hands of the company. This

hotel is larger than any other hotel in England, and in this portion of the building the usual business of an hotel and tavern is to be carried on. . . . I rely much upon the consideration that the arrangement is temporary and preliminary, and conducive to the ultimate object of the whole building being devoted to the proper business of the hotel." and the other learned lords concurred.

*Ashbury v.
Riche, 1875.*

After the Act of 1862 came into operation this decision was treated as applicable to companies registered under that Act, and as importing that a company so registered was, as regards its powers, substantially in the same position as a railway, water, gas or other company incorporated for specified purposes or objects, and was not endowed with the general powers of a common law corporation (*supra*, p. 30). Whether this was the true position of such a company was not, however, finally settled until 1875, when the celebrated case of *Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653, was decided by the House of Lords. In that case the objects of the company were "to make and sell, or lend on hire, railway carriages and waggons and all kinds of railway plant, and to carry on the business of mechanical engineers and general contractors; to purchase, lease, work and sell mines, minerals, land and buildings; to purchase and sell, as merchants, timber, coal, metals and other materials; to buy and sell any such materials on commission or as agents; to acquire, purchase, hire, construct or erect works or buildings for the purposes of the company; and to do all such other things as are necessary, contingent, incidental or conducive to all or any of such objects."

The company with this memorandum defining its objects had entered into a contract with the plaintiff in relation to the construction of a railway in Belgium, and the question raised in the action was, whether that contract was valid. The Exchequer Chamber, affirming the decision of the Court of Exchequer, held that the contract was *ultra vires*, but in the Exchequer Chamber, L. R. 9 Ex. 249, the judges were evenly divided in opinion.

Blackburn, J., in his judgment, in which Brett and Grove, J.J., also concurred, was of opinion that the company, being incorporated, was like a chartered or common law corporation endowed with full powers, that, although the Act might have expressly or impliedly cut down these powers it had not in fact done so, and that in the circumstances the contract was only *ultra vires* the directors, not *ultra vires* the company, and capable, therefore, of being ratified by the shareholders.

On appeal, the House of Lords held that the contract was *ultra vires* the company and therefore altogether void, and that the views put forward by Blackburn, J., and those who concurred with him, were erroneous.

House of
Lords'
decision.

The view of their Lordships was that a company under the Act of 1862 was not to be regarded as a common law corporation endowed

with full powers, but as a statutory corporation endowed with limited powers only. Lord Chancellor Cairns, after premising (p. 669) that the subscribers "are to state the objects for which the proposed company is to be established, and that the existence, the coming into existence of the company, is to be an existence and to be a coming into existence for those objects, and for those objects only," and after referring to the words at the end of sect. 12, to the effect that "no alteration shall be made by any company in the conditions contained in its memorandum of association," proceeded as follows:

"Now, my Lords, if that is so—if that is the condition upon which the corporation is established—if that is the purpose for which the corporation is established—it is a mode of incorporation which contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary so to state, negatively that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified."

Grounds for
decision.

"A statutory corporation," said Lord Selborne in the same case, "created by Act of Parliament for a particular purpose, is limited as to all its powers by the purposes of its incorporation, as defined in that Act. The present and all other companies, incorporated by virtue of the Companies Act, 1862, appear to me to be statutory corporations within this principle. The memorandum of association is, under the Act, their fundamental and, except in certain specified particulars, their unalterable law; and they are incorporated only for the objects and purposes expressed in that memorandum. . . . I am unable to see any distinction for this purpose between statutory corporations under the Railway Acts and statutory corporations under the Companies Act, 1862. . . . I think that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law and for the purposes of their incorporation, than that it depends upon some express or implied prohibition making acts unlawful which otherwise they would have had a legal capacity to do." And all the learned lords were of opinion that, if it were necessary to find words of prohibition, the words at the conclusion of sect. 12, to the effect that, "save as aforesaid, no alteration shall be made in the conditions contained in the memorandum of association," were sufficient, and that in thus prohibiting any alteration of the conditions in the memorandum the Act, in effect, prohibited the doing of anything beyond the objects expressed. They further held, as a corollary from the above, that the contract, being *ultra vires*, and therefore void in its inception, was

incapable of ratification even by the unanimous consent of all the shareholders.

Att.-Gen. v. G. E. Rail. Co.

In a subsequent case (*Att.-Gen. v. Great Eastern Rail. Co.*, 5 App. Cas. 473), the principle laid down in *Ashbury v. Riche* was again recognized in the House of Lords, but it was given a greater elasticity by the rule laid down by Lord Selborne, L. C., and the other Law Lords, to the effect that the principle was one to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental or consequential upon those things which the Legislature had authorized (that is, those things specified in the memorandum as objects) ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*.

Lastly, in *London County Council v. Att.-Gen.*, Lord Halsbury, L. C., referring to *Ashbury Railway Carriage Co. v. Riche* and *Att.-Gen. v. G. E. Rail. Co.*, said, "I think now it cannot be doubted that those two cases do constitute the law upon the subject. It is impossible to go behind those two cases. They are now part of the law of this country, and we must acquiesce in them whether we like them or not."

Question of *ultra vires* same for railway, &c. companies as for companies under Act of 1862.

It will be convenient here to refer to some cases in which transactions have been held *ultra vires* on the ground that they were not expressly or impliedly comprised in the specified objects. Some of these cases relate to railway companies; but "there is no distinction between statutory corporations under railway and similar Acts, and statutory corporations under the Companies Acts, as regards the extent of their powers to enter into contracts or to deal with their corporate funds: both are limited in the exercise of their powers to purposes within the scope of their constitution." Per Baggallay, L. J., *Att.-Gen. v. G. E. Rail. Co.*, 11 C. Div. 449.

Any shareholder is entitled to have a contemplated act, which is *ultra vires* the company, restrained, and it makes no difference that the shareholder has himself been a party to similar *ultra vires* acts in the past, as, for instance, an *ultra vires* issue of shares. *Moseley v. Koffyfontein, Ltd.*, (1911) 1 Ch. 73; (1911) A. C. 409.

ILLUSTRATIONS OF ULTRA VIRES TRANSACTIONS.*

Cases of *ultra vires*.

Where the prosperity of a railway company depended materially on the navigation of a river being improved, and accordingly they proposed to Parliament

* "An *ultra vires* contract or transaction is not illegal in the sense that no right of action can arise in connection therewith. It is not, merely because it is *ultra vires*, to be regarded as *malum prohibitum* or *malum in se*." Per Lord Cairns, *Ashbury v. Riche*, L. R. 7 H. L. 672. The contract is void, and no action can be brought on it, but the company, or an innocent shareholder on behalf of the shareholders, can sue for the recovery of its assets wrongfully

for the requisite powers. Held, that an application of the funds of the company towards the promotion of the Bill was *ultra vires*. *Munt v. Shrewsbury Co.*, 13 Beav. 1; and see *East Anglian Rail. Co. v. E. C. Rail. Co.*, 11 C. B. 775. See further, *infra*, Chap. XXIII., and Form 116.

Where a railway company proposed to secure the capital, and guarantee the profits of another company about to run steamboats in connection with the line. *Colman v. E. C. Rail. Co.*, 10 Beav. 1. In that case Lord Langdale, M. R., said: "It has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the Act; but it has been contended that they have a right to pledge, without limit, the funds of the company in the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profits of the shareholders. There is, however, no authority for anything of the kind."

Where a railway company proposed to subscribe to the Imperial Institute. *Tomkinson v. S. E. Rail. Co.*, 56 L. T. 813.

Where a railway company was working coal mines and dealing in coal for profit. *Att.-Gen. v. G. N. Rail. Co.*, 1 Dr. & Sm. 283.

County council running omnibuses in connection with tramways, lawfully worked by the council, but without any statutory authority, the council being only a statutory corporation. *London County Council v. Att.-Gen.*, (1902) A. C. 165. Local authority using land, acquired for a sewage farm, as a hospital site. *Att.-Gen. v. Howell U. D. C.*, (1900) 2 Ch. 377.

Where the capital of a company was about to be applied, or had been applied, to the payment of dividends. *Guinness v. Land Corporation of Ireland*, 22 C. Div. 342; *Flitcroft's case*, 21 C. Div. 533.

Where the capital of a company has been applied to the purchase of its own shares, or a contract has been made so to do: *Land Credit Co. v. Lord Fermoy*, 5 Ch. 763; *Treco v. Whitworth*, 12 App. Cas. 409; even though expressly authorized by its memorandum. *Raine's case*, 4 T. L. R. 303; *Mersina and Adana Co.*, 5 T. L. R. 680; *General Property Co. v. Matheson's Trustees*, 16 C. of S. Cas. 282 (Sc.); *British, &c. Co. v. Couper*, (1894) A. C. 339.

Provision that dismissed employé shall surrender his shares. *Walker v. Hackney*, 57 L. T. 763.

Where a railway company subscribes to the Imperial Institute. *Tomkinson v. S. E. Rail. Co.*, 35 Ch. D. 675.

Where the company had issued shares at a discount: *Almada and Tinto Co.*, 38 C. Div. 415; *Railway Time Tables Co.*, 42 C. Div. 98; *Ooregum, &c. Co. v. Roper*, (1892) A. C. 125; even though expressly authorized by its memorandum or articles. *Welton v. Saffery*, (1897) A. C. 299.

Where a company issued bonus shares pursuant to a filed agreement, but without consideration. *Eddystone, &c. Co.*, (1893) 3 Ch. 9.

Where a company offers debentures at a discount with an option, at once exercisable, to exchange them for shares, fully paid, equal in nominal value to the face value of the debentures. *Moseley v. Koffyfontein Mines*, (1904) 2 Ch. 108.

Where an arrangement for partnership or amalgamation had been made. *Ex parte British Nation Life Association*, 8 C. Div. 679, 704.

expended in relation to that contract as constituting a misapplication of the company's funds. *G. E. Rail. Co. v. Turner*, 8 Ch. 149; *Coltman v. Coltman*, 19 C. Div. 64; *Towers v. African Tug Co.*, (1904) 1 Ch. 558. And the directors and other parties implicated in the transaction may be sued in relation thereto, and may have rights of contribution *inter se*.

Where the undertaking of another company was taken over. *Ernest v. Nicholls*, 6 H. L. C. 401.

Where the company was formed to carry on the business of a bill broker and scrivener, the making advances and procuring loans, and investing in securities, and other specified objects, it was held that the subscribing for shares in a new company in order to assist in floating it was not a *bonâ fide* investment, and was therefore *ultra vires*. *Joint Stock Discount Co. v. Brown*, 8 Eq. 381.

Where the company was formed to make and sell railway carriages and waggons, and railway plant, and to carry on the business of mechanical engineers and general contractors, and to purchase mines and lands, and to buy and sell timber and coals, and other specified objects. Held, that the words "general contractors" must be read as referring to such contracts, and to such contracts only, as were incidental to the business of a mechanical engineer. *Ashbury Co. v. Riche*, L. R. 7 H. L. 665.

Where the funds of the company had been applied in paying the costs of a prosecution against a person who had libelled the company's directors, the libel not applying to the company itself. *Studdert v. Grosvenor*, 33 C. D. 528.

Where commission had been paid for placing shares. *Fauré Electric Accumulator Co.*, 40 C. Div. 141. But see *Metropolitan, &c. Assoc. v. Scrimgeour*, (1895) 2 Q. B. 604; and sect. 89 of the Act of 1908, *supra*, p. 279.

Where directors were issuing new shares without the sanction of a resolution of the company in general meeting. *Moseley v. Koffyfontein Mines, Ltd.*, (1911) A. C. 409.

For action against tramway for manufacturing rolling stock, see *Att.-Gen. v. North Metropol. Tram. Co.*, (1892) 3 Ch. 70.

Applying the company's net profits in buying off opposition to a parliamentary bill, or getting a public body to exercise powers in its favour which were for the public benefit. *Greenwich Pier Co. v. Thames Conservators*, 21 T. L. R. 669.

Where a corporation acts as carriers in relation to tramways. *Att.-Gen. v. Manchester Corporation*, (1906) 1 Ch. 643; and see *Att.-Gen. v. North Eastern Rail. Co.*, (1906) 2 Ch. 675.

The jurisdiction of the Attorney-General to decide in what cases it is proper for him to sue on behalf of relators is absolute. *London County Council v. Att.-Gen.*, (1902) A. C. 165.

Where, in the winding-up of a company, a resolution was passed for the distribution of a large sum among its officers. *Stroud v. Royal Aquarium*, 19 T. L. R. 656; and see *Hutton v. West Cork Rail. Co.*, 23 C. D. 654.

Where a company issues debentures with bonus certificates for payment of an additional sum out of profits, it cannot afterwards, by arrangement, issue fully paid shares in satisfaction of the certificates. *Bury v. Fatatina Development Co.*, (1909) 1 Ch. 754; *Railway Time Tables*, 68 L. T. 649; *Moseley v. Koffyfontein Mines, Ltd.*, (1904) 2 Ch. 108.

ILLUSTRATIONS OF INTRA VIRES TRANSACTIONS.

Cases of *intra vires*.

On the other hand, the following are cases in which transactions have been held within the powers of a company:—

Where an insurance company had paid losses not strictly covered by its policies. *Taunton v. Royal Insurance Co.*, 2 H. & M. 135.

Where a company had given to its employes a bonus beyond their wages. *Hampson v. Prier's Patent Candle Co.*, 45 L. J. Ch. 437; 24 W. R. 754. But see *Hutton v. West Cork Rail. Co.*, 23 C. D. 654. Compare *Stroud v.*

Royal Aquarium. 19 T. L. R. 656; W. N. (1903) 146. as to gratuities to directors and other officers.

Where a company granted a pension to the widow of an ex-officer of the company. *Henderson v. Bank of Australasia*, 40 Ch. D. 170.

Where a company compromised a *bond fide* dispute. *Bath v. Case*. 8 Ch. D. 85.

Where a company, with wide powers of lending, lent money to a servant of the company. *Raintorth v. James Keith*, (1905) 2 Ch. 147.

Where a company formed to work a patent purchases the patent. *Leifchild's case*. 1 Eq. 231; and see *Baglan Hall Co.*, 5 Ch. 356.

Where a company was formed to work mines, and having acquired a lease, it afterwards bought the freehold, including the surface. *Jones v. Balfour*, 5 T. L. R. 389.

Where a hotel company, not requiring the whole of its premises, let part off. *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. C. 712.

Where a colliery company sold land from time to time when the sale was reasonably necessary. *Kingsbury Collieries*, (1907) 2 Ch. 259.

Where a railway company contracted to supply rolling stock to another company in special circumstances. *Att.-Gen. v. G. E. Rail. Co.*, 5 App. Cas. 473.

Where a railway company leased the arches under its lines, *Foster v. L. C. & D. Rail.*, (1895) 1 Q. B. 711; or a right of way over its line. *Gonty v. Manchester & C. Rail. Co.*, (1896) 2 Q. B. 439.

Where an unlimited company, pursuant to provisions in its regulations, paid out withdrawing members. *Borough Commercial & C. Soc.*, (1893) 2 Ch. 242.

Where a trading company created a mortgage to secure a debt due to its bankers. *Patent Fide Co.*, 6 Ch. 83; *General Auction Co. v. Smith*, (1891) 3 Ch. 436; see further, *infra*, p. 472.

A company incurring debts for the purpose of its business. *Russell v. East Anglian Rail. Co.*, 3 M. & G. 125.

Where several companies having power to borrow money on debentures, granted joint debentures charging all their properties, the charge was held good on the separate property of each company to the extent of the money actually received by that company. *Johnston Foreign Patents Co.*, (1904) 2 Ch. 234.

Where a company was formed to create a *société anonyme* in Peru, and to transfer the assets to that company when formed, and the memorandum also provided that "in order to the attainment of the main object of the company,

"they may do, either in the United Kingdom or Peru, or elsewhere, whatsoever they may from time to time think incidental or conducive thereto." Held, that the company could validly accept bills of exchange. But for the words inserted commas it was considered that there would have been no such power. *Pecuvian Ry. Co.*, 2 Ch. 623.

Where one company took shares in another. *Barnes's Banking Co., Ex parte Contract Corporation*, 3 Ch. 105. In that case the objects included power "to purchase or accept shares in any foreign or English company."

See, also, *Financial Corporation, Goodson's claim*, 28 W. R. 760. There the objects of the company included "the undertaking, assisting, and participating in financial, commercial, and industrial operations and undertakings, both in England and abroad, and both singly and in connection with other persons, firms, companies, and corporations." Held, that the taking of shares in another company was *intra vires*. Jessel, M. R., there said: "Reading this memorandum in the largest sense, as I think it ought to be and was intended to be read, it seems to me that these words are meant to include almost everything in the way of financial operations. The words are [as above]. Now, I can imagine no wider terms than these; it appears to me that the last words I read are quite wide

enough to comprise the buying and selling of shares, and the succeeding words only add to the extent of their application."

See, also, *International Contract Co.'s case*, 17 W. R. 454, where a banking company holding some debentures by way of security sold them and guaranteed the interest. *West of England Bank, Ex parte Booker*, 14 C. D. 317. Held valid.

Where a company having power to enter into any arrangement for amalgamation with respect to the union of interests on amalgamation, either in whole or in part, with any other companies or persons carrying on any trade or business of a similar nature to that of the company, entered into an agreement to acquire, in consideration of paid-up shares, the undertaking of a society carrying on a similar business. *Pulbrook v. New Civil Service Co.*, 26 W. R. 11.

Where a company whose objects included the selling of its undertaking for shares sold the same. *Cotton v. Imperial, &c. Co.*, (1892) 3 Ch. 454, and other cases, *infra*, p. 510.

Where a company formed to carry on a specified business, and also to amalgamate with any other company carrying on a similar business, and to sell all or any part of its business or property, and to hold debentures and shares in any other company, sold all its assets (including goodwill), except certain securities, to a new company, formed to take over its undertaking and property, in consideration of shares and debentures in the new company, although the selling company contracted not to carry on the specified business otherwise than in conjunction with and for the benefit and on behalf of the new company. *Borax Co., Foster v. Borax Co.*, (1901) 1 Ch. 326. And see Chap. XXII. (Amalgamation).

Where a company which was bound to supply boats for a ferry employed the boats, when not wanted for the ferry, in excursions. *Forrest v. Manchester Rail. Co.*, 30 Beav. 40.

Where a railway company, having provided a weighing machine for the purpose of its business, let the public have the use and made charges for the use. *L. & N. W. Rail. Co. v. Price*, 11 Q. B. D. 485.

Where an insurance company, having power to give and take policies by way of guarantee, entered into an agreement with other offices for joint liability. *Norwich Equitable*, 57 L. T. 241.

Where a company was empowered to insure against sickness, ill-health, and other specified contingencies, and life insurance, and to grant annuities, and "generally to make insurances against all and every kind of risk, special or general, which may be effected according to law." Held, that there was power to carry on fire insurance business. *Bath's case*, 8 C. Div. 334. "I cannot," said Jessel, M. R., in that case, "see that there is any ground for restricting the meaning of the terms of the latter part of that clause, or for applying that which is so often called the doctrine of *noscitur a sociis*, when you cannot suggest a single instance of a risk having any connection with life assurance which is not included in the express terms of the prior part of the clause." And see *Phoenix Bessemer Co.*, 44 L. J. Ch. 683.

Where the company was formed for carrying on the business of discounters, lenders of and dealers in money, and a number of other specified objects, and "the entering into and carrying on any monetary and financial arrangements or operations, and the doing of all matters and things which may appear to the company to be incident or conducive to the objects aforesaid, or any of them." Held, that a purchase by the company, jointly with other parties, of an estate on which one of such other parties undertook to finish the Alexandra Palace for 200,000*l.*, the company undertaking to float another company to acquire the premises, was not *ultra vires*. *London Financial Association v. Kelk*, 26 C. Div. 107. In that case it was argued, *inter alia*, that the general words

at the conclusion of the objects clause ought to be treated as merely ancillary to the businesses mentioned at the commencement of the objects; but Bacon, V.-C., declined to adopt that argument, saying, "It is enough to say in answer to it, that if it were to prevail all the succeeding words would be useless. I am not at liberty to say that the parties to the contract meant nothing by the words they have thought fit to employ for defining and regulating the conduct of their lawful business."

Where a company was formed to acquire and work an iron-ore mine, it was considered that the company might properly pay fees for a report on its mine, and fees to solicitors, brokers, and for advertisements, printing, &c., but could not properly pay a commission for placing its shares. *Lydney and Wiggpool Co. v. Bird*, 33 C. Div. 85.

Where a company is second mortgagee it may be entitled, if called on, to pay off the first mortgage, and where it is mortgagee of leaseholds it may be entitled to pay rent and otherwise prevent forfeiture. *Sheffield, &c. Society v. Aitchwood*, 44 C. D. 412.

Where the funds of the company were applied in paying the costs of prosecuting a person who had libelled the company and its directors. *Studdert v. Grosvenor*, 33 C. Div. 528; *Breay v. Royal British Nurses' Ass.*, (1897) 2 Ch. 272.

Where a reasonable commission or brokerage is paid to brokers for placing shares. *Metropolitan Coal Consumers' Ass. v. Scrimgeour*, (1895) 2 Q. B. 604; and see Companies Act, 1908, sect. 89, *supra*, p. 279.

Where a company, with a view to advertising its patent medicine, offered a prize to be shot for at Wimbledon. *Lackwood v. Hop Bitters Co.*, 3 T. L. R. p. 698. But *query* as to this.

Where a company incurred expense in printing, stamping and sending out proxy papers and circulars to secure the defeat of a resolution which the directors considered adverse to the company's interests. *Peel v. L. & N. W. Rail. Co.*, (1907) 1 Ch. 5, overruling *Studdert v. Grosvenor*, 33 C. D. 528, on this point.

Whether any given transaction is or is not within the powers of a company is a question of law depending on the construction to be placed on its memorandum of association; and that [construction] must be [construed] in accordance with the rules generally applicable to the construction of written documents. Hence, the whole document must be read; the words must have their ordinary significance, unless, when so applied, they produce an inconsistency, or an absurdity or inconvenience sufficient to show that the intention could not have been to use them in their ordinary signification; technical words are to be treated *prima facie* as being used in their technical sense; and the words used must be understood with due reference to the subject-matter. In all cases the object is to arrive at the intention as expressed by the words used.*

But in framing the objects clause of a memorandum of association, it behoves the draftsman to bear in mind a novel rule of construction first suggested in *Haven Gold Mining Co.*, 20 C. D. 151, and in

Construction of objects clause.

"Main object" rule

* See further as to the interpretation of the memorandum, *infra*, Chap. VII. p. 591 *et seq.*

German Date Co., 20 U. D. 169, and subsequently recognized in *Crown Bank*, 44 C. D. 634; *Amalgamated Syndicate*, (1897) 2 Ch. 600; *Coolgardie Gold Mines*, 76 L. T. 269; *Stephens v. Mysore Reefs Co.*, (1902) 1 Ch. 745.

According to these authorities, where the objects of a company are expressed in a series of paragraphs, the true rule of construction is to seek for the paragraph or paragraphs (commonly the first) which appears to embody the main or dominant object of the company, and to treat all the other paragraphs, however generally expressed, as merely ancillary to this main object, and as limited and controlled thereby.

Assuming that this rule of construction is to be treated as established, it is, of course, to be borne in mind that like every other rule of construction it may be excluded or modified by the contents of the documents to be construed, for every rule of construction contains by implication the saving clause "unless a contrary intention appear by the document."* Accordingly the rule must be applied with caution; it has only a *prima facie* application, and it must be seen that there is nothing in the document to exclude or modify it. For cases in which the rule was held inapplicable see *Pedlar v. Road Block Co.*, (1905) 2 Ch. 427; and *Butler v. Northern Territories Mines of Australia*, 96 L. T. 41. Sometimes the memorandum declares the intention to be that the objects specified in each paragraph of the clause, or in each of three or four specified paragraphs, shall, except where otherwise expressed in such paragraph, be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company. These words are obviously intended to exclude or modify the rule, and the Court is bound to give effect to the intention thus indicated.†

There are other modes occasionally adopted of excluding the artificial rule in question. For example, several of the leading objects are sometimes made to commence with the words "as an independent object." In other cases, the first few paragraphs are expressed in very wide general terms, and any special object is made subordinate thereto, and is sometimes expressed to be "without prejudice to the generality of the preceding objects." See further, as to interpretation, Chap. VII., *infra*, p. 591 *et seq.*

* See per Bowen, L. J., in *Earl of Jersey v. Guardians of Poor of Neath*, 22 Q. B. D. 548.

† Yet, strange to say, in *Stephens v. Mysore Reefs Kangandy Mining Co.*, *supra*, a learned judge disregarded the presence of such words on the ground that inasmuch as when applied to one particular paragraph they would be nonsense, they could not be held to apply to the other twenty-three paragraphs. Such a doctrine is at variance with the settled principles of construction, and cannot, it is apprehended, be maintained.

The objects clause generally closes with the following words: "And to do all such other things as are incidental or conducive to the attainment of the above objects, or any of them." It might have been supposed that these words were implied—for *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud*—and were accordingly superfluous; since *Expressio eorum quæ tacite insunt nihil operatur*. The Court has, however, on several occasions treated such words as material. *Baglan Hall Co.*, 5 Ch. 356; *Simpson v. Westminster Palace Co.*, 8 H. L. C. 712; *Taunton v. Royal Insurance Co.*, 2 H. & M. 135.

Sometimes the words "as the company may think conducive" are substituted for the words "as are conducive." These were the words used in *Peruvian Rail. Co. v. Thames, &c. Co.*, 2 Ch. 617, and were treated as very material. In that case, Lord Cairns, L. J., said that but for the general words the words used "would not, in my opinion, confer on the company, as incident to the carrying on its business, the power of issuing negotiable instruments"; but, having read the general words, his Lordship proceeded: "Anything, therefore, which, in the opinion of the company (how to be expressed we shall see afterwards) is incidental or conducive to the main object of the company—which was the acquisition of concessions for railways—they may do. If, therefore, there comes to be a concession for a railway which is to be paid for by instalments, it is, I think, beyond all possibility of dispute, that if they think it incidental or conducive to the attainment of the concession, when the instalments become or are about to fall due, in place of making calls on their shareholders, they should give a bill of exchange, payable at a future day, for the amount of the instalments, they may do so. The words seem to me so wide that they necessarily include a power of that kind. This is a power which, of course, may require to be exercised by a general meeting of the shareholders, or it may be capable of being exercised by the directors"; and it appearing that by the articles the general conduct of the business was vested in the directors, his Lordship held that they could exercise the power.

This case goes further to show that the substitution of the words "as the company may think conducive," for the words "are conducive," is not without effect. But no doubt the operation of the words must be limited to such things as may reasonably and in good faith be deemed conducive. See *Joint Stock Discount Co. v. Brown*, 3 Eq. 150; 8 Eq. 381; and *Att.-Gen. v. Gt. Eastern Rail.*, 5 App. Cas. 473.

Formerly it was the practice of the office of the Registrar of Joint Stock Companies to require general words to strictly follow the statutory forms. *Peel's case*, 2 Ch. 675. But this practice has been abandoned, and general words may be made as extensive as desired. It is, however, generally considered better not to rely too much on the effect of general words, having regard to the artificial doctrine

Effect of
general words
in objects
clause.

Practice of
office.

Power to
extend objects
cannot be
given.

Implied
powers:
To act by
agents.

To compro-
mise.

To mortgage,
&c. or deal
with its
property.

of construction above alluded to, pp. 469, 470, but to state the objects in sufficient detail, and conclude as in the statutory forms.

It was at one time by no means uncommon to insert in the objects clause of the memorandum words to the following effect: "And also such additional or extended objects as the company may from time to time determine." Examples may be found in the following cases: *Clinch v. Financial Corporation*, 5 Eq. 452; 4 Ch. 117; *Syers v. Brighton Brewery Co.*, 13 W. R. 221; compare with *Ashbury Railway, &c. Co. v. Riche*, L. R. 7 H. L. 653. But such words ought never to be inserted, as being nugatory and misleading.

As to implied powers.—There are some implied powers which the company possesses in virtue of its being a body corporate. Thus a company may appoint and act by agents, and as principal may incur the ordinary consequences (see *supra*, p. 36); and in *Bath's case*, 8 C. Div. 334, it was held that a power to compromise a *bonâ fide* dispute is incident to every body corporate. "I think," said James, L. J., in that case, "we are warranted in holding that a power *bonâ fide* to compromise any dispute whatever is incident to the legal existence of the *persona* of a body corporate." Again, according to *Patent File Co.*, 6 Ch. 83, a body corporate as such has an implied power to deal with its property. In that case, James, L. J., said: "The company is a body corporate, and by the laws of England a body corporate can hold property and dispose of it as freely as an individual, unless it is specially prohibited from so doing. In the memorandum of this company I can find nothing to prevent the company *quâ* company from pledging part of its property for payment of a debt incurred in the course of its business." And Mellish, L. J., said: "It was urged that no company can mortgage unless expressly authorized to do so. Now, the company has property which it is authorized to deal with, and I should say that the true rule is just the contrary, namely, that the company can mortgage unless expressly prohibited from doing so." But too much reliance must not be placed on these *dicta*, for the company in this case was a *trading* company, formed to acquire and work certain patented inventions, and "for the doing of all such other things (including the purchasing, leasing or otherwise acquiring, holding and disposing of lands and buildings) as are incidental or conducive to the attainment of the above objects, or any of them." The question for decision was whether the company had power to mortgage its property to secure a debt owing to its bankers, and the mortgage might very well have been treated as covered by the general words, or as justified by reason of the company being a trading company. Moreover, the *dicta* seem scarcely consistent with the principle established in *Ashbury, &c. Co. v. Riche*, L. R. 7 H. L. 653, which was decided five years later.

It is submitted that the powers of a company to deal with its property and to borrow depend (in the absence of express power in the memorandum of association), not on its being a body corporate, but

on its having implied power to do whatever is fairly and reasonably necessary to effectuate its specified objects. In each case the question depends on the specified objects of the company. Thus, a company formed "to carry on the business of a colliery proprietor" might no doubt acquire and work collieries; might have a banking account; might for the purposes of its business borrow money on mortgage or otherwise, and draw, accept, and endorse bills of exchange; might compromise claims made against it; might remunerate its employees; might pay dividends to its shareholders; might advertise its products; might establish branch offices; might acquire rolling stock, and machinery, and vessels for conveying its coal; for all these things, and many others, are reasonably implied by the words used; and *a fortiori* it might do these things if the objects concluded with general words as above, p. 471.

Question depends on what specified objects.

Examples.

Again, if a company is formed simply "to provide a Town Hall at —, and to let the same for any purpose, public or private," the company might no doubt purchase a site and erect a building, and might let it, and might remunerate its employees, and do various other things; but it seems doubtful whether it could without express authority in its memorandum accept a bill of exchange, or borrow, or sell, or mortgage the property. Perhaps it might borrow money to pay for the erection or repair of the building (see *Re Badger*, (1905) 1 Ch. 568), but that must be because the power is reasonably implied from the objects specified. It will not have the power merely because it is a corporation. In this respect what was said by Cotton, L. J., in *The Queen v. Sir Charles Reed*, 5 Q. B. Div. 483, may be cited: "But it was said that every corporation, unless restricted by this Act of incorporation, has the same power as an individual to enter into contracts, including that of borrowing money. In our opinion, this contention of the School Board cannot be maintained. In our opinion, the power of a corporation established for certain specified purposes must depend on what those purposes are, and, except so far as it has express powers given it, it will have such powers only as are necessary for the purposes of enabling it in a reasonable and proper way to discharge the duties or fulfil the purposes for which it was constituted. . . . A trading corporation stands, as regards an implied power of borrowing, in a very different position from a school board." In this case the *dicta* in *Patent File Co.* were relied on; but Cotton, L. J., said that "was a case of a trading corporation, which may have the power to borrow or to mortgage its property for the purpose of enabling it to carry on its trade."

A trading company has for the purpose of effectuating its objects an implied power to borrow to a reasonable amount (see *General Auction, &c. Co. v. Smith*, (1891) 3 Ch. 432; *Bryon v. Metropolitan Omnibus Co.*, 3 De G. & J. 123; *Australian Co. v. Mounsey*, 4 K. & J. 723; and *Company Prec.*, Part III., pp. 47, 48); it has also an implied power to incur debts (see *Russell v. East Anglian Rail. Co.*,

3 Mac. & G. 125; and *Cork Rail. Co.*, 4 Ch. 748; and it may have an implied power to sell and mortgage (see *Gardner v. L. C. & D. Co.*, 2 Ch. 201; *Yorkshire Rail. Co. v. Maclure*, 21 C. Div. 307; *Kingsbury Collieries*, (1907) 2 Ch. 259).

Having regard to these doubts and difficulties as to corporate capacity, it is exceedingly desirable not merely to state the main objects of the company, but also to state any ancillary objects which the company is intended to have, or may possibly require, and which are not necessarily implied from the statement of the main objects, or cannot with confidence be left to the opinion of the general words with which every memorandum concludes. Practice varies as to where to draw the line, but it has now become customary to set out the objects in considerable detail.

Old practice
as to stating
objects.

It was formerly not unusual to state the objects in the memorandum with the utmost conciseness, and then to elaborate them in the articles; for instance, the objects as stated in the memorandum might be: "The working of coal mines, and the doing of all such things as are conducive or incidental thereto." The articles would then contain, *inter alia*, power for the directors to sell the undertaking of the company, in consideration of cash or shares, to promote other companies, to purchase and hold shares in other companies, to purchase the business of any other company, and undertake the liabilities thereof, to enter into partnership arrangements, to lend money, to guarantee contracts, and so forth. The danger where this plan was adopted was that some of the powers expressly conferred on the directors by the articles might be held *ultra vires* of the company.

Present
practice

According to present practice, the reverse of this plan is adopted. Thus, in the above case the powers conferred by the articles on the directors would be inserted as objects of the company in the memorandum, while the articles would empower the directors to exercise all the powers of the company not by statute required to be exercised in general meeting, subject, perhaps, to certain restrictions.

Advantages of
such practice.

No doubt in the result the objects clause of the memorandum, as now framed, is in many cases unnecessarily long, and states not only what may be called the leading or primary objects, but expressly empowers the company to do a great many things which, if not expressed, would or might be implied as reasonably incidental to the leading objects, or which may never be required. But, after all, it must be borne in mind that the objects clause of a memorandum is intended to be read and understood, and acted on not merely by lawyers, but by ordinary business men; and such men like to see the powers of the company expressed with fulness and in considerable detail, instead of resting in implication.

Take, for example, the case of a company whose objects are "to buy, sell, and deal in coal, and to do all things incidental thereto."

What an imperfect guide such a specification of objects affords to business men! They may be taken to know in a general way that

the company can only do those things which are comprised in its objects or are fairly incidental thereto. But the practical question arises: "What is fairly incidental thereto? Where is the line to be drawn?" The directors will say: "May we buy and work a colliery? May we buy offices and stores? May we buy ships? May we make patent fuel? May we accept bills of exchange? May we borrow money? May we issue debenture stock? May we lend money? May we enter into partnership with others? May we take shares in other concerns? May we sell the whole undertaking if a chance arises? May we give a guarantee? May we promote another company to make an alliance with our company? May we buy up the business of another company? May we buy a patent?"

No doubt a lawyer could answer these questions and say, "Some of these things you may do; others you cannot." But surely the business man has reasonable ground to ask, "Why is so much left to implication? Would it not have been more convenient to state the objects in greater detail, and thus let the document itself answer questions that are sure to arise?"

Nor is it easy to answer this question otherwise than in the affirmative.

And even the lawyer cannot but sympathize in the matter with the business man, for the decisions as to what is and what is not *ultra vires* are not altogether in accord, and although a concise objects clause may suffice when read in the light of the decisions, it appears very shortsighted and impolitic to leave to implication powers with which it is clearly desirable to invest the company, and thus in effect to pave the way for differences of opinion, to prepare pitfalls for the unwary, and to compel the prudent director to seek legal advice at every step. See further, on this point, *Company Law* (9th ed.), pp. 30 *et seq.*

As to altering and extending the objects of a company, see sect. 9 of the Companies Act, 1908, incorporating the provisions of the Companies (Memorandum of Association) Act, 1890, *infra*, Chap. XVII.

The foregoing matters (p. 449) must be inserted in every memorandum of association, whether the company is to be limited or unlimited. In the case of a company limited by guarantee, there is only one more clause—viz., the guarantee clause, unless it is to have a capital divided into shares, in which case there must also be a capital clause (see sect. 4 (2) of the Act, replacing sect. 27 of the Companies Act, 1900); whilst in the case of a company limited by shares there are two more clauses—viz., the declaration of limited liability and the capital clauses. The above mentioned are conditions of the memorandum which sect. 41 of the Act of 1908 would seem to render unalterable. The word "seem" is used because, singularly enough, it has been held that those conditions do not prevent the company from imposing, by its regulations, on its members a greater or further liability.

Alteration of objects.

As to additional clauses.

Thus, in *Hill's case*, 20 Eq. 585, and *Maria Anna Co.*, 6 C. D. 447, it was held by Malins, V.-C., that the articles could effectually impose a liability in excess of the amount of the shares held by the members, and the last-mentioned decision was affirmed by the Court of Appeal. See also *Peninsula Co. v. Fleming*, 27 L. T. N. S. 93.

In like manner, it has been held that, in the case of a company limited by guarantee, the articles may impose further liabilities. *Lion Insurance Co. v. Tucker*, 12 Q. B. Div. 176.

But the liabilities imposed by the memorandum on the members cannot be diminished or restricted by the articles of association. *Baglan Hall Co.*, 5 Ch. 346; *Sewell's case*, 3 Ch. 131; *Wellon v. Saffery*, (1897) A. C. 299; *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 372.

As Lord Selborne said in *Forbes' case*, 8 Ch. 776, sect. 12 of the Act of 1862 (now sect. 41 of the Companies Act, 1908) prohibits any alteration of the conditions in the memorandum, and "it is quite certain that under that section, if there be found anything in the articles limiting the liability of the shareholders in a way inconsistent with the memorandum—anything tending to reduce the liability of the shareholders thereby prescribed—it is simply void."

Capital.

As to the CAPITAL of the Company:—

The fifth clause of the memorandum of a company limited by shares must state the nominal capital and the number of shares into which it is divided, with the amount of each share.

As the capital can be readily increased, there is no object in starting with a very large nominal capital, much reason in fact against it. It involves a needless expenditure in stamp duty; no saving, however, is effected in stamp duty or otherwise by starting with less than 2,000*l.* capital.

Amount of shares.

The amount of the shares depends on a number of considerations. If the public are to be invited to apply for shares, the amount should be moderate, for it is generally found that there is a better market for 10*l.* or 5*l.* shares than for larger ones. Indeed, 1*l.* shares are now the most popular. Moreover, it is generally expedient not to leave much, if any, liability on the shares issued. So long as shares are not fully paid up, their value, unless in exceptional cases, is impaired by the existence of the liability; and if the company should meet with reverses, its shares may become almost unmarketable.

Objection to shares only in part paid up.

There may, however, be cases in which these disadvantages may be counterbalanced by the security afforded by the existence of a large amount of uncalled capital. *e.g.*, in a banking, investment, or insurance company.

Alteration of capital.

In the case of a company limited by shares, the capital, being one of the fundamental conditions contained in the memorandum, can

only be altered as provided by the Act. That is to say, where the articles permit—

- (a) The capital may be increased by the creation of new shares.
- (b) The shares may be consolidated, *e.g.*, ten 1*l.* into one 10*l.*
- (c) Paid-up shares may be converted into stock.
- (d) Stock may be reconverted into fully-paid shares.
- (e) The shares may be sub-divided by special resolution, *e.g.*, one 10*l.* into ten 1*l.*
- (f) Shares which have not been issued may be cancelled.
- (g) The capital may be reduced by special resolution sanctioned by the Court.

(a), (b) and (c) were authorized by sect. 12 of the Act of 1826; (d) by sect. 29 of the Act of 1900; (e) by sect. 21 of the Act of 1867; (f) by sect. 5 of the Act of 1877, all now consolidated in sect. 41 of the Companies Act, 1908; (g) by sect. 9 of the Act of 1867, explained by the Act of 1877, now sect. 46 of the Companies Act, 1908.

Save as aforesaid, and subject to the power now given to a company to reorganize its capital (Companies (Consolidation) Act, 1908, s. 45), no alteration of the capital of such a company can be legally made. *Fielding and Rimington's case*, 2 Ch. 714 (unauthorized sub-division of shares); *Sewell's case*, 3 Ch. 131 (unauthorized increase of capital); *Treor v. Whitworth*, 12 App. Cas. 409; *Welton v. Sattery*, (1897) A. C. 299 (unauthorized reduction of capital).

As regards reduction of capital, the Act of 1862 gave no power to reduce the capital. The power was first conferred by the Act of 1867. It was, however, held that the power so conferred only authorized the reduction of liability in respect of uncalled capital (*Ebbw Vale Co.*, 4 C. D. 837), and not reduction of paid-up capital which had been lost; but by the Act of 1877 it was declared that the word "capital," as used in the Act of 1867, should include paid-up capital, and that the power to reduce capital conferred by that Act should include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which might be in excess of the wants of the company. These powers are now contained in sect. 46 of the Companies Act, 1908. By the provisions of that section the interests of creditors are carefully safeguarded; for the reduction to be effective requires (1) the sanction of a special resolution; (2) the consent of every creditor, or provision for his payment, except as provided by sect. 49; (3) the confirmation of the Court, except as provided by sects. 48-56. See, further, Chap. XVII., *infra*.

Nor can any words inserted in the memorandum or articles of association abrogate the disability imposed by the Act, or enable the parties to escape from the conditions which the Legislature, on the grounds of public policy, has thought fit to impose. Thus, if a company, by its memorandum of association, takes power to buy its

Reduction of capital.

Words in memorandum or articles cannot alter the restrictions.

own shares, or to pay dividends out of capital, inasmuch as the exercise of the power would involve a reduction of the capital, the power cannot be validly exercised, except in accordance with the statutory provisions. *Trevor v. Whitworth*, 12 App. Cas. 409. What cannot be done directly cannot be done indirectly.

Liability to
pay for all
shares in full.

No power to
issue at
discount;

nor bonus
shares.

Issue of paid-
up shares.

It may be convenient here to note that the liability incident to a share can only be satisfied by payment in full. Payment may now be made in cash or in property, or services, or anything of value; but there is no power to issue at a discount, either for cash or otherwise. It was held, in *Ince Hall Co.*, 23 C. D. 545, n., that shares might be issued at a discount, provided an agreement was filed under the now repealed sect. 25 of the Companies Act, 1867; but it was held by the House of Lords that this was not so, and that sect. 25 did not alter the amount payable, but merely required that if the amount was to be paid up otherwise than in cash a contract must be filed before the issue of the shares. *Addlestone Linoleum Co.*, 37 C. D. 191; *Almada and Tirito Co.*, 38 C. Div. 415; *Railway Time Tables Co.*, 42 C. Div. 98, and that this was the law was settled by the House of Lords. *Ooregum Co. v. Roper*, (1892) A. C. 125. Even where all liabilities to outside creditors have been satisfied, the discount shareholder must pay up in full to adjust the rights of shareholders *inter se*. *Welton v. Saffery*, (1897) A. C. 299. And *a fortiori* bonus shares cannot be validly issued. *Eddystone Marine, &c. Co.*, (1893) 3 Ch. 9; *Moseley v. Koffyfontein Mines*, (1904) 2 Ch. 108.

A company cannot issue paid-up shares except on the footing that they are to be paid for in cash or its equivalent in value. True, it may pay a commission to a subscriber, and thus, so far as the financial result is concerned, issue the shares at a discount, but in theory the shares are still paid up in full by the underwriter, though part is returned in the form of commission. See sect. 89 of the Companies Act, 1908. *supra*, p. 279.

An agreement to issue paid-up shares in consideration of property, services, or other consideration of value is only effective because it is in substance an agreement by the directors to accept the property, services, or other consideration in payment of the amount of the shares. While the agreement stands unimpeached, the Court will not inquire into the value of the property or services, but will assume the directors to have exercised an honest judgment and the consideration in property or services, &c. to have been the equivalent of the capital liability on the shares. *Pell's case*, 5 Ch. 11; *Re Wragg*, (1897) 1 Ch. 796, *supra*, p. 62 *et seq.*

But this does not import that shares can be issued as fully paid-up in consideration of property which the contract itself shows that the parties valued at less than the amount of the shares. *Almada and Tirito Co.*, *ubi supra*.

Minimum Subscription.

Where share capital of the company is to be offered to the public for subscription, the amount of "the minimum subscription upon which the directors may proceed to allotment" may be "fixed by the memorandum" of association. See sect. 85 of Companies Act, 1908, and p. 10, *supra*. It need not be stated in the memorandum, but it must be fixed either by the memorandum or by the articles of association. *Ibid.* And it is better to fix it by the articles, for if inserted in the memorandum it is unalterable, and may, if not obtained, wreck the company, whereas if inserted in the articles it can, if the public subscription proves insufficient, be altered.

Additional Provisions.

Besides those conditions which the Act of 1908, s. 3, requires to be specified in the memorandum, any material provision which is in fact set out in the memorandum of association—*e.g.*, as to the amount of the minimum subscription—is (subject to what is said above) unalterable. Thus, if the memorandum of association of a company states the capital and divides the shares therein into several classes, and declares the rights as regards dividends or otherwise assigned to each class, such declaration is a condition of the memorandum, and is unalterable by special resolution or otherwise. *Ashbury v. Watson*, 30 C. Div. 376. In that case certain special resolutions had been passed by the Smyrna and Cassaba Railway Company, and acted on for more than ten years without objection, which purported to alter the rights *inter se* of the different classes of shares as defined by the memorandum of association, and it was held that these resolutions were *ultra vires* and inoperative. In support of the validity of the resolutions it was there contended, in reliance on *Duke's case*, 1 C. D. 620, and *Winstone's case*, 12 C. D. 239, that the definition of rights was not a condition within the meaning of sect. 12 of the Act of 1862 (now sect. 41, Companies Act, 1908), and that the conditions which, by that section, are made unalterable, were only those conditions which the Act required to be specified. But it was held otherwise. Brett, M. R., after referring to the words of sect. 12 of the Act of 1862, said: "Anything more plain I cannot conceive. It does not say, 'the conditions hereinbefore mentioned,' nor 'in any condition necessary to the constitution of the company.' It contains no limitation of any kind. To my mind it is a plain enactment that the company shall not alter anything in the memorandum of association, which is a condition, save what is expressly authorized." See *infra*, note to Form 260: also *Andrews v. Gas Meter Co.*, (1897) 1 Ch. 361; and *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656.

Conditions in memorandum in addition to the statutory ones.

Examples.
As to different classes of shares.

Preference and other Special Classes of Shares.

Definition of
rights in
memorandum.

Not infrequently the capital is, by the memorandum and articles of association, divided not only into shares of different amounts, but into different classes of shares with different rights attached to them; for instance, into preference and ordinary shares, or preference, ordinary, and founders' shares. When this is the case, it is not uncommon to define in the memorandum some of the rights attached to the different classes of shares respectively, or to some one class of them.

The object of so defining the rights of shareholders in the memorandum is to fortify the position of the class, for rights once *unconditionally* attached by the memorandum to a particular class of shares cannot be altered or infringed. *Ashbury v. Watson*, 30 C. D. 376. See *supra*.

But if the rights are not *unconditionally* attached, that is, if though specified in the memorandum they are coupled with a clause in the memorandum providing for alteration, such a specification in the memorandum does not take effect as an unalterable condition. *Welsbach, &c. Co.*, (1904) 1 Ch. 87.

General clause
in memoran-
dum as to
division in
classes.

More often, however, the memorandum merely contains a clause in general terms to the effect that "the shares in the capital for the time being, whether original or increased, may be divided into several classes with any preferential, special, qualified, or deferred rights, privileges, or conditions attached thereto," and, in such case, it is clear that the articles for the time being may authorize the division of the shares into classes and attach thereto preferential and other special rights.

Memorandum
silent, but
power in ori-
ginal articles.

In other cases, now less common than formerly, the memorandum is totally silent as to the issue of special classes of shares; but even in such cases it was long since held that the articles, as originally framed and registered, could effectually divide, or give power to divide, the capital into different classes of shares with preferential and other rights attached. *Harrison v. Mexican Rail. Co.*, 19 Eq. 358; *Re South Durham Brewery Co.*, 31 C. D. 261. This conclusion was not arrived at without difficulty, for the decisions in *Hutton v. Scarborough Cliff, &c. Co.* (No. 1) (1865), 4 De G. J. & S. 672; and (No. 2) 2 Dr. & Sm. 521, both appeared to point to the conclusion that where the memorandum of association was silent as to classes, there was an implied condition of equality, and, if so, it was not easy to see how (looking to sect. 12 of the Act of 1862 (now sect. 41 of the Companies Act, 1908)) the articles of association could effectually modify this condition. However, Jessel, M. R., in *Harrison v. Mexican Rail. Co.*, 19 Eq. 358, held that the articles could, in effect, negative or qualify this implied condition, and, although Kay, J., subsequently decided the contrary in *South Durham Brewery Co.* (*supra*), that decision was reversed on appeal.

It is, however, not uncommon to find that neither the memorandum nor the articles, as originally framed, give power to issue preference and other special classes of shares, and, where both are silent, the following questions sometimes arise:—(1) Can the company issue part of the shares in its original capital with preferential or special rights attached? (2) Can the company issue new shares created upon an increase of capital with preferential or special rights attached?

Until recently, it was generally considered that both these questions must be answered in the negative.

As to the first question, it was decided by Lord Westbury, L. C., that when both the memorandum and articles were silent as to preference shares, a company could not issue shares in its original capital as preference shares, at any rate, without altering its articles; and further, his Lordship expressed doubt whether even by altering its articles the power could be obtained (*Hutton v. Scarborough Cliff, &c. Co.*, 4 De G. J. & S. 672); and the decision of Kindersley, V.-C., in *Hutton v. Scarborough Cliff, &c. Co.* (No. 2), 2 Dr. & Sm. 521, went far to confirm this doubt. And as to the second question, it was answered in the negative by the decision of Kindersley, V.-C., in the case last mentioned.

But this decision has now been overruled by the Court of Appeal in *Andrews v. Gas Meter Co.*, (1896) 1 Ch. 361. In that case there was no power in the original memorandum or articles to issue preference shares, but power was taken by special resolution and acted on. The Court of Appeal held that the preference shares were validly created, on the ground that, although by sect. 8 of the Act of 1862 (now sect. 3 of the Act of 1908) the memorandum of association is to state the amount of the original capital, yet in other respects the rights of the shareholders in respect of their shares and the terms on which any additional capital may be raised, are matters to be regulated by the articles of association rather than by the memorandum, and are therefore matters which (unless provided for by the memorandum, as in *Ashbury v. Watson*, 30 C. D. 376) may be determined by the company from time to time by special resolution, pursuant to sect. 50 of the Act of 1862 (now sect. 3 of the Act of 1908). This view clearly negatives the doctrine that there is a condition in the memorandum of association that all shareholders are to be on an equality unless the memorandum itself shows the contrary. See Lindley, L. J. Accordingly, the correct answer to the second question is: "Yes, by altering its articles so as to take the requisite power."

Moreover, the grounds of this decision go far to show that the same answer should be given to the first question; for it is now abundantly clear that a memorandum being silent as to any distinction between shareholders does not amount to an implied condition of equality as between the shares in the capital.

Where memorandum and articles are both silent as to classes of shares.

Views till recently prevailing:

The law as now settled.

Adverting to this point, Cotton, L. J., in *Guinness v. Land Corporation of Ireland*, 22 C. D. 349, 377, said: "In reality it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividend arises, but by the implication which the law raises as between partners, unless their contract has provided to the contrary." And in a later case (*British Co. v. Couper*, (1894) A. C. 399), Lord Macnaghten said: "I agree that the equality of shareholders as regards dividend is not an implied condition of the memorandum; but I doubt whether it is necessary to have recourse to the doctrine of partnership. It seems to me that if the sum of the interests of persons concerned in a joint venture is divided into shares of equal amount distinguished by numbers for the purpose of identification, but with no other distinction between them, expressed or implied, it follows as a self-evident proposition that the interests of the shareholders in respect of these shares, as regards dividends and everything else, must be equal."

There being, then, no implied condition of equality, it appears to follow that silence in the memorandum does not preclude the issue of preference shares, but that the articles as originally framed or as altered by special resolution can give the requisite power to issue part of the original shares as preference shares. This conclusion is not at variance with the decision in *Hutton v. Scarborough Cliff Co.*, 4 De G. J. & S. (No. 1), *supra*, for in that case the company was seeking to issue preference shares, although neither its memorandum nor articles gave power to issue the same, and although its articles expressly, in effect, provided that all dividends were to be paid *pari passu*. It is only contrary to the doubt expressed by Lord Westbury—a doubt which gave rise to a dictum merely. As to altering the rights attached to classes of shares, see *infra*, p. 63; and *Welsbach, &c. Co.*, *supra*.

Subscribers' declaration.

On referring to the forms of memoranda of association given below (pp. 490–503), it will be seen that each of them concludes with a declaration that the subscribers desire to be formed into a company.

It will also be observed that sects. 4, 5 of the Act require that, "in a company limited by guarantee or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite his name in the memorandum of association the number of shares he takes." It has been considered that the word "memorandum" in this paragraph is an error for "articles," but the practice of the registrar is to require the number of shares taken to be stated in the memorandum. If the shares are of different classes it should be stated which class of shares the signatories subscribe for.

Memorandum may be in writing or printed.

The memorandum may be in writing, but where articles are registered it is usually printed with them. If in writing, it is sometimes filled in upon a skeleton printed form. It must be signed by at

least seven persons (or in the case of a private company two persons, see p. 911), in the presence of, and be attested by, one witness at least. The same witness usually attests the signatures of all the subscribers.

Certificate of Incorporation.

Sect. 17 of the Act of 1908 (representing sect. 1 of the Companies Act, 1900) provides that:

Certificate evidence that requisitions of Act complied with.

"(1.) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of the Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under this Act.

"(2.) A statutory declaration by a solicitor of the High Court, and in Scotland by an enrolled law agent, engaged in the formation of the company, or by a person named in the articles as a director or secretary of the company, of compliance with all or any of the said requirements, shall be produced to the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance."

See *supra*, p. 25, as to the operation of this provision.

The registrar makes no objection to registering a memorandum subscribed by a married woman. No doubt he would refuse if he knew that one of the subscribers was an infant, but if the memorandum so subscribed is registered, it is conceived that the infant was bound even before the Act of 1900. See *Nassau Phosphate Co.*, 2 Ch. D. 610; *Laron & Co.* (2), (1892) 3 Ch. 555. Sect. 1 of that Act (now sect. 17 of the Act of 1908) dispels any doubt as to the future.

As to the effect of subscribing the memorandum of association: By sect. 24 of the Act (sect. 23 of the Companies Act, 1862) it is provided that:—

Effect of subscribing memorandum.

"(1.) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members; (2.) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company."

Hence a subscriber to the memorandum is indisputably a member of the company, and cannot repudiate the shares he has subscribed for, even though he has been induced to take them by misrepresentation. *Lord Lurgan's case*, (1902) 1 Ch. 707; and see *Lever's case*, W. N. (1878) 205.

In a company limited by shares, "no subscriber of the memorandum may take less than one share," and each subscriber "must write

Subscription and agreement to take

and pay for
shares.

opposite to his name the number of shares he takes." Sect. 3 of the Act of 1908 (sect. 8 of the Act of 1862). It is conceived that where a subscriber, in the case of a company limited by shares, does not set any number of shares opposite his signature, he impliedly agrees to take and is liable for at least one. See *Porter v. Emmens*, 1 C. P. D. 201 and 664.

Where a company limited by shares, registered on or after Jan. 1, 1901, invites the public to subscribe for its shares within a year after the date at which it is entitled to commence business, a director may have to sign the memorandum of association "for a number of shares not less than his qualification (if any)." See Companies Act, 1908, s. 72 (Companies Act, 1900, s. 2). The memorandum may, as the section points out, be signed either by the director "or by his agent authorized in writing."

Independently of the power given by sect. 72 of the Act of 1908, a subscriber may sign the memorandum by an agent. *Whitley Partners*, 32 C. Div. 337. In that case the agent had signed in the name of the principal, and the principal was held bound. Probably, even before the Act of 1900, the Registrar of Joint Stock Companies could have required evidence of the agency if a signature purported to be that of an agent. But in practice he never required such evidence where there were seven persons who subscribed personally.

But see as to an application for registration, sect. 17 of the Companies Act, 1908, *supra*, and the statutory declaration now required.

The subscriber of the memorandum agrees to take the shares set opposite to his name *from the company*, and to pay for them. *Migotti's case*, 4 Eq. 258; *Fothergill's case*, 8 Ch. 279; *Nicol's case*, 29 C. Div. 421; *Lord Lurgan's case*, (1902) 1 Ch. 707. The fact that no shares have ever in fact been allotted to him (unless all the shares have been allotted to other persons (*Mackley's case*, 1 C. Div. 247)), or that his name has never been put on the register, will not relieve him (*Erans' case*, 2 Ch. 427; *Argyle Co.*, 54 L. T. 233), for he has by subscribing, notwithstanding he is not entered on the register, acquired the full status of membership. *Tuffnell & Ponsonby's case*, 29 Ch. D. 441.

A clause in the articles that shares subscribed for in the memorandum shall be deemed to be fully paid up is ineffectual. *Dent's case*, 8 Ch. 768; *Crickmer's case*, 10 Ch. 614; *Firmstone's case*, 20 Eq. 524.

As to what was payment in cash under sect. 25 of the Act of 1867 (now repealed), see *supra*, p. 68.

When shares
subscribed in
memorandum
must be paid
for in cash.

Sect. 25 of the Act of 1867 having been repealed, shares, whether subscribed for in the memorandum or otherwise taken up, have to be paid up in full, but they may be paid for in cash or otherwise. "If a man contracts to take shares he must pay either in money or money's worth, and payment in either will be a satisfaction." Per Giffard, L. J., in *Baglan Hall Colliery Co.*, 5 Ch. 346, 355. And in the same case he says (p. 59, *supra*) that he does not see that "payment

in kind according to a subsequent contract with the company is inconsistent with such a memorandum. If there be a contract of such a nature that on a bill filed by the company it could not be set aside, a payment for shares in kind according to that contract is legal," and see *Pell's case*, L. R. 5 Ch. 11; and *Re Wragg, Ltd.*, (1897) 1 Ch. 796.

Hence, if shares (after 1st January, 1901, the date of the repeal of the cash payment section) are issued to A. on a cash basis there is nothing to prevent a subsequent contract under sect. 88 of the Companies Act, 1908 (Companies Act, 1900, s. 7), that the amount or part thereof shall be satisfied by making over to the company property or rendering it services which the company is willing to accept in satisfaction.

Moreover, the section in no way interferes with *Spargo's case*, 8 Ch. 407 (approved *Larocque v. Brauchemin*, (1897) A. C. 358), and accordingly any *bonâ fide* transaction between a company and a shareholder which in an action for calls would support a plea of payment is, *à fortiori*, sufficient. See further, *supra*, p. 69.

The memorandum irrevocably binds a subscriber thereof, as above mentioned, to take the number of shares set opposite his name from the company; but if he subscribes for preference shares, he may subsequently agree with the company to take ordinary shares instead; for as regards matters not required by the Act to be stated in the memorandum, the contract contained in it is revocable (*Duke's case*, 1 C. D. 623), and this is one. Where a person subscribes the memorandum for shares, no allotment being required to render him liable (*London and Provincial, &c. Co.*, 5 C. D. 525), he should not sign any further application for such shares, though if he do sign such application, merely intending to apply for the shares he has already subscribed for, he will not incur any further liability. (*Gilman's case*, 31 C. D. 420; *Dunster's case*, C. A., (1894) 3 Ch. 734. By virtue of the subscription he is entitled to the shares, but he takes them upon the ordinary conditions, and one is that he is not bound to pay up the amount of the shares except in answer to calls duly made upon him in accordance with the articles before the company is wound up (*Alexander v. Automatic Co.*, (1900) 2 Ch. 56), or in a winding-up.

As to stamping the memorandum of association:

By sect. 6 of the Act of 1908 the memorandum is required to bear the same stamp as if it were a deed, *i.e.*, a 10s. stamp. Stamps and fees.

In addition to this, it must before registration be stamped with companies' fee stamps in respect of the fees payable under sect. 244 of the Act.

The tables of fees referred to in sect. 244 are as follows:—

TABLE B.

TABLE OF FEES TO BE PAID TO THE REGISTRAR OF COMPANIES.

I. By a Company having a Share Capital.

	£	s.	d.
For registration of a company whose nominal capital does not exceed 2,000/., a fee of	2	0	0
For registration of a company whose nominal capital exceeds 2,000/., the above fee of 2/., with the following additional fees, regulated according to the amount of nominal capital (that is to say):—			
For every 1,000/., of nominal capital, or part of			
1,000/., after the first 2,000/., up to 5,000/.	1	0	0
For every 1,000/., of nominal capital, or part of			
1,000/., after the first 5,000/., up to 100,000/.	0	5	0
For every 1,000/., of nominal capital, or part of			
1,000/., after the first 100,000/.	0	1	0
For registration of any increase of capital made after the first registration of the company, the same fees per 1,000/., or part of 1,000/., as would have been payable if such increased capital had formed part of the original capital at the time of registration.			
Provided that no company shall be liable to pay in respect of nominal capital on registration, or afterwards, any greater amount of fees than 50/., taking into account in the case of fees payable on an increase of capital after registration the fees paid on registration.			
For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.			
For registering any document hereby required or authorized to be registered, other than the memorandum of association	0	5	0
For making a record of any fact hereby authorized or required to be recorded by the Registrar of Companies, a fee of	0	5	0

II. By a Company not having a Share Capital.

For registration of a company whose number of members, as stated in the articles of association, does not exceed 20	2	0	0
For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100	5	0	0
For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of 5/., with an additional fee of 5s. for every 50 members or less number than 50 members after the first 100.			
For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of	20	0	0
For registration of any increase on the number of members made after the registration of the company in respect of every 50 members, or less than 50 members, of such increase	0	5	0
Provided that no one company shall be liable to pay on the whole a greater fee than 20/., in respect of its number of members, taking into account the fee paid on the first registration of the company.			

k. s. d.

For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.

For registering any document hereby required or authorized to be registered, other than the memorandum of association	0 5 0
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For making a record of any fact hereby authorized or required to be recorded by the Registrar of Companies, a fee of	0 5 0
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By sect. 112 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), additional duty is imposed thus:

"A statement of the amount which is to form the nominal share capital of any company to be registered with limited liability shall be delivered to the Registrar of Joint Stock Companies in England, Scotland, or Ireland, and a statement of the amount of any increase of registered capital of any company now registered or to be registered with limited liability shall be delivered to the said registrar, and every such statement shall be charged with an *ad valorem* stamp duty of 2s. for every 100*l.*, and any fraction of 100*l.* over any multiple of 100*l.* of the amount of such capital, or increase of capital, as the case may be."

It is apprehended that duty must be paid on an increase notwithstanding that the new shares are created in substitution for other shares. *Midland Rail. Co. v. Att.-Gen.*, (1902) A. C. 171; *Att.-Gen. v. Gas Light and Coke Co.*, 18 T. L. R. 517; *Att.-Gen. v. Regent's Canal and Dock Co.*, (1904) 1 K. B. 263.

By sect. 7 of the Finance Act, 1899 (62 & 63 Vict. c. 9)

"Five shillings shall be substituted for two shillings as the *ad valorem* duty imposed by sects. 112 and 113 of the Stamp Act, 1891, as extended by sect. 12 of the Finance Act, 1896, on the statements with regard to the capital of companies referred to in those sections."

Sect. 12 of the Act of 1896 does not relate to companies under the Act of 1908.

By the joint operation therefore of sect. 112 of the Stamp Act, 1891, and sect. 7 of the Finance Act, 1899, a statement of the amount which is to form the nominal share capital of any company to be registered with limited liability is to be delivered to the Registrar of Joint Stock Companies in England, Scotland, or Ireland, and a statement of any amount of increase of capital of any company, now registered or to be registered with limited liability, shall be delivered to the said registrar, and every such statement shall be charged with an *ad valorem* duty of 5s. for every 100*l.* and any fraction of 100*l.* over any multiple of 100*l.* of the amount of such capital, or increase of capital, as the case may be.

By sect. 5 of the Revenue Act, 1903 (3 Edw. 7, c. 46)—

"The statement of the amount of any increase of registered capital of any company registered under the Companies Acts, 1862 to 1900, which is required by sect. 112 of the Stamp Act, 1891, to be delivered to the Registrar of Joint Stock Companies, shall be delivered duly stamped, with the duty charged thereon, within fifteen days after the passing of the resolution by which the registered capital is increased; and, in default of that delivery, the duty, with interest thereon at the rate of 5 per cent. per annum from the passing of the resolution, shall be a debt to His Majesty recoverable from the company."

In *Att.-Gen. v. Anglo-Argentine Tramways Co., Ltd.*, (1909) 1 K. B. 677, the company had passed a special resolution authorizing the directors to increase the capital by a sum not exceeding 5,000,000*l.* by the creation and issue from time to time of new shares of 5*l.* each, and it was held that the whole of such 5,000,000*l.* was chargeable at once with *ad valorem* duty as an increase of registered capital, though in fact the directors had, pursuant to the resolution, only created capital to the extent of 2,000,000*l.* The grounds on which the learned judge (Channell, J.) arrived at this remarkable conclusion, appear to be based on a complete misapprehension of the scheme of operation of the Companies Act, 1862, and of the Companies (Consolidation) Act, 1908, in regard to a company's capital. The learned judge seems to have thought that the capital of a company was not a mass of shares created and existing, but merely a figure denoting the maximum beyond which the company might not go. It is submitted that this is not the correct view, and that a company's capital for the time being consists of existing shares, and is not increased until the new shares constituting such increase are brought into actual existence, and that a mere authority to the directors to increase does not increase the capital (or the registered capital) unless and until the authority is exercised.

Following are a few examples of the amount payable on the registration of the memorandum and articles of association of a company limited by shares:—

Nominal Capital.	Amount Payable.
£	£ s. d.
1,000	5 15 0
5,000	18 15 0
10,000	32 10 0
20,000	60 0 0
30,000	87 10 0
50,000	142 10 0
80,000	225 0 0
100,000	280 0 0
200,000	535 0 0
500,000	1,300 0 0
1,000,000	2,551 5 0

INTRODUCTORY NOTES.

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As to the procedure to be adopted on registration of a company,
see supra, p. 3.

By sect. 18 (1) of the Companies Act, 1908, every company shall send to every member at his request and on payment of one shilling, or such less sum as the company may prescribe, a copy of the memorandum and the articles, if any; (2) if a company makes default in complying with the requirements of this section it shall be liable for each offence to a fine not exceeding one pound.

Member
entitled to
copy of
memorandum
and articles.

PRECEDENTS.

Form 79.

Memorandum
of a company
limited by
shares.

THE COMPANIES (CONSOLIDATION) ACT, 1908.

Coy Limtd by Shares.

Memdm of Asson of the — Coy, Limtd.

1. The name of the coy is the " — Coy, Limtd."

See *supra*, p. 449. Scrutton, J., has recently decided that the abbreviation of "Limited" to "Ltd." is a sufficient compliance with the requirements of the Act, *supra*, p. 454.

2. The registered office of the coy will be situate in England [or Scotland, or Ireland, as the case may be].

See *supra*, p. 454.

3. The objects for which the coy is established are:—

See *supra*, p. 455.

(1.) To acquire, &c., *e.g.*, Form 85.

(2.) To carry on, &c., *e.g.*, Form 130 *et seq.*

(3.) Add general clauses from Form 97 *et seq.*

4. The liability of the members is limtd.

See *supra*, pp. 475, 476.

5. The capital of the coy is £——, divided into —— shares of £ each, with power to divide the shares in the capital for the time being into several classes, and to attach thto resply any preferential, deferred, qualified, or special rights, privileges, or conditions [but so that where shares are issued with any preferential or special rights attached thto, such rights shall not (except where the terms of issue otherwise provide) be alterable otherwise than pursuant to the provisions contained in clauses 50 or 153 of the accompanying arts of asson].

As to the capital, see *supra*, p. 476 *et seq.*

As to reserve capital, which is only to be called for in a winding-up, see Form 225, *infra*.

As to taking express power in the memorandum to issue preference shares, see *supra*, p. 479.

As to defining in the memorandum the rights of the several classes of shares, see *infra*, p. 475 *et seq.*

As to reserving power in the memorandum to modify the rights there defined by resolutions under clauses in the articles, see *supra*, p. 476.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a co., in pursuance of this memdm of assen, and we resply agree to take the number of shares in the capital of the co. set opposite our respive names.

Form 79.

Names, Addresses, and Descriptions of Subscribers.	Number of Shares taken by each Subscriber.
--	---

1. JOHN JONES, of, &c., Merchant	One
2. JOHN SMITH, of, &c., Landed Proprietor	One
3. THOMAS GREEN, of, &c., Grocer	One
4. HENRY THOMPSON, of, &c., Commission Agent	One
5. CHARLES EVANS, of, &c., no occupation	One
6. WILLIAM DAY, of, &c., Surgeon	One
7. ALFRED JONES, of, &c., Wine Merchant	One

Total Shares taken	Seven
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Dated the — day of — 19— .

Particular care should be taken to give the names, addresses and descriptions of the subscribers fully and correctly and clearly; otherwise delay is almost certain to occur.

WITNESS to the above signatures.

SAMUEL WELLER,
10, North Street,
Westminster.

Or,

WITNESS to the above signatures of John Jones, John Smith, William Day,
and Alfred Jones,
SAMUEL WELLER, &c.

WITNESS to the above signatures of Thomas Green, Henry Thompson, and
Charles Evans,
MARTIN CLARKE, &c.

Or,

WITNESS to the above signatures other than that of Thomas Green,
SAMUEL WELLER, &c.

WITNESS to the above signature of Thomas Green,
MARTIN CLARKE, &c.

Where an agent signs, the proper course is to sign thus:—"A. B., of —, his duly authorized agent." And, to satisfy sect. 72 (1) of the Act, it should be stated that the agent is "authorized in writing." That the signature may be by an agent, see *Whitley Partners*, 32 C. D. 337.

In subscribing the memorandum, particular care should be taken that the signatures are legible. Not uncommonly one or more signatures are quite undecipherable. Where there can be any doubt, it is desirable to bring with the memorandum a clearly written list showing the names, addresses and descriptions of the subscribers. As to descriptions, care should be taken to

Form 79. make these also clear, especially where a subscriber has no profession. If needs be, insert the words "no occupation." In the case of a clerk, state what sort of a position he holds, as, for instance, clerk to a merchant, or secretary to a public company.

There must be at least seven subscribers (or two in the case of a "private company," see p. 911), but there may be as many more as the promoters choose. Each subscriber must take at least one share, and must write opposite to his name the number of shares he takes. Where the shares are of different classes, the class of shares should be stated, thus, *e.g.*, "one preference," or "one ordinary."

Minimum Subscription.

Sect. 85 of the Companies Act, 1908, allows the specification of the minimum subscription in the memorandum or articles of association. But it is rarely expedient to specify it in the memorandum unless it is very small, for if there specified it can in no circumstances be altered, and this difficulty may wreck the company if the minimum is not obtained.

Form 80.

Memorandum
of a company
limited by
guarantee.

THE COMPANIES (CONSOLIDATION) ACT, 1908.

Coy Limtd by Guarantee.

Memdum of Asson of the — Coy. Limtd.

1. The name of the coy is the "— Coy, Limtd."

See *supra*, p. 449.

2. The registered office of the coy will be situate in England [or Scotland, or Ireland].

See *supra*, p. 454.

3. The objects for which the coy is established are:—

(1.) To, &c.; see Forms 200 to 204, *infra*.

4. The liability of the members is limtd.

This clause, though in the new Act, was not in the Act of 1862.

5. Every member of the coy undertakes to contribute to the assets of the coy in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the coy contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding 10l. [See *supra*, p. 448.]

The amount of the guarantee varies according to the circumstances of the company. Sometimes it is fixed at 100l., but more often it is fixed at 10l.,

or 5*l.*, or 1*l.*, and occasionally at 3*s.* The guarantee is usually of the same amount for each member, but occasionally the amount is made to vary with the extent of a member's interest, as in the case of *The Shipping Federation, Ltd.* (1890), where the amount was "not exceeding 3*s.* per gross registered ton in respect of steam tonnage, or 1*s.* per gross registered ton in respect of sailing tonnage, respectively entered by such member with the company at the date of the order or resolution to wind up the company, or at the date of his ceasing to be a member, whichever date shall be the earlier."

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[Where there is to be a capital divided into shares, add:

6. The capital of the coy is £- - divided into - - shares of £- - each.

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a coy, in pursuance of this memdm of assn.

See *supra*, p. 491.

Names, addresses, and descriptions of subscribers

See *supra*, p. 491. And if there is a share capital, state the number of shares taken by each subscriber. See as to this, *supra*, p. 491.

Dated the --- day of ---, 19---

WITNESS, &c.: see *supra*.

Sect. 4, sub-sect. 2, of the Companies Act, 1908 (sect. 27 of the Companies Act, 1900), contains the following provision as to companies limited by guarantee:—

"(2) If the company has a share capital

(i) The memorandum must also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount."

Under sect. 9 of the Companies Act, 1862, it was *not* necessary, in the case of a company limited by guarantee, to specify the capital in the memorandum of association; it was sufficient, as appears by sect. 14 of the Act and Form C in the second schedule, to specify the capital in the articles of association, and that capital (being a regulation, not a condition) could be altered from time to time by special resolution. Hence the power to increase and reduce capital, conferred by sect. 12 of the Act of 1862 and sect. 9 of the Act of 1867, and by the Act of 1877, was only given to a "company limited by shares," and not to a company limited by guarantee with a capital divided into shares. The above sub-section renders it necessary henceforth to specify the capital in the memorandum. In the result, the capital becomes a "condition" of the memorandum, which can only be altered (see sect. 41 of the Act of 1908) in the manner permitted by the Act. None of the other powers by the Act expressed to be given exclusively to companies limited by shares are, by this section, made applicable to companies limited by guarantee, *e.g.*, power to consolidate shares, and to convert shares into stock, sect. 41 of the Act of 1908; power to sub-divide shares, *ibid.*; power to issue share warrants, sect. 37 of the Act of 1908.

Form 80.

The special feature of companies limited by guarantee, with a share capital, was that the hard and fast rules as to capital applicable in the case of a company limited by shares were relaxed, and the shareholders could, by special resolution, deal with the capital as they chose. The destruction of this feature of flexibility takes away the principal inducement to register this form of company instead of a company limited by shares. Nevertheless, it may still be desirable, in some cases, to form companies limited by guarantee with a nominal capital divided into shares, for it will be possible in such a company to have two classes of members—namely, those who hold shares and those who are members without holding shares, *e.g.*, a class of persons who may be called the founders, and to whom a share of the profits may be given. This would not be in contravention of sub-sect. (1) of sect. 21 of the Companies Act, 1908, *infra*. Moreover, companies of this kind are exempt from sects. 88 and 65 of the Act of 1908 as to returns of allotments and the statutory meeting.

Participation in Divisible Profits.

Sect. 21 of the Act provides as follows:

21.—(1) In the case of a company limited by guarantee and not having a share capital, and registered on or after the first day of January, nineteen hundred and one, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered on or after the first day of January, nineteen hundred and one, purporting to divide the undertaking of the company into shares or interests shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

This sub-sect. (2) is curiously expressed. It does not apparently make void any such provision, for the language is very different to that used in sub-sect. (1). It appears to recognize that a memorandum may contain a provision dividing the undertaking into shares and yet not specifying the nominal amount or number of the shares, and it declares that such a provision shall, for the purposes of this section, be treated as a provision for a capital divided into shares. Perhaps the true construction is that the Legislature is here dealing, not with registered documents, but with documents proposed to be registered: so that if a memorandum proposed to be registered states that the undertaking is divided into (say) 10,000 shares, it cannot, looking to sub-sect. (2) of sect. 27 (*supra*), be registered unless it goes on to state the amount and number of the shares. This sect. 21 goes far to abolish a very convenient mode of constitution which has been occasionally adopted, *e.g.*, in the case of the Beira Railway Company, Limited. According to that mode of constitution the company was registered as a company limited by guarantee, and the articles stated that the undertaking was to be deemed to be divided into so many (say 100,000) shares [of no nominal value or amount], and the members became holders of those shares. There was no liability beyond the guarantee in respect of the shares unless the regulations imposed a liability, but of course every member in the winding-up was liable for the amount guaranteed, say 10*s.* per member. Thus it was rendered possible to avoid the grave difficulty that sometimes arises in fixing the capital value of a speculative undertaking, and there were various other advantages incident to the mode of incorporation—a mode which borrowed its special features from the cost-book mining company for centuries prevalent in Cornwall and Devon. Unfortunately, however, this mode incidentally en-

abled the parties to escape from the capital duty payable on a nominal capital, and obstacles were placed in the way of those who desired to register companies in accordance with this mode. Subsequently it was held by the High Court in *Molleson v. General Mineral Patent Syndicate, Limited*, (1894) 3 Ch. 538 that a company limited by guarantee could, by special resolution, adopt regulations dividing its undertaking into a number of shares as above; and this of course made it clear that these obstacles were unjustifiable, for it is well settled that a company cannot legally adopt by special resolution regulations which could not legally have been embodied in its original articles of association. Hence this sub-section.

There is, however, nothing in the section to prevent the adoption of the common expedient of vesting shares in trustees and declaring that the beneficial interest in such shares shall be regarded as a joint stock, and be deemed to be divided into a number of shares of no nominal amount, e.g., 100,000, transferable either by the delivery of the certificates or by transfer registered in books kept by either trustees or other nominees. Moreover, the section does not appear to cover every mode of providing for a division of the undertaking into shares.

In the winding-up of a company limited by guarantee a member is liable to be placed on the A list of contributories, and to pay in respect of his guarantee, and also under sect. 101 of the Act of 1862 (Companies Act, 1908, s. 165) to pay up any other sums due from him; but if he has ceased to be a member for more than a year before the winding-up, and therefore cannot be placed on the list, he can only be sued in an action for any other sums due from him. *Baird's case*, (1899) 2 Ch. 593.

Form 80.**THE — ASSOCIATION OR SOCIETY.**

The following is the official form issued by the Board of Trade:

Memorandum of Asson.

1. The name of the association is the "— Association." See *supra*, pp. 449 *et seq.*
2. The registered office of the society *supra*, p. 454].
3. The objects for which the society *or, chamber, or, institute, &c.* is established are:—[See pp. 455 *et seq.*] And see proviso as to charities and trusts, *infra*.

(1) The

(2) The

(3) The doing all such other lawful things as are incidental or conducive to the attainment of the above objects.

Provided that the association shall not support with its funds or endeavour to impose on or procure the observance by its members or others of any regulation or restriction which if an object of the association would make it a trade union.

Provided also that in case the association shall take or hold any property subject to the jurisdiction of the Charity Commissioners for England and Wales, the association shall not sell, mortgage, charge, or lease the same without such consent as may be required by law,

Form 81.

Memorandum of association of a company limited by guarantee and registered pursuant to sect. 20 of the Companies Act, 1908 sect. 23 of the Act of 1867.

Form 81. and as regards any such ppty the managers or trees of the association shall be chargeable for such property as may come into their hands, and shall be answerable and accountable for their own acts, receipts, neglects, and defaults, and for the due administration of such ppty in the same manner and to the same extent as they would as such managers or trees have been if no incorporation had been effected, and the incorporation of the association shall not diminish or impair any control or authority exerciseable by the Chancery Division or the Charity Commissioners over such managers or trees, but they shall, as regards any such ppty, be subject jointly and separately to such control or authority as if the association were not incorporated. In case the association shall take or hold any ppty which may be subject to any trusts, the association shall only deal with the same in such manner as allowed by law having regard to such trusts.

As to the earlier part of the clause prohibiting sales, &c., it is to be observed that it only applies to property "subject to the jurisdiction of the Charity Commissioners," and accordingly property exempted by sect. 62 of the Charitable Trustees Act, 1853, and by sects. 47, 48, and 49 of the Charitable Trusts Act, 1855, does not come within the words. See *Royal Society of London v. Thompson*, 17 C. D. 407; *Clergy Orphan Corporation*, (1894) 3 Ch. 145; *Gilchrist*, (1895) 1 Ch. 367; *Mason Orphanage, &c.*, (1896) 1 Ch. 596; *Stockport School*, (1898) 1 Ch. 611.

But as regards property subject to the jurisdiction of the Charity Commissioners, the proviso no doubt points to sect. 29 of the Charitable Trusts Act, 1855.

As regards the central portion of the proviso, it is in substance a repetition of the words of sect. 5 of the Charitable Trustees Incorporation Act, 1872. That Act enables trustees of charities to apply for a certificate of incorporation, and then, by sect. 5, preserves their individual liability; but that seems a very different thing to imposing by the proviso the liabilities of trustees on the managers, who are not owners of the trust property but agents and servants of the owners, and are under no antecedent liability as trustees.

It is submitted that the words are objectionable, and that it would be far better to leave the general law to operate.

As to the last paragraph of the proviso, it is presumably inserted by way of reminder.

A company formed for charitable and other purposes, e.g., trading or philanthropic purposes, is not a charity. See *Macduff v. Macduff*, (1896) 2 Ch. 451.

4. The income and ppty of the asson, whencesoever derived, shall be applied solely towards the promotion of the objects of the asson as set forth in this memdum of asson; and no portion thof shall be paid or transferred, directly or indirectly, by way of dividend, bonus, or otherwise howsoever by way of profit, to the members of the asson.

Provided that nothing herein shall prevent the payment, in good faith, of remuneration to any officers or servants of the asson, or to any member of the asson, or other person, in return for any services actually rendered to the asson. [See cases, *infra*, p. 501.]

Provided further that no member of the council of management or governing body of the asson shall be appointed to any salaried office

of the assen, or any office of the assen pd by fees, and that no remuneration shall be given by the assen to any member of such council or governing body except repayment of out-of-pocket expenses and interest on money lent or rent for premises demised to the assen. Provided further that this provision shall not apply to any payment to any railway, gas, electric lighting, water, cable, or telephone co of which a member of the council of management or governing body may be a member or any other co in which such member shall not hold more than one-hundredth part of the capital, and such member shall not be bound to account for any share of profits he may receive in respect of such payment.

Form 81.

The first paragraph of this clause (4) might reasonably be held to prohibit only a payment to a member *qui* member, but this construction would render the first proviso superfluous. In order to obviate doubt the proviso has, in several cases, with the sanction of the Board of Trade, been modified: *e.g.*, by the addition of the words "nor prevent the payment of interest at a rate not exceeding 5 p.c.p.a. on money borrowed from any member of the society," or words to that effect (*Banff Town and County Club*, and *Worcester Law Society*, 1882; *Hackney Stool Book Society*, 1884); or, "but it shall nevertheless be competent to the corporation to repay the contributions of the permanent members with interest at 5 p.c.p.a., and also to remunerate" (*Corporation of Foreign Bondholders*); "nor be deemed to exclude any member of the association from the benefit of any grant made in furtherance of any of the objects of the association" (*Incorporated Free and Open Church Association*, 1882); "nor the gratuitous distribution among, or sale at a discount to, subscribers to the funds of the society of any books or other publications, whether published by the society or otherwise, relating to all or any of its objects as above set forth" (*Palestine Exploration Fund*, 1879); "nor shall prevent the *bona fide* relieving or assisting pursuant to clause (h) of the preceding paragraph of persons, or the wives, widows, families or relations of persons who, having been members of the association, have ceased to be so, and have become poor and necessitous, or are deceased, or prevent the payment in good faith of remuneration to any officers or servants, &c., or prevent the payment of interest at a rate not exceeding 5 p.c.p.a. on any money borrowed from any member for any of the purposes of the association" (*Petroleum Association*, 1885); "nor prevent payment of interest, &c., nor be deemed to exclude any member of the society from the benefit of any grant made in furtherance of any of the objects of the society" (*Church Army*, 1892); or, "prevent any member who may be a successful exhibitor at any exhibition or show held or promoted by the club or to the cost of establishing or holding of which the club may have subscribed out of its income or property, from receiving as such exhibitor any prize, medal, or other recognitions which may, under the regulations affecting the said exhibition or show, be awarded to him" (*Smithfield Club*, 1900).

5. The fourth paragraph of this memdum is a condition on which a licence is granted by the Board of Trade to the society in pursuance of sect. 20 of the Cos Act, 1908.

See *infra*, p. 498.

6. The liability of the members is limited.

Form 81.

7. Every member of the society undertakes to contribute to the assets of the society, in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the society contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding £—— [or whatever the amount fixed on may be].

8. If upon the winding-up or dissolution of the society there remains, after satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the association, but, if and so far as effect can be given to the next provision, shall be given or transferred to some other institution or institutions having objects similar to the objects of the association, to be determined by the members of the association at or before the time of dissolution, and in default thereof by such Judge of the High Court of Justice as may have or acquire jurisdiction in the matter.

As to meaning, see *infra*, p. 500, Form 82.

9. True accounts shall be kept of the sums of money received and expended by the assn. and the matter in respect of which such receipt and expenditure takes place, and of the ppty, credits, and liabilities of the assn; and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed in accordance with the regulations for the time being of the assn. shall be open to the inspection of the members. Once at least in every year, the accounts of the assn shall be examined and the correctness of the balance-sheet ascertained by one or more properly qualified auditor or auditors.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a society in pursuance of this memorandum of assn.

Names, addresses, and descriptions of subscribers. Date, &c., as in Form 79 (omitting shares).

Sect. 20 of the Companies (Consolidation) Act, 1908, replacing sect. 23 of the Act of 1867, provides as follows:—

Power to dispense with "limited" in name of charitable and other companies.

20.—(1) Where it is proved to the satisfaction of the Board of Trade that an association about to be formed as a limited company is to be formed for promoting commerce, art, science, religion, charity, or any other useful object, and intends to apply its profits (if any), or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Board may by licence direct that the association be registered as a company with

limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly.

Form 81.

(2) A licence by the Board of Trade under this section may be granted on such conditions and subject to such regulations as the Board think fit, and those conditions and regulations shall be binding on the association, and shall, if the Board so direct, be inserted in the memorandum and articles, or in one of those documents. [1867, s. 23.
1907, s. 42.]

(3) The association shall on registration enjoy all the privileges of limited companies, and be subject to all their obligations, except those of using the word "Limited" as any part of its name, and of publishing its name, and of sending lists of members and directors and managers to the registrar of companies.

(4) A licence under this section may at any time be revoked by the Board of Trade, and upon revocation the registrar shall enter the word "Limited" at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by this section:

Provided that before a licence is so revoked the Board shall give to the association notice in writing of their intention, and shall afford the association an opportunity of being heard in opposition to the revocation.

The above sect. 20 has proved very useful, and a large number of associations have been registered under it, generally as companies limited by guarantee, e.g., law societies, chambers of commerce, trade protection societies, medical societies, agricultural associations, &c., charitable associations. The section frequently resorted to.

For a list of some of the associations so registered, see *infra*.

An association desiring to be incorporated with limited liability, but without the word "limited" as part of the name, and for that purpose to obtain a licence from the Board of Trade pursuant to sect. 20 of the Act, should, according to the rules now in force, make a written application to the Board for a licence, and together with such application should transmit for their consideration a draft, in duplicate, of the proposed memorandum and articles of association. The drafts and any subsequent revisions that may be required should, whether in print or manuscript, be on foolscap-sized paper. If the Board of Trade are satisfied that the application should be entertained they will furnish a notice of such application, to be inserted in a local newspaper for the information of the public, and if after the expiration of a limited time there appears to be no sufficient reason why the licence should not be granted, the Board of Trade will approve the memorandum and articles of association, with or without amendment, and grant a licence.

The Board of Trade will require to have the memorandum and articles of association settled on their behalf by their counsel, at the expense of the applicants, for which purpose a fee of five guineas must accompany the application. A cheque for the amount should be made payable to an assistant secretary of the Board of Trade. The Board of Trade will not be responsible for the memorandum and articles being properly framed as regards the interests of the association.

The Board is always willing to sanction the omission of the word "company" in the memorandum and articles, and the substitution of the word "chamber," "society," "corporation," or the like.

The names of the subscribers to the memorandum should be in full, and the addresses should be definite, giving, where practicable, the name of the street and the number of the house.

The following is a specimen of the licence issued by the Board:—

Form 82.

WHEREAS it has been proved to the Board of Trade that the — CHAMBER OF COMMERCE, which is about to be registered under the Companies (Con-

Licence of Board of Trade.

Form 82.

olidation) Act, 1908, as an association limited by guarantee, is formed for the purpose of promoting objects of the nature contemplated by the 20th section of the Act, and that it is the intention of the said chamber that the income and property of the association, whencesoever derived, shall be applied solely towards the promotion of the objects of the association, as set forth in the memorandum of association of the said chamber, and that no portion thereof shall be paid or transferred, directly or indirectly, by way of dividend or bonus, or otherwise howsoever by way of profit to the persons who at any time are, or have been, members of the said association, or to any of them, or to any person claiming through any of them.

Now, therefore, the Board of Trade, in pursuance of the powers in them vested, and in consideration of the provisions and subject to the conditions contained in the memorandum of association of the said chamber, as subscribed by [eleven] members thereof on the — day of —, do by this their licence direct the — CHAMBER OF COMMERCE to be registered with limited liability, without the addition of the word "limited" to its name.

Signed by order of the Board of Trade, this — day of —

The following are some of the resulting advantages:—The association avoids what may be called the taint of commercialism. It becomes a permanent legal entity, and thereby gains stability, credit, and dignity; the property can be vested in and held by the association in its own name and corporate capacity, and thereby dealings with such property are much facilitated, and expense as to trustees avoided; the association can contract, sue, and be sued in its own name; while the officers can act without incurring any personal liability.

Incorporation under this section has almost entirely displaced incorporation by Royal Charter or Letters Patent, when the intended operations are to be within the United Kingdom.

For specimens of objects, see Forms 200 *et seq.*, *infra*.

The notice which the Board of Trade requires to be advertised is generally in the following form:—

Form 83.

APPLICATION for a LICENCE of the BOARD OF TRADE.

Notice of
Board of
Trade.

NOTICE is hereby given that in pursuance of the 20th section of the Companies Act, 1908, application has been made to the Board of Trade for a licence directing an association, about to be formed under the name of the —, to be registered with limited liability without the addition of the word "limited" to its name.

The objects for which the association is proposed to be established are [*Here the principal objects are stated*].

The other objects of the association are set out *in extenso* in the memorandum of association, a copy of which may be inspected at the office of Messrs. — and —, Solicitors, — Street, London, E.C.

Notice is hereby given that any person, company, or corporation objecting to this application may bring such objection before the Board of Trade, on or before the — day of — next [*about a month*], by a letter addressed to the Comptroller of the Companies Department, Board of Trade, 8, Delahay Street, London, S.W.

Dated this — day of —.

—, Secretary.

Form 63.

The official form set out *supra*, p. 405, &c., was adopted in 1909, and is a considerable improvement on the official form previously in use. That form was commented on in the ninth edition of this work, p. 403. It was open to many objections: in particular it contained provisions to the effect that in the event of any contravention of the conditions contained in the memorandum the person contravening should be under unlimited liability. Such provisions were of doubtful validity, for sect. 23 of the Act of 1867, which allowed the Board of Trade to impose conditions, also provided that the association when registered should enjoy all the privileges by the Act . . . imposed on limited companies. The new official form contains nothing about unlimited liability, and has been framed so as to meet several of the objections referred to in the last edition. But the form still remains open to some objections. The second proviso to clause 3 is objectionable. The second proviso to clause 4 is also objectionable, for why should remuneration of a member of the council or body of management for services rendered be forbidden, even where there is a competent quorum of independent members of the council or board who, in the interest of the society, desire to deal with the member of the council or body of management, or secure his services at a fair remuneration, even where the articles allow the transaction? There should be some latitude. In *Bray v. Ford*, (1896) A. C. 50, it was held that a proviso somewhat to the effect of the above did not relax the rule that a director or officer is not to make any profit out of his position except as authorised by the regulations. In that case a member of the governing body acted as solicitor to the society, and was remunerated, but it was held that, as the regulations did not allow for this, he was accountable to the society.

The Board of Trade has a discretion as to granting a licence under sect. 20, and in the result those who seek to obtain a licence have learned that it is not wise to criticise the official forms too freely. But, although these forms have generally to be accepted very much as they stand, the Board of Trade do allow modifications to suit the circumstances of particular cases.

Where a company incorporated under sect. 20 of the Act desires to alter its objects, the approval of the Board of Trade is required. *St. Hilda Incorporated College, Cheltenham*, (1901) 1 Ch. 556.

As to granting a pension to an officer of such a company. *Cyclists' Touring Co. v. Hopkinson*, (1910) 1 Ch. 179.

As to holding land, sect. 19 of the Act runs thus:—

"A company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by its individual members, shall not, without the licence of the Board of Trade, hold more than two acres of land; but the Board may by licence empower any such company to hold lands in such quantity, and subject to such conditions, as the Board think fit."

Restriction on charitable and other companies holding land.

The notion appears to prevail that all companies registered under sect. 20 of the Act are within this enactment, and therefore unable to hold more than two acres without a licence. But looking to the decisions (*supra*, p. 110) as to the meaning of the words "involving the acquisition of gain," in sect. 4 of the Act of 1862 (now sect. 1 (2) of the Act of 1908), this notion does not appear to be well founded. In many cases the objects of the association do involve the acquisition of gain by the association if not by the members. See *Incorp'd. Council of Law Reporting*, 22 Q. B. D. 279. In order to preclude doubt the Board of Trade sometimes has required the insertion of qualifying words in the objects. See *infra*, Form 200, clause 9.

Certain companies not to hold more than two acres without licence.

Form 83

The following are a few of the associations which have been registered without word "limited" —

BENEVOLENT.

Birmingham Hospital Saturday Fund	1892
Clergy Pensions Institution ..	1893
Irish Industries Association ..	1893
Provident Clerks' Benevolent Fund	1886
Working Ladies' Guild	1893

CHAMBERS OF COMMERCE.

London Chamber of Commerce [And many others.] ..	1881
Associated Chambers of Commerce ..	1875
British Chamber of Commerce in Belgium ..	1910

CLUBS.

Huddersfield Carlton Club ..	1875
Manningham Football Club ..	1886
Newcastle Junior Liberal Club ..	1880
St. Pancras Reform Club	1887
Incorporated West Herts Golf Club	1894
Smithfield Club	1900

COLLEGES.

Cheltenham Ladies' College ..	1880
Midland Clergy College Corporation ..	1899
Newnham College	1880
University College, Bristol	1876
Yorkshire College	1878
City and Guilds of London Institute for the advancement of Technical Education ..	1887
St. Hilda's Incorporated College, Cheltenham	1895
Bishop's College, Cheshunt ..	1870
Princess Christian College ..	1870

EXCHANGES.

Birmingham Exchange	1880
Manchester Coal Exchange ..	1882

HOSPITALS.

Cecilia Home for Blind Women ..	1882
Dalrymple Home for Inebriates ..	1882
Hampstead Home Hospital and Nursing Institute	1882
Home Hospitals Association for Paying Patients	1878

LAW SOCIETIES.

[A great many.]

MISCELLANEOUS.

Incorporated Council of Law Reporting	1870
Incorporated Free and Open Church Association ..	1882
Manchester Incorporated Law Library Society	1884
Meteorological Council ..	1892
National Smoke Abatement Institution	1882
Palestine Exploration Fund ..	1879
Royal School of Art Needlework	1878
Salisbury Diocesan Board of Finance ..	1882
Society for Promoting the Employment of Women ..	1882
Society of Comparative Legislation	1882
Surrey Public House Trades ..	1882
Royal Albert Institution, Lancaster ..	1882

MUSIC.

Sacred Harmonic Society.

PROFESSION.

Auctioneers' Institute	1882
Birmingham Medical Institute ..	1882
British Dental Association ..	1882
British Medical Association ..	1882
College of Organists	1882
College of State Medicine ..	1882
Incorporated Society of Officers of Health ..	1893
Incorporated Society of Clergymen	1893
Institute of British Manufacturers	1883
Institute of Chemistry ..	1877
Institute of Engineers ..	1890
Institute of Marine Engineers ..	1890
Institute of Mechanical Engineers ..	1887
Institute of Mining Engineers ..	1878
Institute of Colliery ..	1890

Form 83

The Unlimited Cos.

Form 84.

THE COMPANIES (CONSOLIDATION) ACT 1908.

Memorandum
of unlimited
company

Mendum of Asson of the 24

1. The name of the coy is the " — Coy."
2. The registered office [*supra*, p. 454].
3. The objects for which the coy is established are:

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a cove in pursuance of this memorandum of assen.

Names, addresses, and descriptions of subscribers.

Dated the — day of

WITNESS *supra*, p. 491].

OBJECT CLAUSES.

ACQUISITION OF EXISTING CONCERN.

Very many, perhaps the majority, of companies are formed nowadays to acquire and work existing businesses. In such cases some or other of the following twelve forms (85 to 96) will probably be found applicable. Such clauses have generally been set out first as describing the principal or more important of the company's objects, but having regard to the decisions referred to at pp. 600—603, it may often be expedient not to give them such prominence as to found the inference that they are the main objects of the company, to which everything else is to be subordinate.

Form 85.

To acquire a
business.

To acquire and take over as a going concern the business now carried on at —, in the county of —, under the style or firm of —, and all or any of the assets and liabilities of the proprietor s] of that business in connection therewith, and with a view thto to enter into the agreemt referred to in clause 3 of the coy's arts of asson. and to carry the same into effect with or without modification.

Where the agreement is with a trustee or agent for an intended company, the expression used in the clause should be "adopt" instead of "enter into," unless clause 3 of the articles refers to the adoptive contract.

Where the company is formed to acquire a business belonging to another company, or to amalgamate several businesses, the clause will be varied, c.

Form 86.

To acquire
undertaking
of another
company.

To acquire and take over as a going concern the undertaking, and all or any of the assets and liabilities of the — Coy, Limtd, incorporated in 18_90], and with a view thto, &c.

Form 87.

To acquire and
amalgamate
other
concerns.

To acquire, take over, and amalgamate the undertakings of the — Coy, Limtd, and of the — Coy, Limtd, and with a view thto to enter into the agreemts, &c.

Form 88.

Another.

To acquire, take over, and amalgamate the business carried on by the — Coy, Limtd, and the business carried on at — under the firm name of J. & Sons, and all or any of the assets, &c. 'as in Form 85.]

Form 89.

To acquire
mines.

To acquire certain mines and mining claims in — known as, &c. and with a view thereto, &c.

Form 90.

To acquire
patents.

To acquire certain patents for inventions in relation to, &c., and with a view thto, &c.

To acquire a concession granted by, &c., and with a view, &c.

Form 91.

To acquire
concession.

To acquire, &c., and with a view thto to adopt an agreemt dated the — of —, and made between A. of the one pt, and B., as tree for the coy, of the other pt, being an agreemt for the acquisition of, &c., and to carry such agreemt into effect with or without modification

Form 92.

To adopt
agreement
with trustee
for company.

In the absence of articles of association this form will be used instead of Form 85, where the preliminary agreement is made with a trustee for the intended company. See *supra*, p. 326.

To adopt and carry into effect, with or without modification, an agreemt which has already been prepared and is expressed to be made between A. of the one pt, and B., on behalf of the coy, of the other pt, and is to be signed immediately after the incorporation of the coy, and a copy whereof has for the purpose of identification been subscribed by —, a solor of the Supreme Court.

Form 93.

To acquire
and amalga-
mate other
concerns.

See Plan II., *supra*, p. 326.

To enter into and carry into effect (either with or without modification) an agreemt which has already been prepared, and is expressed to be made between [the sd] A. of the one pt, and the coy of the other pt, a copy whereof has for the purpose of identification been endorsed with the signatures of B., C., and D., three] of the subscribers hto or a copy whereof is set forth in the schedule to the arts of asson of the coy].

Form 94.

To enter into
a contract.

Where it is desired to mention any preliminary agreement in the memorandum, this or some other of the above forms will be used, according as Plan I., or II., or III., *supra*, pp. 325—327, is adopted.

To acquire, &c., and with a view thto to enter into and carry into effect the three contracts referred to in clause 3 of the coy's arts of asson, and to carry the same resply into effect with or without modification.

Form 95.

To acquire,
&c. and to
enter into
three
contracts.

To acquire and take over the undertaking of the — Coy, Limtd, and with a view thto to acquire all or any of the shares, debts and liabilities of that coy, and for that purpose to adopt an agreemt dated and made between A. B., on behalf of himself and all the other members of the sd coy, of the one pt, and C. D., on behalf of the coy, of the other pt, and to carry the same into effect, &c.

Form 96.

To acquire
undertaking
and shares
therein.

COMMON FORMS OF CLAUSES.

These common form clauses are intended for use in connection with the various object clauses set forth or mentioned above, and in Forms 130 to 205, *infra*. As a general rule, Forms 97 to 121 may be used, but regard must, of course, be had to the special clauses and to the circumstances of the case. In some cases some of the other common forms, or some of the Forms 122-129, may have to be added.

Form 97.

To carry on
other busi-
nesses.

To carry on any other business [whether manufacturing or otherwise] which may seem to the coy capable of being conveniently carried on in connection with the above or calculated directly or indirectly to enhance the value of or render profitable any of the coy's ppty or rights.

The above is frequently adopted, and has been found very useful.

Such words are not surplusage, and must have effect given them. See *Peruvian Rail. Co.*, 2 Ch. 617; *supra*, p. 471.

Form 98.

To purchase
other busi-
nesses.

To acquire and undertake the whole or any part of the business, ppty, and liabilities of any person or coy carrying on any business which the coy is authorized to carry on, or possessed of ppty suitable for the purposes of this coy.

The above power ought to be specified among the objects, if the company is intended to have the power. *Ernest v. Nicholls*, 6 H. L. 401. Express mention should be made of liabilities. But see *Overend, Gurney & Co. v. Gibbs*, L. R. 5 H. L. 480, as to what is sufficient.

Many companies formed without this object have found it necessary to resort to an Act of Parliament, or proceedings under the Companies (Memorandum of Association) Act, 1890, now replaced by sect. 9 of the Companies Act, 1908, to obtain the requisite power for the extension of their objects.

Form 99.

To purchase
patents.

To apply for, purchase, or otherwise acquire, any patents, *brevets d'invention*, licences, concessions, and the like, conferring any exclusive or non-exclusive or limited right to use, or any secret or other information as to any invention which may seem capable of being used for any of the purposes of the coy, or the acquisition of which may seem calculated directly or indirectly to benefit the coy, and to use, exercise, develop, or grant licences in respect of, or otherwise turn to account the ppty, rights or information so acquired.

A good many companies, especially manufacturing companies, insert the above.

Form 100.

To enter into
partnership,
take shares,
&c.

To enter into [partnership or into] any arrangement for sharing profits, union of interests, co-operation, joint adventure, reciprocal concession, or otherwise, with any person or coy carrying on or engaged in, or about to carry on or engage in, any business or transac-

tion which this coy is authorized to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this coy. And [to lend money to, guarantee the contracts of, or otherwise assist, any such person or coy, and] to take or otherwise acquire shares and securities of any such coy, and to sell, hold, re-issue, with or without guarantee, or otherwise deal with the same. **Form 100.**

It was at one time supposed to be illegal for one company to take shares in another, but the contrary is now well settled, provided the memorandum gives the requisite power. *Barnes's Banking Co.*, 3 Ch. 105; *International Contract Co.'s case*, 17 W. R. 459; *Financial Corporation*, 28 W. R. 760; W. N. (1880) 88; but very clear words are necessary to enable a company to enter into partnership with another company or person, or to take shares in another company. *British Nation Life Assurance Assoc.*, 8 Ch. Div. 704.

Thus, a power in a scrivener and bill broking company's memorandum for "making advances and procuring loans, &c., and investing in securities," was held not to authorize the directors to take shares in a banking company with a view to promoting a banking company. *Joint Stock Discount Co. v. Brown*, 3 Eq. 139; 8 Eq. 381. But a power to assist in the formation of other companies and generally to transact the business of a capitalist will authorize taking shares in another company. *Re Peruvian Ry. Co.*, W. N. (1869) 24; and see *Re Financial Corporation*, 28 W. R. 760.

The powers should be expressly conferred by the memorandum of association, though the power to acquire and hold shares may be implied from the nature of the company's business. See *Royal Bank of India's case*, 4 Ch. 252; and *London Financial Assoc. v. Kelk*, 26 C. D. 107.

If Form 100, *infra*, is used, the words in brackets will be omitted; and if Form 101 is also used, the latter part of the above clause can be omitted.

To take, or otherwise acquire, and hold shares in any other coy **Form 101.**
having objects altogether or in part similar to those of this coy, or
carrying on any business capable of being conducted so as directly
or indirectly to benefit this coy. **To take shares in other companies.**

See note to Form 100. This form is sometimes used in conjunction with that form.

To enter into any arrangements with any [governments or] authorities supreme], municipal, local, or otherwise, that may seem conducive to the coy's objects, or any of them, and to obtain from any such government or authority, any rights, privileges, and concessions which the coy may think it desirable to obtain, and to carry out, exercise, and comply with any such arrangements, rights, privileges, and concessions. **Form 102.**

To make arrangements with authorities.

This clause is frequently used, with more or less modification.

To establish and support or aid in the establishment and support of **Form 103.**
associations, institutions, funds, trusts, and conveniences calculated to
benefit employes or ex-employes of the coy [or its predecessors in **To benefit employes, &c.**

- Form 103.** business; or the dependants or connections of such persons, and to grant pensions and allowances, and to make payments towards insurance, and to subscribe or guarantee money for charitable or benevolent objects, or for any exhibition, or for any public, general or useful object.

A gratuity to employes may be supported without express power. *Hampson v. Price's Patent Candle Co.*, 45 L. J. Ch. 437; *Hutton v. West Cork Rail. Co.*, 23 C. D. 654. And so may a pension. *Henderson v. Bank of Australasia*, 40 C. D. 170. But to justify a subscription for outside purposes express authority is necessary. *Tomkinson v. S. E. Rail. Co.*, 56 L. T. 813, *supra*, p. 465; and see Chap. XI. It is very common now to admit employes to participate in profits without giving them shares, and to establish provident and pension funds. See Forms 382 *et seq.*

- Form 104.** To promote any coy or cos for the purpose of acquiring all or any of the ppty. rights and liabilities of this coy, or for any other purpose which may seem directly or indirectly calculated to benefit this coy.

To promote companies.

Not to be able to promote another company may be very inconvenient, and if the power is desired it should be taken expressly. *Joint Stock Dis. Co. v. Brown*, 8 Eq. 381.

- Form 105.** Generally to purchase, take on lease or in exchange, hire, or otherwise acquire, any real and personal ppty, and any rights or privileges which the coy may think necessary or convenient for the purposes of its business [and in particular any land, buildings, easements, machinery, plant, and stock-in-trade].

To purchase property, &c.

A form to this effect is generally inserted. Sometimes the words in brackets are omitted; but it is usual to enumerate a number of items which the company will be likely to require.

- Form 106.** To construct, maintain, and alter any buildings, or works, necessary or convenient for the purposes of the coy.

To build, &c.

This is very commonly inserted. It is modified, more or less, to suit different companies.

- Form 107.** To construct, improve, maintain, develop, work, manage, carry out, or control any roads, ways, tramways, railways, branches or sidings, bridges, reservoirs, watercourses, wharves, manufactories, warehouses, electric works, shops, stores, and other works and conveniences which may seem calculated directly or indirectly to advance the coy's interests, and to contribute to, subsidise, or otherwise assist or take part in the construction, improvement, maintenance, working, management, carrying out, or control thof.

To construct work.

Such a clause is commonly inserted with variations to suit the particular case.

To invest and deal with the moneys of the coy not immediately required in such manner as may from time to time be determined. **Form 108.**
To invest

To lend money to such persons and on such terms as may seem expedient, and in particular to customers and others having dealings with the coy, and to guarantee the performance of contracts by any such persons. **Form 109.**
To receive money on deposit, lend, and guarantee.

See, as to the Money Lenders Act, 1900, *infra*, p. 526.

To borrow or raise or secure the payment of money in such manner as the coy shall think fit, and in particular by the issue of debentures, or debenture stock, perpetual or otherwise, charged upon all or any of the coy's ppty (both present and future), including its uncalled capital, and to purchase, redeem, or pay off any such securities. **Form 110.**
To borrow and mortgage, &c

The above is now usually inserted. It is not always strictly necessary, for a power to borrow is readily implied (*Bryon v. Metropolitan, &c. Omnibus Co.*, 3 D. G. & J. 123; *In re Marine Mansions Co.*, 4 Eq. 601; *Ex parte City Bank*, 3 Ch. 758; *Gibbs and West's case*, 10 Eq. 312; especially in the case of a trading company (*General Auction, &c. Co. v. Smith*, (1891) 3 Ch. 432; see further, *supra*, p. 472). Where a company has power to borrow, it has an implied power to secure the repayment of borrowed money by mortgage. *Australian, &c. Co. v. Mounsey*, 4 K. & J. 733; *Bryon v. Metropolitan, &c. Co.*, *ubi supra*; *Patent File Co.*, L. R. 6 Ch. 83. And where a company has power to raise money on mortgage, it has power to covenant to pay. *Baroness Wenlock v. River Dee*, 36 C. D. 675.

As to mortgaging uncalled capital, see Part III. The existence of a borrowing power, however ample, should not make a lender less careful to see that his security is framed in adequate terms. *Streatham and General Estates Co.*, (1897) 1 Ch. 15.

To remunerate any person or coy for services rendered, or to be rendered, in placing or assisting to place or guaranteeing the placing of any of the shares in the coy's capital, or any debentures, debenture stock or other securities of the coy, or in or about the formation or promotion of the coy or the conduct of its business. **Form 111.**
To remunerate.

This clause is now commonly inserted, and clearly justifies payment out of premiums or profits. See Companies Act, 1908, s. 89, *supra*, p. 279, and *supra*, p. 275 *et seq.*

To draw, make, accept, indorse, discount, execute, and issue promissory notes, bills of exchange, bills of lading, warrants, debentures, and other negotiable or transferable instruments. **Form 112.**
To accept bills, &c

A company cannot issue negotiable instruments unless it has an express or implied power for that purpose given to it by its memorandum. An implied

Form 112. power arises where the business of the company is one which cannot, in its ordinary course, be carried on without the issue of such instruments, or where, upon a fair construction of the memorandum, the power appears to be incidental or conducive to the objects. *Peruvian Ry. Co. v. Thames and Mersey Mar. Ins. Co.*, 2 Ch. 623.

The power to accept and issue bills and other negotiable instruments is one with which it is generally desired to endow a company, and where desirable, it is expedient to provide accordingly in express terms in the memorandum, at any rate where the company is not formed for purposes which necessarily imply the power. In the absence of an express power the test is what is necessary to carry on the partnership business under ordinary circumstances and in the usual course of business. *Re Cunningham & Co.*, 36 Ch. D. 538; *Re General Estates Co.*, L. R. 3 Ch. 762.

The following are cases in which it has been held that companies had no such power:—*Bramah v. Roberts*, 3 Bing. N. C. 263, which was a case of a gas company; *Dickenson v. Valpy*, 10 B. & C. 128, the case of a mining company; *Steele v. Harmer*, 14 M. & W. 831, the case of a cemetery company; *Bull v. Morrell*, 12 Ad. & E. 745, the case of a salt and alkali company; *Thompson v. Universal Salvage Co.*, 1 Ex. 694, the case of a salvage company; *Bateman v. Mid-Wales Rail. Co.*, L. R. 1 C. P. 499, the case of a railway; *Atkin v. Wardle*, 61 L. T. 23, the case of a swimming bath company.

If the name of the company is not correctly given, the directors signing on its behalf may be personally liable. *Atkin v. Wardle*, *supra*; *Nassau v. Tyler*, 70 L. T. 376; and see *Penrose v. Martyn*, E. B. & E. 490; *Dutton v. Marsh*, L. R. 6 Q. B. 361; and *Dermatine v. Ashworth*, 21 T. L. R. 510; sect. 63 of the Companies Act, 1908. But see *supra*, p. 454.

Where an acceptance is "per proc." an indorsee for value is bound to inquire into the authority to accept. *Re Land Credit Co. of Ireland*, L. R. 4 Ch. 460.

As to execution of a bill, see sect. 77. The authority under the section must be an authority in fact. *Premier Industrial Bank v. Crabtree*, (1909) 1 K. B. 106.

Form 113. To undertake and execute any trusts the undertaking whereof may seem desirable, and either gratuitously or otherwise.

To act as trustee.

Where the undertaking of trusts is contemplated, power should be taken, unless Form 119 is used and is considered sufficient.

Form 114. To sell or dispose of the undertaking of the coy or any pt tht for such conson as the coy may think fit, and in particular for shares, debentures, or securities of any other coy having objects altogether or in pt similar to those of this coy.

Sale of undertaking.

A clause to this effect may now almost be regarded as a common form, and the power is often found useful. Of course, every company can effect a sale of its undertaking under sect. 192 of the Companies Act of 1908, replacing sect. 161 of the Companies Act, 1862 [*infra*, Chap. XXI.], but only by going into liquidation. Occasions, however, sometimes arise in which it is more beneficial to sell without winding-up, especially where the sale is conditional on the floating of a new company, or when the number of dissentients on a sale under sect. 192 is likely to be large, or where a would-be purchaser will not wait for a winding-up. The proceeds of sale of the undertaking, except so far as they

can properly be regarded as profit, cannot be distributed among the members except by means of a winding-up, or with the sanction of the Court under sect. 46 of the Companies Act, 1908, the reduction of share capital section. **Form 114.**

That such a power to sell was effective was for a long time regarded as settled. *Grant v. United Switchback Rail.*, 40 C. Div. 135. In that case the memorandum of association contained a clause to the above effect, and it was held that an agreement to sell, sanctioned by resolution of a general meeting, was unimpeachable. Cotton, L. J., said: "It is clear that a contract of this nature was within the objects of the company"; and Lindley, L. J., said: "Again, it was clearly not *ultra vires* of the company, for when we look at the memorandum of association we find powers so wide as clearly to include such a transaction." N. C., 37 W. R. 313.

In that case, it is true, the sale did not include the whole undertaking; but in *Cotton v. Imperial, &c. Co.*, (1892) 3 Ch. 454, the whole undertaking was sold for shares, and Chitty, J., held the sale valid. It was contended that such a sale could only be made under sect. 161 of the Act of 1862, but the learned judge held that there was no foundation for this contention. See also *New Zealand, &c. Co. v. Peacock*, (1894) 1 Q. B. 622, where the case last mentioned was followed by the Court of Appeal.

A still stronger case is *Rorax Co., Foster v. Rorax Co.*, (1901) 1 Ch. 326, where the memorandum empowered the company to carry on a specified business, to amalgamate with another company carrying on a similar business, to sell all or any part of its business or property, and to hold debentures or shares in any other company. The company sold all its property, including the goodwill (except certain securities), to a new company, formed to purchase it, for shares and securities in that company, and agreed not to carry on the specified business except in conjunction with and for the benefit of and on behalf of the new company; and the Court of Appeal held that the transaction was valid. See also *Mason v. Motor Traction Co.*, (1905) 1 Ch. 419; *Booth v. New Afrikaander Mining Co.*, (1903) 1 Ch. 295; *Honig v. Blackett's Mines*, 49 S. J. 770; and *Nicholson v. Consolidated Kent Collieries*, Times, 19th April, 1905, in which Joyce, J., followed the above decisions, and held that a sale of the defendant company's undertaking for shares in a new company was valid, although the sale was made by the directors without the sanction of a duly convened meeting of the company.

These decisions were in accordance with the decisions as to unregistered companies. See *Agus Life Assurance Co.*, 39 C. D. 571; *Sovereign Life Co.*, 42 C. D. 542; *Harman's case*, 1 C. D. 326; *Conquest's case*, 1 C. D. 334; *Dorman's case*, 3 C. D. 21; *Clay v. Rufford*, 5 De G. & S. 768; *Wall v. London and Northern Assets Co.*, (1898) 2 Ch. 469.

The whole subject has now, however, been re-opened by a recent decision of the Court of Appeal. *Bisgood v. Henderson's Transvaal Estates Co.*, (1908) 1 Ch. 743. In that case a scheme of reconstruction very similar to that held valid in *Cotton v. The Imperial, &c. Corporation* was being carried out by the company under a power in its memorandum, and the Court held it to be *ultra vires* on the ground that sect. 161 of the Companies Act, 1862 (now sect. 192 of the Act of 1908), by implication prohibits a company selling its undertaking for shares under a power in its memorandum where the sale is made at a time when a voluntary winding-up and distribution of the shares is "proposed." In other words, the Court's view was that "if the company is proposed to be wound up and the transaction is a sale and distribution, then the statute provides that sale by conversion into money may be replaced by exchange for shares on the terms, but only on the terms, of complying with the provisions of sect. 161," now replaced by sect. 192 of the Act of 1908. The decision does not invalidate a sale under the power in the memorandum for cash, or a

Form 114. sale for shares where it is proposed to keep the selling company going. This decision of the Court of Appeal therefore, if correct, qualifies and *pro tanto* modifies the law as previously laid down, but it is not generally considered by the profession to be good law: see further, *infra*, Chap. XXI.

Form 115. To advertise products of company. To adopt such means of making known the products of the company as may seem expedient, and in particular by advertising in the press, by circulars, by purchase and exhibition of works of art or interest, by publication of books and periodicals, and by granting prizes, rewards, and donations.

Where, as in some cases, a business lives mainly by advertisement, it is expedient to insert special provision as above.

Form 116. To obtain Acts. To obtain any provisional order or Act of Parliament for enabling the company to carry any of its objects into effect, or for effecting any modification of the company's constitution, or for any other purpose which may seem expedient, and to oppose any proceedings or applications which may seem calculated, directly or indirectly, to prejudice the company's interests.

A company, like any other subject, has a *locus standi*, without special authority, to apply to Parliament for any purpose; but the funds of a company cannot be used for the purpose of obtaining a parliamentary modification of its constitution unless the memorandum gives the requisite authority. *Ware v. Grand Junction Waterworks Co.*, 2 R. & M. 470; *Gt. W. Rail. v. Rushout*, 5 De G. & S. 290; *Caledonian Co. v. Solway*, 23 W. R. 100. Hence the importance of inserting a clause as above when an application is at all probable.

As to opposing a bill in Parliament, see *Att.-Gen. v. Mayor of Brecon*, 10 C. D. 204; approved and distinguished in *Leith Council v. Leith Harbour Comrs.*, (1899) A. C. 508; *Att.-Gen. v. Swansea Corp.*, (1898) 1 Ch. 602; also *Brooks, Jenkins & Co. v. Mayor, &c. of Torquay*, (1902) 1 K. B. 601.

Form 117. Foreign registration. To procure the company to be registered or recognized in any foreign country or place [or in — and elsewhere abroad].

Where a company intends to carry on business abroad, the above is sometimes inserted. See also Form 119, which is more commonly used; but if a company is expressly authorized to carry on business abroad, it has an implied power to do all things necessary for the purpose.

Form 118. To sell, &c. To sell, improve, manage, develop, exchange, lease, mortgage, enfranchise, dispose of, turn to account, or otherwise deal with, all or any part of the property and rights of the company.

This is almost always inserted, and expressly invests the company with ample powers of dealing with its property. Even if the company is already invested by its constitution with a power of dealing with its property, the clause is useful as illustrating modes of doing so.

To do all or any of the above things [in any part of the world and] **Form 119.**
 as principals, agents, contractors, trees, or otherwise, and by or To act as
 through trees, agents, or otherwise, and either alone or in conjunction trustees, &c.
 with others.

The above is frequently inserted with a view to providing for unforeseen contingencies.

To do all such other things as are incidental or conducive to the **Form 120.**
 attainment of the above objects. General words.

As to this, see *supra*, pp. 471 *et seq.*

And it is hereby declared that the word "coy" in this clause shall be **Form 121.**
 deemed to include any partnership or other body of persons, whether Interpreta-
 incorporated or not incorporated, and whether domiciled in the United tion clause.
 Kingdom or elsewhere, and the intention is that the objects specified
 in each paragraph [or, in each of the first — paragraphs] of this
 clause shall, except where otherwise expressed in such paragraph, be
 in no wise limited or restricted by reference to or inference from the
 terms of any other paragraph or the name of the coy.

The concluding portion of the above paragraph is inserted in order to exclude or control the application of the artificial novel rule of construction (referred to, *supra*, p. 470), where the stultifying, sterilising operation of that rule might paralyse the company.

In most cases it seems wiser to insert the bracketed words referring to certain specified paragraphs in lieu of the general reference to each paragraph, for at any rate one learned judge has found a difficulty in applying the general references, *supra*, p. 470; but where it is specially desirable to emphasize the independence of some of the objects, one of the other courses indicated above can, if preferred, be adopted.

ADDITIONAL OBJECT CLAUSES.

To lay out land for building purposes, and to build on, improve, let **Form 122.**
 on building leases, advance money to persons building on, and other- To build on
 wise develop the same, in such manner as may seem expedient to and improve
 advance the coy's interests. land.

To develop and turn to account any land acquired by the coy or in **Form 123.**
 which it is interested, and in particular by laying out and preparing Another.
 the same for building purposes, constructing, altering, pulling down,
 decorating, maintaining, fitting up, and improving buildings and
 conveniences, and by planting, paving, draining, farming, cultivat-

Form 123. ing, letting on building lease or building agreement, and by advancing money to and entering into contracts and arrangements of all kinds with builders, tenants, and others.

The above is not uncommonly inserted where a company is likely to have surplus land on its hands.

Form 124. To amalgamate with any other company having objects altogether or in part similar to those of this company.

Amalgamation.

"Amalgamation" is not uncommonly made one of the objects, but it is by no means clear what the extent of the operation of the clause is. "To amalgamate" probably authorizes a company to acquire the business and liabilities of another company. *Pulbrook v. New Civil Service Co.*, 26 W. R. 11; *Ero case*, 1 D. G. J. & S. 29; *South African Supply, &c. Co.*, (1904) 2 Ch. 268; see Chap. XXII. Where it is desired to confer this power, it seems better to do so in express terms. See Form 93. To "amalgamate" also appears to authorize a sale of the company's business in consideration of shares in the purchasing company. *Dougan's case*, 8 Ch. 545; *Pulbrook v. New Civil Service Co.*, *ubi supra*; *Wynne's case*, 8 Ch. 1007; *Financial Corp.*, 28 W. R. 760; and *Hall v. London and Northern Assets Corporation*, (1898) 2 Ch. 469; *Borax Co., Foster v. Borax Co.*, (1901) 1 Ch. 326. But here again it is far better to give this power in express terms, as in Form 114.

Form 125. To distribute any of the property of the company in specie among the members.

To divide assets in specie.

This clause is not uncommonly inserted, and may be found convenient. In the absence of such a clause, either in the memorandum or articles, it is conceived that a majority has no power, as against a dissentient minority, to authorize a distribution of assets, *e.g.*, shares in some other company, *in specie*, either under sect. 46 of the Companies Act, 1908 (Act of 1877, s. 3), or in a winding-up. However, the Court can, in a winding-up, sanction a distribution *in specie*, as also under sect. 120 whether in a winding-up or otherwise. *English and Foreign Credit Co.*, 1 T. L. R. p. 1, Bacon, V.-C., 25 Oct. 1884. See also *March v. Martin*, which was, in effect, an action for winding-up an unregistered association called the Municipal Trusts: *Malins, V.-C.* (10th June, 1880), sanctioned a scheme for the division of the assets *in specie*. The assets consisted of municipal bonds and uncollected coupons. And see *Tunis Rail. Co.*, 31 L. T. 264; 10 C. D. 270, n.

The Liquidation Act, 1868 (31 & 32 Vict. c. 68), only applied where winding-up proceedings were pending at the passing of the Act.

Where the above clause is inserted, the articles of association generally contain further provisions as to distribution. It would seem that a provision in the articles is sufficient.

Sometimes it is considered better to use the words "in kind," instead of "in specie." Both mean the same thing. But "in specie" are the words used by Lord Cairns in *Houle v. G. W. Ry.*, 3 Ch. 271; and by the Legislature in the Act of 1868, above referred to; they are the words generally used, and seem to be sufficient. See *South African Supply and Cold Storage Co.*, (1904) 2 Ch. 268.

If thought fit to obtain any Act of Parliament dissolving the company and re-incorporating its members as a new company for any of the objects specified in this memorandum, or for effecting any other modification in the company's constitution. **Form 126.**

To obtain Act of incorporation.

It was by no means uncommon, where it was desired to procure the incorporation of a company by special Act, or to obtain a Provisional Order to be confirmed by Parliament, for the promoters, in the first instance, to form themselves into a company, under the Act of 1862, for the desired objects; and also for the express purpose of applying to Parliament for an Act dissolving the company so formed, and establishing in its place another company for the like objects, but regulated by the "Companies Clauses Consolidation Act, 1845," and the Acts amending the same. And the same is done under the Act of 1908. The advantages of this mode of procedure by incorporation are considerable. If promoters are not incorporated, there is room for much dispute and possible litigation as to their rights and liabilities *inter se*, especially if the application to Parliament is abortive; but if they are incorporated, the articles of association, and, if necessary, specific agreements made with the preliminary company, preclude all controversy in such matters.

Again, a company incorporated by Act of Parliament is not bound by contracts made before its incorporation by its promoters, unless the Act confirms the agreements. But if the promoters have formed themselves into a preliminary company, such company can enter into all necessary contracts, *e.g.*, to purchase land, to pay compensation, to engage officers, and so forth, and all these contracts will become binding on the Parliamentary company, because clauses are always inserted in an Act which dissolves one company and establishes another in its place, transferring the contracts and liabilities of the former to the latter.

The directors of the preliminary company should be given full powers to take all necessary proceedings, and the company can, of course, from time to time, alter, vary, and control such powers and proceedings.

This course is not uncommonly adopted when it is desired to vest the undertaking of an established company in a new company, and the transaction requires the authority of Parliament.

To purchase or otherwise acquire, on such terms and in such manner as the regulations of the company from time to time provide, any shares in the company's capital.] **Form 127.**

To acquire the company's own shares.

Such a clause is sometimes inserted; and from some of the earlier reported cases it would seem to have been considered that a company, if authorized by its memorandum, might purchase its own shares without the sanction of the Court.

But it is now clear beyond dispute that it is *ultra vires* for a company limited by shares to purchase its own shares. Such a purchase necessarily involves a reduction of capital, and no reduction of such a company's capital is permissible without the sanction of the Court. *Trevor v. Whitworth*, 12 App. Cas. 409; *British, &c. Co. v. Couper*, (1894) A. C. 399; *Bellerby v. Rowland, &c. Co.*, (1902) 2 Ch. 14, 22. See further *infra*, Chap. VII.

In the case of an unlimited company such a power is valid (*Borough Commercial, &c. Soc.*, (1893) 2 Ch. 243), as also in the case of a company limited by guarantee, and in these cases it may be expedient to insert such a clause

Form 127.

when the power is desired; for otherwise it may be said that the application of the company's funds to the acquisition of its own shares would be *ultra vires*.

It should be borne in mind that where a company seeks a quotation for its shares on the London Stock Exchange, its articles must prohibit the purchase of its own shares. See *infra*, p. 646.

Directors who expend the funds of their company in an *ultra vires* purchase of its shares are liable to make good the amount. [See Chap. XX., *infra*.]

Interest out of capital.

Formerly it was not uncommon to find in a memorandum a clause empowering the company "During a period not exceeding — years to apply a competent part of the capital in paying interest on the paid-up capital for the time being at a rate not exceeding 5 per cent. per annum."

But it seems clear that, in the case of a company limited by shares (except under sect. 91 of the Act of 1908), such a power is practically *inoperative* for here again the exercise of the power would involve a reduction of capital, and such a reduction can only be effected with the sanction of the Court. *Trevor v. Whitworth*, 12 App. Cas. 409. Accordingly, the insertion of the clause does not dispense with the necessity of obtaining the sanction of the Court; and it is therefore misleading and objectionable. Some of the Indian railways, with the approval of the Secretary of State, paid interest during construction, under a power in their memorandum of association; but this having been found to be illegal, an Act was obtained (The Indian Railways Act, 1894 (57 Vict. c. 12)), authorizing *sub modo* payment in the future and sanctioning past payments.

The same concession has now been made by the Legislature in favour of companies under the Companies Act, 1908 (sect. 91 replacing sect. 9 of the Companies Act, 1907); but the power, as will be seen by reference to the section, is carefully hedged round with conditions designed to prevent any abuse. The opening words of sect. 91 are: "Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period, and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital."

Form 128.**Labour difficulties.**

To promote freedom of contract, and to resist, insure against, counteract, and discourage interference therewith, and to subscribe to any action or fund for any such purposes.

There is nothing illegal in subscribing to a trade union if the company is empowered as above. See *supra*, p. 113.

Form 129.**Special for guarantee companies.**

(a) To accumulate funds, and to admit any person or persons to participate in the profits or assets of the coy.

(b) To distribute any of the assets for the time being of the coy among the members in kind, and to stipulate for and obtain for the members, or any of them, any ppty, rights, privileges, or options.

(c) To acquire by surrender or otherwise, the whole or any pt of the interest of any member of the coy therein

(d) To assign to any member or class of members any preferential, special or qualified rights or privileges over or as compared with any other members as regards participation in profits or assets, and as regards voting, and as regards winding-up or otherwise howsoever. **Form 129.**

The above clauses are usually inserted in the memorandum of association of a company limited by guarantee when the members are to be interested in varying proportions.

OBJECTS FOR SPECIFIC COMPANIES.

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Form 130.

Life and
accident
insurance.

(1) To carry on the business of life assurance in all its branches, and in particular to grant or effect assurances of all kinds for payment of money by way of a single payment, or by several payments, or by way of immediate or deferred annuities or otherwise, upon the happening of all or any of the following events, namely, the death, or marriage, or birth or survivorship, or failure of issue of or the attainment of a given age by any person or persons, or the expiration of any fixed or ascertainable period, or the occurrence of any contingency or event which would or might be taken to affect the interest, whether in possession, vested, contingent, expectant, prospective, or otherwise, of any person or persons in any ppty. or the loss or recovery of contractual or testamentary capacity in any person or persons, and also (in connection with assurances on the life or lives of the same person or persons, but not otherwise) to grant assurances payable upon or after the happening of personal injuries caused by accident of any description, or upon the happening of sickness or bodily or mental incapacity.

Form 130.

(2) To grant annuities of all kinds, whether dependent on human life or otherwise, and whether perpetual or terminable, and whether immediate or deferred, and whether contingent or otherwise.

(3) To contract with leaseholders, borrowers, lenders, annuitants, and others for the establishment, accumulation, provision, and payment of sinking funds, redemption funds, depreciation funds, renewal funds, endowment funds, and any other special funds, and that either in consideration of a lump sum, or of an annual premium, or otherwise, and generally on such terms and conditions as may be arranged.

(4) To purchase and deal in and lend on life, reversionary, and other interests in property of all kinds, whether absolute or contingent, or expectant, and whether determinable or not; and to acquire, lend money on, redeem, cancel, or extinguish by purchase, surrender, or otherwise, any policy, security, grant, or contract issued, made, or taken over or entered into by the company.

(5) To re-assure or counter-assure all or any risks, and to undertake all kinds of re-assurance and counter-assurance connected with any of the business aforesaid.

(6) To give to any class or section of those who assure, or have other dealings with the company, any rights over or in relation to any fund or funds, or a right to participate in the profits of the company, or in the profits of any particular branch or part of its business, or any other special privileges, advantages or benefits.

Add selection of common forms, supra, Forms 97 to 120.

THE ASSURANCE COMPANIES ACT, 1909 (9 EDW. VII. c. 49).

This Act applies (sect. 1) to all persons or bodies of persons, whether corporate or unincorporate, not being registered under the Acts relating to Friendly Societies or to Trades Unions (hereinafter referred to as Assurance Companies), whether established before or after the commencement of this Act, and whether established within or without the United Kingdom, to carry on within the United Kingdom assurance business of all or any of the following classes, namely, life assurance business or the granting of annuities upon human life, fire insurance business, accident insurance business, employers' liability insurance business, bond investment business, subject as respects any class of assurance business to the special provisions of the Act relating to the business of that class. The Act (sect. 2) requires every assurance company to deposit and keep deposited with the Paymaster General for and on behalf of the Supreme Court the sum of 20,000*l.* and provides that the deposit may be made by the subscribers, and upon the incorporation of the company is to be deemed to have been made by and to be part of the assets of the company, and the Registrar shall not issue a certificate of incorporation of the company until the deposit has been made. The Act also provides that where a company carries on or intends to carry on assurance business of more than one class, a separate sum of 20,000*l.* shall be deposited and kept deposited under this section as respects each class of business, but this requirement is qualified later on. And by sect. 3: "The fund in each case deposited is to be regarded as a separate fund." The Act also provides for annual statements and audit, and divers other provisions corresponding with those in the Life Assurance Companies Acts, 1870 and 1872. The Act will be found discussed in Chap. XVII. Where the requisite 20,000*l.* cannot be

Form 130. found before the formation of the company the prospectus can be advertised as of an intended company, and it can state that the amount will be deposited in due course. As to the right to deposit on amalgamation, see *Scottish, &c. Economic Society*, 45 C. D. 220.

As to tea merchants granting annuities, see *Nelson v. The Board of Trade*, 84 L. T. 505; 49 W. R. 500; and see *Nelson & Co.*, 22 T. L. R. 406.

As to payment out of the deposit, see *Life and Health Assur. Assoc.*, (1910. 1 Ch. 468.

Form 131.

Marine and
transit insur-
ance.

(1) To carry on the business of marine insurance in all its branches, and in particular, without prejudice to the generality of the foregoing words, to make or effect insurances on ships, vessels, boats, and craft of all kinds, and on goods, merchandise, live or dead stock, luggage, effects, specie, bullion, or other ppty, respondentia and bottomry interests, commissions, profits and freights.

(2) To carry on all kinds of transit insurance business, and generally every kind of insurance and re-insurance business, except the issuing of policies of assurance upon human life.

Add (e) and (f) of Form 130, and selection of General Forms. 97 et seq.

Form 131a.

(1) To carry on the business of accident insurance in all its branches, &c.

Form 132.

Insurance of
all kinds.

(1) To carry on all kinds of insurance business, and all kinds of guarantee and indemnity business, and in particular, without prejudice to the generality of the foregoing words, to carry on life, fire, marine, accident, employers' liability, workmen's compensation, disease, sickness, survivorship, failure of issue, burglary and robbery, theft, fidelity and transit insurance.

(2) To grant annuities of all kinds, whether dependent on human life or otherwise, and whether perpetual or terminable, immediate or deferred, absolute, contingent, or otherwise.

(3) To contract with leaseholders, borrowers, lenders, &c.

(4) To purchase, &c. reversionary interests, &c.

(5) To act as agents for the issue of any bills, bonds, debenture stock, whether or not offered to the public for subscription, and to guarantee the subscription of any such securities or shares, and to act as trustee, executor, or administrator with or without remuneration, and to undertake trusts of all kinds and the conduct of any business connected with trusts of any description or the estates of deceased persons, and to receive for safe custody.

(6) To lend and advance money upon or without security, including the lending of money upon policies issued by the company or in respect of which it is liable, and to apply any of the funds of the company in buying up, cancelling, extinguishing, or obtaining a release from any policy, contract, or liability.

(7) To pay, satisfy, or compromise, &c.

Form 132.

(8) To borrow, &c.

Add selection of common forms from Form 97 et seq.]

(1) To insure upon the mutual principle against every description of marine risk which may be lawfully undertaken, ships, vessels, and craft of all kinds, in which the members of the coy are interested as owners, managing owners, mortgagees, agents, or otherwise. **Form 133.**

Mutual ship insurance company.

(2) To establish different classes or clubs of insuring members upon the footing that the members of each class or club shall insure one another on the mutual principle, and to manage and regulate such classes or clubs.

(3) To purchase, take on lease, hire, or otherwise acquire, any real or personal ppty necessary or convenient for the purposes of the coy.

Add selection of common forms, supra, Forms 97 et seq.]

It was formerly thought that mutual insurance societies were not to be considered as formed with a view to gain, so as to require, if consisting of more than twenty members, to be registered under the Act of 1862. See sect. 4 of the Act. Arnould on Marine Insurance, 5th ed., vol. i., p. 152. But in *Ex parte Hargrove & Co.*, 10 Ch. 542, n., Jessel, M. R., decided that a mutual insurance society was within sect. 4 of the Act, and not having been registered, was an illegal association. Since this decision, several hundred mutual insurance societies have been registered. Their objects, for the most part, are the insurance of vessels or freight. In most cases only a particular class of vessels is insured, e.g., iron steamships, or vessels of not less than 1,000 tons burden, or vessels engaged in a particular trade, e.g., coal trade.

In most cases these companies are limited by guarantee, but a considerable number are registered as unlimited companies. The articles require very careful treatment, as many of the forms in common use are full of ambiguity, and frequently lead to dispute. See *Marine Mutual v. Young*, 43 L. T. 841, as to the contract between the parties, and *Baird's case*, (1899) 2 Ch. 303, as to amount of contribution on winding up.

(1) *If necessary, insert one of Forms 85 to 96.]*

Form 133a.

(2) To carry on the business of fire insurance in all its branches, and to grant insurances against injury or damage to or loss of ppty directly or indirectly caused by or resulting from fire, lightning, or explosions.

Fire

Add selection of common forms, supra, Forms 97 et seq.]

To carry on business as proprietors of flats and to let on lease or otherwise apartments therein, and to provide for the tenants and occupiers thereof all or any of the conveniences commonly provided in hotels or clubs. **Form 133b.**

Flat proprietors

Add selection of common forms, supra, Forms 97 et seq.]

(1) To guarantee the fidelity of persons filling or about to fill situations of trust or confidence, and the due performance and discharge by such persons of all or any of the duties and obligations imposed on them by contract or otherwise. **Form 134.**

Guarantee and indemnity

Form 194.

(2) To guarantee the due performance and discharge by receivers, official and other hqrs, committees, guardians, executors, administrators, trustees, attorneys, brokers, and agents of their respective duties and obligations.

(3) To guarantee the payment of money secured by or payable under or in respect of debenture bonds, debenture stock, contracts, mortgages, charges, obligations, and securities of any coy or of any authority, supreme, municipal, local, or otherwise, or of any persons whomsoever, whether corporate or unincorporate.

(4) To guarantee persons filling or about to fill situations of trust or confidence against liabilities in connection therewith, and in particular against liabilities resulting from the misconduct of any co-trustee, co-agent, sub-agent, or other person, or from the insufficiency, imperfection, or deficiency of title to ppty, or from any insufficiency, imperfection or deficiency in any security, or from any bankruptcy, insolvency, fraud, or tortious act on the part of any such persons, or from any error of judgment or misfortune.

(5) To guarantee the title to or quiet enjoyment of ppty owner absolutely or subject to any qualifications or conditions, and to guarantee persons interested about to become interested in any ppty against any loss, actions, proceedings, claims, or demands in respect of any insufficiency or imperfection or deficiency of title in respect of any incumbrances, burdens, or outstanding rights.

(6) Generally, except as below mentioned, to carry on and transact every kind of guarantee business, and every kind of indemnity business, and every kind of counter guarantee and counter indemnity business, and generally every kind of insurance and reinsurance business, whether of the like or of a different kind, and whether now known or hereafter devised, except fire insurance business, marine insurance business, accident insurance business, employers' liability insurance business, and bond investment business.

(7) To contract with leaseholders, borrowers, lenders, annuitants, and others for the establishment, accumulation, provision, and payment of sinking funds, redemption funds, depreciation funds, renewal funds, endowment funds, and any other special funds, and that either in conson of a lump sum or of an annual premium or otherwise, and generally on such terms and conditions as may be arranged.

(8) To undertake the office of trustee, receiver, and hqrs, whether official or otherwise, executor, administrator, committee, manager, attorney, delegate, substitute, treasurer, and any other offices or situations of trust or confidence, and to perform and discharge the duties and functions incident thereto, and generally to transact all kinds of trust and agency business, either gratuitously or otherwise.

(9) To furnish and provide deposits and guarantee funds required in relation to any tender or application for any contract, concession, decree, enactment, ppty, or privilege, or in relation to the carrying out of any contract, concession, decree, or enactment.

(10) To receive money, securities, and valuables of all kinds on

deposit at interest or for custody, and generally to carry on the business of a safe deposit coy **Form 134**

(11) To lend, deposit, or advance money, securities, and ppty to or with such persons and on such terms as may seem expedient.

* * * * *

(16) Generally to purchase, &c.

(17) To pay, satisfy, or compromise any claims made against the coy which it may seem expedient to pay, satisfy or compromise, notwithstanding that the same may not be valid in law. To re-insure and effect counter-guarantees.

Add selection of common forms, supra. 97 et seq.

1. To indemnify the members of the coy against proceedings, costs, damages, claims and demands in respect of any accident, alleged accident, resulting, or alleged to have resulted, in injury, death or otherwise, to any workman or other person employed or in connection with any mines in which any member of the coy is interested, and to which the Coal Mines Regulation Act, 1887, Metalliferous Mines Regulation Act, 1872, apply. **Form 135.**

Employers'
Mutual
Association.

To contract for and grant any such indemnity on such terms, and to such qualifications and conditions, as may seem

expedient, to take all such steps, and do all such things, as may seem to the coy expedient, with a view to investigating the circumstances of any accident, or alleged accident, and all other material facts, and to obtaining any information or evidence which may seem to have any bearing upon any claims or demands made, or to be made, in respect of such accident, or alleged accident, and to oppose, resist, compromise, or satisfy, wholly or in part, any such claims and demands.

2. To promote and encourage the adoption of precautionary measures of all kinds, which may seem to the coy calculated to prevent accidents, and to minimise the danger and mitigate the consequences thereof.

3. To inspect and supervise any such mines, and the operations carried on therein.

4. To effect and obtain all such re-insurances, counter-insurances and counter-guarantees, and adopt all such measures for mitigating the risks of the coy as may seem expedient to the coy.

5. To protect and indemnify the members of the coy from and against fraudulent or unfounded claims, and to take steps to expose and detect such claims, and to punish those who are concerned in making, or supporting them.

6. To consider, originate and support improvements in the law which may seem directly or indirectly conducive to any of the coy's objects, and to resist and oppose alterations therein which may seem to the coy directly or indirectly adverse to the interests of the coy or its members, or any section thereof.

Add selection of common forms supra. 97 et seq.

Form 135. Policies issued prior to the passing of the Finance Act, 1899 (June 20, 1899), to employers of labour, by which insurance companies agreed to pay, for and on behalf of the employers, such sums as they should become liable to pay under the Employers' Liability Act, 1880, the Workmen's Compensation Act, 1897, or by the common law, in respect of personal injury to any workmen in their employ, were held not to be policies "of insurance against accident" within the meaning of sect. 98 and Schedule 1. of the Stamp Act, 1891, which imposed a duty of 1*d.* only, but to be liable to a duty of 10*s.* if under seal, or 6*d.* if in writing only. *Lancashire Insurance Co. v. Inland Revenue; Vulcan Boiler Co. v. Same*, (1899) 1 Q. B. 353. But by the Finance Act, 1899 (62 & 63 Vict. c. 9), s. 11, the provisions of sect. 98 of the Act of 1891 as to policies of insurance against accident, are to "extend to and include policies of insurance or indemnity against liability incurred by employers in consequence of claims made upon them by workmen who have sustained personal injury when the annual premium on such policies does not exceed one pound."

Such companies now come within the Assurance Companies Act, 1909, as to which see note after Form 663b, *infra*.

Form 136

Bank.

[1. To establish and carry on the business of a bank, whereof the head office or place of business shall be in London, with such branches or agencies as may from time to time be determined.]

2 To carry on the business of banking in all its branches and departments, including the borrowing, raising or taking up money; the lending or advancing money, securities and property; the discounting, buying, selling and dealing in bills of exchange, promissory notes, coupons, drafts, bills of lading, warrants, debentures, certificates, scrip and other instruments and securities, whether transferable or negotiable, or not; the granting and issuing letters of credit and circular notes; the buying, selling and dealing in bullion and specie; the acquiring, holding, issuing on commission, underwriting and dealing with stocks, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds; the negotiating of loans and advances; the receiving money and valuables on deposit, or for safe custody, or otherwise; the collecting and transmitting money and securities; the managing ppty, and transacting all kinds of agency business commonly transacted by bankers

3 [Form 98 confined to banking and discount business.]

4 [Clause 16 of Form 134 down to "liability."]

5, 6, 7. [Forms 100, 101, 113, modified.]

8 To undertake and execute any trusts the undertaking whereof may seem desirable, and also to undertake the office of executor, administrator, receiver, treasurer, registrar or auditor, and to keep for any coy, government authority, or body, any register relating to any stocks, funds, shares or securities, or to undertake any duties in relation to the registration of transfers, the issue of certificates, or otherwise

9. To take or concur in taking all such steps and proceedings as may seem best calculated to uphold and support the credit of the coy,

and to obtain and justify public confidence, and to avert or minimise financial disturbances which might affect the company. **Form 136.**

10 13. [*Forms 103, 114, 118 to 120.*]

Passed by the Court in several cases under the Companies (Memorandum of Association) Act, 1890.

Underwriting sanctioned by Farwell, J., in Halifax Commercial Banking Co. (1900), H. 9116, April 3, 1901.

(1) To purchase or otherwise acquire and deal in real and personal ppty of all kinds, and in particular lands, buildings, hereditaments, business concerns and undertakings, mortgages, charges, annuities, patents, licences, shares, stocks, debentures, securities, policies, book debts, claims, and any interest in real or personal ppty, and any claims against such ppty or against any persons or coy, and to carry on any business concern or undertaking so acquired, and to establish and carry on any business (except as to the issuing of policies of assurance on human life), which may seem calculated to enhance the value of any of the ppty or rights of the coy, or to facilitate the disposition thof. **Form 137.**

Assets
conversion

Add selection of common forms, Forms 57 et seq

(1) To lend money and negotiate loans. (2) To draw, accept, indorse, discount, buy, sell, and deal in bills of exchange, promissory notes, bonds, debentures, coupons, and other negotiable instruments and securities. (3) To issue on commission, subscribe for, take, acquire, and hold, sell, exchange, and deal in shares, stocks, bonds, obligations, or securities of any government authority or coy. (4) To form, promote, subsidise, and assist cos, syndicates, and partnerships of all kinds. (5) To give any guarantee for the payment of money or the performance of any obligation or undertaking. (6) To undertake and execute any trusts. (7) To acquire, improve, manage, work, develop, exercise all rights in respect of, lease, mortgage, sell, dispose of, turn to account, and otherwise deal with, ppty of all kinds, and in particular land, buildings, concessions, patents, business concerns and undertakings. (8) To enter into any arrangements with any authorities *supra*, Form 102. (9) Generally to carry on and undertake any business, undertaking, transaction, or operation commonly carried on or undertaken by bankers, capitalists, promoters, financiers, concessionaires, contractors for public works other than any insurance business within 9 Edward 7, c. 49. **Form 138.**

Financial.

Add selection of common forms, Forms 37 et seq.]

Within the last few years a great many private companies have been formed for financial objects. In many cases these companies are formed by persons who desire to promote public companies, or perhaps a single public company. Such companies or incorporated syndicates are taking the place of unincorporated

Form 138. syndicates, and can promote much more efficiently and advantageously. For the company being distinct from the members which compose it, the members of the promoting company do not become promoters of the promoted company; disclosure is facilitated; dangers are avoided; the interests of the respective members of the company are more easily adjusted, and other benefits accrue from the adoption of this course.

But a promoter company must, of course, act fairly and honestly, otherwise it will be liable just as an individual promoter who is guilty of fraud; thus, if profits are fraudulently made by a promoter company, and divided among its members with knowledge of the fraud, they will be liable to repay. Moreover, if the company, by its directors or other agents, acts fraudulently, such agents will be liable, as well as the company, for "all persons concerned in the commission of a fraud are to be treated as principals; no party can be permitted to excuse himself on the ground that he acted as agent or servant of another." Per Lord Westbury, *Cullen v. Thompson's Trustees*, 4 Macq. 424; *Wells v. Bell*, 3 Ex. Div. 248. Pollock, Torts, 7th ed., 190.

Seet. 6 of the Money Lenders Act, 1900, provides that "the expression 'money-lender' in this Act shall include every 'person' whose business is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business, but shall not include" certain societies mentioned below.

"Person" here clearly includes a company, for under sect. 4 certain offences are made misdemeanours if perpetrated by "any person being a director, manager, or other officer of any corporation carrying on the business of money-lender"; and sect. 3 enables regulations to be made as to the registration of money-lenders, whether individuals, firms, societies, or companies.

To proceed with sect. 6, that enactment says that "money-lender" shall include

(a) Pawnbrokers (in respect of pawnbroking business);

A pawnbroker is not a "money-lender," because on an isolated occasion he lends money on a bill of sale. *Newman v. Doughton*, (1911) 1 K. R. 792.

(b) Friendly societies, societies under the Loan Societies Act, 1840, or building societies;

Any body corporate, incorporated or empowered by a special Act of Parliament to lend money in accordance with such special Act; or

(c) "Any person" which includes "company" "bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money; or" any body corporate for the time being exempted from registration under this Act by the Order of the Board of Trade made and published pursuant to regulations of the Board of Trade."

Therefore, companies not within (a) to (c) that is to say, those whose primary object is the lending of money, must

1. Register under the Act; or
2. Obtain the Board of Trade's exemption.

The fee on registration is only 12s.

(2) Exemption

By an Order of the Board of Trade, S. O. No. 25, 1900, " (1) The application for exemption under the above section, 6 shall be made on foolscap paper

FORMS.

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in the Form A. hereto annexed, and shall be signed by some responsible officer by and on behalf of the body corporate seeking for such exemption." **Form 138.**

The application is as follows:—

A.

THE MONEY LENDERS ACT, 1900.

Application for the Exemption of a Body Corporate from Registration under the above-mentioned Act.

I, [Here insert name and address and official designation of applicant] in the county of —, being duly authorized in that behalf by the Company, Limited, the registered office of which is at No. — Street, in the City of London, hereby make application to the Board of Trade on behalf of the said — Company, Limited, being a body corporate, incorporated by [Here state whether incorporated by charter, deed of settlement, or other document of incorporation, or under the Companies Acts], for an order exempting the said body corporate from registration as a money-lender, under the provisions of the above-mentioned Act, upon the following grounds: [Here state grounds for exemption].

Dated this — day of —, 19 —.

(Signed) A. B.

(Here add official designation.)

To the Secretary,

Board of Trade,

7, Whitehall Gardens,

London, S.W.

Form No. 3.

FORM FOR USE OF INCORPORATED COMPANY OR SOCIETY, RETURNED PURSUANT TO THE MONEY LENDERS ACT, 1900.

Name in which the Incorporated Company or Society carrying on the business of money-lending is to be registered. [£1 stamp to be impressed in this space.]

Name of Places where the business is carried on.

2. Such application shall be accompanied by—

- a. In the case of a body corporate registered under the Companies Acts, a copy of the memorandum and articles of association . . . such copies being certified by some responsible officer of the body corporate as true copies.
- b. A statutory declaration by a responsible officer of the body corporate setting out the nature of the business carried on by the body corporate.
- (c) A copy of the last balance sheet.

Form 135.

3. The Board of Trade may require, and the body corporate (if so required) shall supply such further information by statutory declarations, production of documents, or otherwise, as the Board of Trade may think proper, concerning the constitution, objects, and financial position of the body corporate, and also concerning the manner in which the said body corporate has carried on the business.

4. The Board of Trade may, if they think fit, require notice of the application to be advertised in such papers as they may prescribe.

5. If, in the opinion of the Board of Trade, the body corporate is a proper one for exemption under the Act, the Board will make an order exempting such body corporate from registration under the Act upon such conditions and for such period as the Board may think fit. Such order shall be in the annexed Form B., or in such other form as the Board shall from time to time direct.

B.

THE MONEY LENDERS ACT, 1900.

Order of Exemption.

In pursuance of the powers conferred upon the Board of Trade by sect. 6 (c) of the Money Lenders Act, 1900, the Board of Trade do hereby order that the [*Here insert full name and address of body corporate*] be exempted from registration as a money lender under the provisions of the above-mentioned Act for a period of three years from the date of the publication of this Order in the *Gazette*, or until earlier revocation of this Order by the Board of Trade.

Dated this — day of —, 19 —.

Signed on behalf of the Board of Trade.

By sect. 3 (2) of the Act: "The registration shall cease to have effect at the expiration of three years from the date of the registration, but may be renewed from time to time, and if renewed shall have effect for three years from the date of the renewal."

The Board of Trade has power to revoke the registration.

Form 139.

Exploration
and financial.

(1) *If necessary, insert one of Forms 85 to 96.*

(2) To seek for and secure openings for the employment of capital in Australia and elsewhere, and with a view thereto to prospect, inquire, examine, explore, and test, and to despatch and employ expeditions, commissioners, experts, and other agents.

(3) To acquire from any sovereign state or authority, supreme, local, or otherwise, any concessions, grants, decrees, rights, or privileges whatsoever, which may seem to the coo capable of being turned to account, and to work, develop, carry out, exercise, and turn to account the same.

(4) To purchase or otherwise acquire, sell, exchange, deal in and turn to account ppty and rights of all kinds, and in particular lands, buildings, mines, mining rights, concessions, patents, licences, mono-

pohes, stations, farms, public works, tolls, and business concerns and undertakings. **Form 139**

Add selection of common forms, Forms 97 et seq

(1) *If necessary, insert one of Forms 85 to 96.]*

2) To carry on all kinds of exploration business, and in particular to search for, prospect, examine, and explore mines and ground supposed to contain minerals or precious stones, and to search for and obtain information in regard to mines, mining claims, mining districts **and** localities.

(3) To purchase or otherwise acquire, and to sell, dispose of, and deal with mines and mining rights, and ppty supposed to contain minerals or precious stones of all kinds, and undertakings connected therewith, and to work, exercise, develop, and turn to account mines and mining rights, and any undertakings connected therewith, and to buy, sell, refine, manipulate, and deal in minerals of all kinds.

(4) To carry on all kinds of promotion business, and in particular to form, constitute, float, lend money to, assist, and control any corporations, or undertakings whatsoever.

(5) To purchase or otherwise acquire, sell, dispose of, and deal in real and personal ppty of all kinds, and in particular lands, buildings, hereditaments, business concerns and undertakings, mortgages, charges, annuities, patents, licences, shares, stocks, debentures, debenture stock, securities, concessions, options, produce, policies, book debts and claims, and any interest in real or personal ppty, and any claims against such ppty, or against any persons or coy, and to carry on any business, concern, or undertaking so acquired.

(6) To transact and carry on all kinds of agency business, and in particular to collect rents and debts, and to negotiate loans, to find investments, and to issue and place shares, stocks, debentures, debenture stock, or securities.

7. To subscribe for, purchase, or otherwise acquire and hold, sell, dispose of, and deal in shares, stocks, debentures, debenture stock, or securities of any authority, supreme, municipal, local or otherwise.

8) To guarantee the payment of money secured by or payable under or in respect of bonds, debentures, debenture stock, contracts, mortgages, charges, obligations, and securities of any coy or of any authority, supreme, municipal, local, or otherwise, or of any persons whatsoever, whether incorporated or not incorporated.

(9) To guarantee the title to, or quiet enjoyment of, ppty, either absolutely or subject to any qualifications or conditions, and to guarantee persons interested or about to become interested in any ppty against any loss, actions, proceedings, claims, or demands in respect of any insufficiency or imperfection or deficiency of title, or in respect of any incumbrances, burdens, or outstanding rights.

(10) Generally to carry on and transact every kind of guarantee

Form 140.

Another



Form 140. and indemnity business (except employers' liability insurance business), and to undertake obligations of every kind and description, and also to undertake and execute trusts of all kinds.

(11) To furnish and provide deposits and guarantee funds required in relation to any tender or application for any contract, concession, decree, enactment, ppty, or privilege, or in relation to the carrying out of any contract, concession, decree, or enactment.

(12) To lend or advance money on such terms as may seem expedient.

(13) To receive moneys, securities, and valuables of all kinds on deposit or safe custody, and generally to carry on the business of a safe deposit coy.

(14) To carry on and undertake any business transaction or operation commonly carried on or undertaken by promoters of cos, financiers, concessionaires, contractors for public and other works, capitalists, merchants, or traders, and to carry on any other business which may seem to the coy capable of being conveniently carried on in connection with the above objects, or calculated, directly or indirectly, to enhance the value of, or render profitable, any of the coy's ppty or rights (except insurance business within 9 Edw. 7, c. 49).

(15) To make donations to such persons and in such cases, and either of cash or other assets, as the coy may think directly or indirectly conducive to any of its other objects or otherwise expedient.

[Add selection of common forms, Forms 97 et seq.]

Form 141.

Financial and
general.

1. *[If necessary, insert one of Forms 85 to 96.]*

2. To carry on business as bankers, capitalists, financiers, concessionaires, and merchants, and to undertake, and carry on, and execute all kinds of financial, commercial trading, and other operations, and to carry on any other business (except the issuing of policies of assurance on human life) which may seem to be capable of being conveniently carried on in connection with any of these objects, or calculated, directly or indirectly, to enhance the value of, or facilitate the realisation of, or render profitable, any of the coy's ppty or rights.

3. To advance, deposit, or lend money, securities, and ppty, to or with such persons and on such terms as may seem expedient, to discount, buy, sell, and deal in bills, notes, warrants, coupons, and other negotiable or transferable securities or documents.

4. To guarantee or become liable for the payment of money or for the performance of any obligations, and generally to transact all kinds of guarantee business; also to transact all kinds of trust and agency business.

5. To purchase or otherwise acquire, and to sell, exchange, surrender, lease, mortgage, charge, convert, turn to account, dispose of, and deal with ppty and rights of all kinds, and in particular, mort-

gages, debentures, produce, concessions, options, contracts, patents, annuities, licences, stocks, shares, bonds, policies, book debts, business concerns, and undertakings and claims, privileges, and choses in action of all kinds. **Form 141.**

6. To subscribe for, conditionally or unconditionally, to underwrite, issue on commission or otherwise, take, hold, deal in, and convert stocks, shares, and securities of all kinds, and to enter into partnership, or into any arrangement for sharing profits, union of interest, reciprocal concession or co-operation with any person, partnership, or coo, and to promote, and aid in promoting, constitute, form, or organize coos, syndicates, or partnerships of all kinds, for the purpose of acquiring and undertaking any ppty and liabilities of this coo, or of advancing, directly or indirectly, the objects thof. or for any other purpose which this coo may think expedient.

[Add selection of common forms, *Forms 94 et seq.*]

See the observations on the Money Lenders Act, 1900, *supra*, p. 527.

(1) [If necessary, insert one of *Forms 85 to 96.*]

Form 142.

(2) To construct, execute, carry out, equip, improve, work, develop, administer, manage, or control, in [the colony of — — and elsewhere], public works and conveniences of all kinds, which expression, in this memdum, includes railways, tramways, docks, harbours, piers, wharves, canals, reservoirs, embankments, irrigations, reclamation, improvement, sewage, drainage, sanitary, water, gas, electric light, telephonic, telegraphic, and power supply works, and hotels, warehouses, markets and public buildings, and all other works or conveniences of public utility (3) To apply for, purchase, or otherwise acquire, any contracts, decrees, and concessions, for or in relation to the construction, execution, carrying out, equipment, improvement, management, administration, or control of public works and conveniences, and to undertake, execute, carry out, dispose of, or otherwise turn to account the same. (4) To carry on the business of miners, metallurgists, builders and contractors, engineers, farmers, graziers, ship-owners, ship-builders, merchants, importers and exporters, and to buy, sell, and deal in ppty of all kinds. (5) To purchase or otherwise acquire, issue, re-issue, sell, place, and deal in shares, stock, bonds, debentures and securities of all kinds, and to give any guaranty or security for the payment of dividends or interest thof, or otherwise in relation thereto. (6) To negotiate loans, to lend money, securities, and other ppty, to discount bills and securities, to become sureties and guarantors for any purposes, and generally to carry on business as capitalists, financiers, bankers, and merchants, and any other businesses, &c.

Public work
contractors.

[Add selection of common forms, *Forms 97 et seq.*]

Form 143.

Colonial loan
agent and
investment
company.

(1) *[If necessary, insert one of Forms 85 to 96.]*

(2) To invest money at interest on the security of freehold and leasehold land, stock, stations, wool, cattle, shares, securities, merchandise, and other ppty in the colony of — or elsewhere, and generally to lend and advance money to such persons and upon such terms and subject to such conditions as may seem expedient. (3) To buy, sell, improve, manage, lease, turn to account, dispose of, and deal in land, stock, stations, wool, cattle, shares, securities, merchandise, and other ppty in the sd colony and elsewhere [on the security of which any advances shall have been made by the coy]; and, as regards land, to develop the resources thof by clearing, draining, road-making, farming, grazing, planting, building, or improving, mining, settling, and constructing public works and conveniences. (4) To construct, execute, carry out, equip, improve, work, administer, manage, or control railways, tramways [*etc., as in Form 142*], markets, parks, churches, chapels, libraries, hospitals, baths, shops, stores, and public and private works of all kinds, in the sd colony and elsewhere, which may seem calculated directly or indirectly to enhance the value of any ppty in which the coy is interested, and generally to carry on any businesses, manufacturing or otherwise, which can be conveniently carried on in connection with any of the coy's objects. (5) To establish and subsidize any institutions, associations, clubs, and conveniences for the benefit of the coy's employés, and of any tenants or other persons in whose welfare the coy is interested, and to provide for their religious, sanitary, and educational welfare, and to grant money for these purposes or any of them. (6) To act as agents for the investment, loan, payment, transmission, and collection of money, and for the purchase, sale, and improvement, development, and management of ppty, including business concerns and undertakings, and generally to transact and undertake all kinds of agency business, whether in respect of agricultural, commercial, or financial matters. (7) To subscribe for, issue on commission or otherwise, and deal in mortgages, bonds, obligations, securities, and other investments, and in particular those charged on or otherwise in connection with land in the sd colony. (8) To give any guarantee in relation to mortgages, loans, investments, and securities, whether made or effected, or acquired through the coy's agency or otherwise, and generally to guarantee or become sureties for the performance of any contracts and obligations. (9) To receive money on deposit at interest or otherwise, and to make, draw, accept, indorse, issue, discount, and otherwise deal with promissory notes, bills of exchange, letters of credit, circular notes, and other mercantile instruments. (10) [Generally to undertake and transact any of the businesses of bankers, merchants, capitalists and financiers which may seem conducive to any of these objects, except insurance business within 9 Edw. 7, c. 49.] (11) To act as trustees for the holders of or otherwise in relation to any debentures,

bonds, or debenture stock issued or to be issued by any coy, and generally to undertake and execute any trusts the undertaking whereof may seem calculated directly or indirectly to benefit this coy. **Form 143.**

[*Add selection of common forms, Forms 97 et seq.*]

Sometimes the words in brackets in clause (3) are omitted or altered to "on the security of which the company shall have power to make advances." And in using Form 105, the words, "and so that the word 'property' herein shall be deemed to be used in its most extensive sense," may be inserted.

Many colonial and foreign loan and investment companies have been established and worked with great success during the last ten years. Their objects vary considerably, some not taking power to buy and deal in land [*supra*, clauses 2, 3, 4], but merely to lend, and act as agents. A large part (say 80 per cent.) of the capital is generally left uncalled, and ample funds are raised on debentures. The credit of some of these companies is so good that they are able to raise large sums of money on perpetual debentures [see Part III.] at 4 per cent. per annum, and the dividends paid are usually very large.

To raise money by the issue of the shares and to invest the moneys so raised in the purchase of, or otherwise to acquire and hold any of the investments following, that is to say, any stocks, bonds, debentures, shares, scrip, or securities issued or having any guarantee by the British government, or by any government, ruler, municipality, commissioners, trust, local authority, or other public body in the United Kingdom or India, or in any colony, or dependency, or possession of the United Kingdom, or in any country or state under British protection, or any stock, bonds, debentures, shares, scrip, or securities issued or having any guarantee by any corporation, trust, or coy incorporated, constituted, or carrying on business in the United Kingdom or India, or in any colony, dependency, or possession of the United Kingdom, or in any country or state under British protection, but so that no investment involving unlimited liability shall be deemed to be hby authorized. **Form 144.**

Investment
trust.

To acquire and hold, or otherwise deal with any stocks, bonds, debentures, shares, scrip, or securities of any government, state, dominion, sovereign, or authority, supreme, municipal, local, or otherwise, and any bonds, debenture stocks, scrip, obligations, shares, stocks, or securities of any coy established for the purpose of any railway, tramway, gas, water, dock, telegraph, electric lighting or other undertaking.

To borrow or raise money by the issue or sale of any bonds, mortgages, debentures, or debenture stock of the coy, whether perpetual or otherwise, and to invest any money so raised in any such investments as aforesaid.

To acquire any such investments as aforesaid by original subscription, tender, participation in syndicates, or otherwise, and whether or not fully paid up, and to make payments thereon as called up, or in advance of calls or otherwise, and to underwrite or subscribe for the same.

Form 144. conditionally or otherwise, and either with a view to investment or for resale, or otherwise, and to vary the investments of the coy, and generally to sell, exchange, or otherwise dispose of, deal with, and turn to account any of the assets of the coy.

To make advances upon any such investments as afd, to negotiate loans, to offer for public subscription, or otherwise aid or assist in placing any such investment - as afd, to give any guarantee in relation to any such investments issued by or acquired through or from the coy, to receive money, documents, and valuables for safe custody, transmission, or deposit at interest, or otherwise to draw, accept, indorse, issue, purchase, and otherwise deal with promissory notes, bills of exchange, letters of credit, circular notes, and other mercantile instruments, to act as agents for all purposes, and to undertake and execute trusts of all kinds.

To offer for public subscription any shares or stocks in the capital of, or debentures or debenture stock or other securities of, or otherwise to establish or promote, or concur in establishing or promoting, any coy, société anonyme, asson, undertaking, or public or private body

To guarantee the payment of dividends or interest on any stocks, shares, debentures, or other securities issued by, or any other contract or obligation of, any such coy, société anonyme, association, undertaking, or public or private body.

To purchase, take on lease or in exchange, hire, or otherwise acquire any real or personal ppty which the coy may think necessary or desirable, and to sell, improve, manage, develop, lease, mortgage, dispose of, turn to account, or otherwise deal with all or any part of the coy's ppty.

To take, make, execute, or enter into, commence, carry on, prosecute, and defend all steps, contracts, agreemts, negotiations, legal and other proceedings, compromises, arrangements, and schemes, and to do all other acts, matters, and things which shall at any time appear conducive or expedient for the protection of the coy as holders of or interested in any such investments and securities as afd.

Add selection of common forms, Forms 97 et seq.]

Investment companies of the above kind [are not uncommon, and] have been found very attractive. After a considerable period of depression they are again becoming popular. In many cases they are confined to investments of a special class, *e.g.*, foreign and colonial government, municipal, railway, telegraph, &c. The capital is generally raised by the issue of shares to be paid up in full within a few months, and then to be converted into equal moieties of preferred and deferred stock, the preferred taking a fixed preferential dividend at the rate of 4, 4½, or 5 per cent. per annum, and the deferred the balance of the profits. The executive sometimes consists of a body of directors, and sometimes a body of "trustees." In the latter case the articles do not provide for rotation, and not uncommonly the remuneration is furnished by a percentage on paid-up capital: see *infra*.

The principal object of such companies is, as James, L. J., put it in *Smith v. Anderson*, 15 C. Div. 247, "to enable persons who choose to invest their money in this way to avail themselves of that which I believe to be one of the most certain things in the world, viz., what is called the doctrine of average - that is to say, that if a large number of different independent securities of a hazardous description are held together, the loss upon some will be compensated by the gain upon others, so that a tolerably uniform average rate of interest will be maintained."

This would be so were the investments made almost at random, but under a judicious selection by an experienced body of directors or trustees the profits realised may be very considerable.

Form 144

(1) To acquire and hold shares, stocks, debentures, debenture stocks, bonds, obligations, and securities issued or guaranteed by any company constituted or carrying on business in the United Kingdom, or in any colony, or dependency, or possession thereof, or in any foreign country, and debentures, debenture stock, bonds, obligations, and securities, issued or guaranteed by any government, sovereign ruler, commissioners, public body, or authority, supreme, municipal, local, or otherwise, whether at home or abroad.

Form 145.

Another, with wider powers.

(2) To acquire any such shares, stocks, debentures, debenture stock, bonds, obligations, or securities by original subscription, tender, purchase, exchange, or otherwise, and to subscribe for the same, either conditionally or otherwise, and to guarantee the subscription thereof, and to exercise and enforce all rights and powers conferred by or incident to the ownership thereof.

(3) To issue debentures, debenture stock, bonds, obligations, and securities of all kinds, and to frame, constitute, and secure the same, as may seem expedient, with full power to make the same transferable by delivery, or by instrument of transfer or otherwise, and either perpetual or terminable, and either redeemable or otherwise, and to charge or secure the same by trust, deed, or otherwise, on the undertaking of the company, or upon any specific property and rights, present and future, of the company (including, if thought fit, uncalled capital), or otherwise howsoever.

(4) To advance and lend money and assets of all kinds upon such terms as may be arranged.

(5) To facilitate and encourage the creation, issue, or conversion of debentures, debenture stock, bonds, obligations, shares, stocks, and securities, and to act as trustees in connection with any such securities, and to take part in the conversion of business concerns and undertakings into companies.

(6) To take part in the management, supervision, or control of the business or operations of any company or undertaking, and for that purpose to appoint and remunerate any directors, accountants, or other experts or agents.

(7) To employ experts to investigate and examine into the condition, prospects, value, character, and circumstances, of any business

Form 145. concerns and undertakings, and generally of any assets, ppty, or rights.

(8) To constitute any trusts with a view to the issue of preferred and deferred or any other special stocks or securities based on or representing any shares, stocks, or other assets specifically appropriated for the purposes of any such trust, and to settle and regulate, and, if thought fit, to undertake and execute any such trusts, and to issue, dispose of, or hold any such preferred, deferred, or other special stocks or securities.

(9) To transact or carry on all kinds of agency business, and in particular in relation to the investment of money, the sale of ppty and the collection and receipt of money.

(10) To give any guarantee in relation to the payment of any debentures, debenture stock, bonds, obligations, or securities.

(11) Generally to carry on business as financiers, and to undertake and carry out all such operations and transactions (except the issuing of policies of assurance on human life) as an individual capitalist may lawfully undertake and carry out.

Add selection of common forms, Forms 97 et seq.]

Form 146. (1) *[If necessary, insert one of Forms 85 to 96.]*

Theatre.

2. To construct at — a theatre, and other buildings and works convenient for the purposes thereof, and to manage, maintain, and carry on the said theatre and other buildings when so erected or constructed.]

3. To carry on the business of theatre proprietors and managers, and in particular to provide for the production, representation, and performance of operas, stage plays, operettas, burlesques, vaudevilles, ballets, pantomimes, spectacular pieces, promenade and other concerts, and other musical and dramatic performances and entertainments.

4. To carry on the business of restaurant keepers, wine and spirit merchants, licensed victuallers, theatrical agents, box office keepers, concert room proprietors, hotel keepers, dramatic and musical publishers and printers, and any other business which can be conveniently carried on in connection with any of those objects as may seem calculated to render profitable any of the coys's ppty and rights for the time being.

5. To enter into agreements with authors or other persons for the dramatic or other rights of operas, plays, operettas, burlesques, vaudevilles, ballets, pantomimes, spectacular pieces, musical compositions, and other dramatic and musical performances and entertainments, or for the representation thereof in the United Kingdom and elsewhere, as well as of foreign, colonial, and American rights, and to enter into engagements of all kinds with artists and other persons.

[Add selection of common forms, Forms 97 et seq.]

(1) To carry on [at —, and elsewhere in the county of —] the business of an electric light co. in all its branches, and in particular to construct, lay down, establish, fix, and carry out all necessary cables, wires, lines, accumulators, lamps and works, and to generate, accumulate, distribute, and supply electricity, and to light cities, towns, streets, docks, markets, theatres, buildings and places both public and private. **Form 147.**

Electric.

(2) To carry on the business of electricians, mechanical engineers, suppliers of electricity for the purposes of light, heat, motive power, or otherwise, and manufacturers of and dealers in all apparatus and things required for or capable of being used in connection with the generation, distribution, supply, accumulation, and employment of electricity.

Add selection of common forms, Forms 97 et seq.]

See Lighting Act, 1882 (45 & 46 Vict. c. 56), the Electric Light Act, 1899 (62 & 63 Vict. c. 69), and the London Electric Lighting Act, 1904, as to provisional orders.

A power to "supply" electric energy under a Provisional Order will not justify the company in engaging in the sale or hire of apparatus for the use of the energy thus supplied. *Att.-Gen. v. Corpn. of Leicester*, (1910) 2 Ch. 359. See also as to a company's powers under a Provisional Order, *Andrews v. Abertillery Urban Council*, (1911) 2 Ch. 398.

To carry on the business of electric engineers and contractors, suppliers of electricity, carriers of passengers and goods, electric manufacturers of, and dealers in, railway, tramway, electric, magnetic, galvanic, and other apparatus, mechanical engineers, suppliers of light, heat, sound, and power, and to acquire any inventions, &c., and to construct railways and tramways, and work the same by steam, gas, oil, electricity, or other power. **Form 147a.**

Electric engineers and contractors.

(1) To carry on business as dealers in, and producers of, dairy, farm, and garden produce of all kinds, and in particular milk, cream, butter, cheese, poultry and eggs, fruit and vegetables. **Form 147b.**

Dairymen and farm produce dealers.

(2) To carry on business as cow-keepers, farmers, millers, and market gardeners, and as manufacturers of all kinds of condensed milk, jam, pickles, cider, and preserved provisions of all kinds.

Add selection of common forms, supra, Forms 97 et seq.]

To carry on business as goldsmiths, silversmiths, jewellers, gem merchants, watch and clock makers, electro-platers, dressing-bag makers, importers and exporters of bullion, and to buy, sell, and deal in (wholesale and retail) precious stones, jewellery, watches, clocks, gold and silver plate, electro-plate, cutlery, dressing-bags, bronzes, **Form 147c.**

Goldsmiths, silversmiths, jewellers, watchmakers, &c., dressing bag makers.

Form 147c. articles of vertu, objects of art, and such other articles and goods as the coy may consider capable of being conveniently dealt in in relation to its businesses, and to manufacture and to establish factories for manufacturing goods for the above businesses.

Form 148. 1. To supply the town of —, in the county of —, and the neighbourhood thereof, with water, and to carry on the business of a waterworks coy in all its branches. 2. To sink wells and shafts, and to make, build and construct, lay down and maintain, reservoirs, waterworks, cisterns, culverts, filter-beds, main and other pipes, and appliances, and to execute and do all other works and things necessary or convenient for obtaining, storing, selling, delivering, measuring and distributing water, or otherwise for the purposes of the coy.
[Add selection of common forms, Forms 97 et seq.]

Form 148a. (1) *[If necessary, insert one of the Forms 85 to 96.]*
 (2) To carry on the business of searching for, mining, getting, obtaining, cutting, polishing and dealing in diamonds and other precious and valuable stones.
[Add selection of Forms 147c, 178, 179 and 180, and selection of common forms, 79 et seq.]

Form 149. (1) *[If necessary insert any of Forms 85 to 96.]* (2) To construct and establish at — a dock with patent and other slips, workshops, buildings, machinery, warehouses, and other conveniences. (3) To carry on the business of proprietors of docks, wharves, jetties, piers, warehouses and stores, and of shipowners, shipbuilders, shipwrights, engineers, dredgers, tug-owners, wharfingers, warehousemen, commission agents, merchants, and any other businesses which can be conveniently carried on in connection with the above.
[Add selection of common forms, Forms 97 et seq.]

Form 150. (1) To acquire and take over as a going concern the business of brewers and otherwise heretofore carried on under the style or firm of "— and Coy," at the — Brewery, —, in the County of Middlesex, and elsewhere, and all or any of the assets and liabilities of that firm in connection therewith, and with a view thereto, &c.
[Form 85, supra.]
 (2) To carry on the business of brewers and maltsters in all its branches.
 (3) To carry on all or any of the businesses of hop merchants and growers, malt factors, corn merchants, wine and spirit merchants and importers, and distillers, coopers and bottlers, bottle makers, bottle

stopper makers, potters, manufacturers of and dealers in aerated and mineral waters, and other drinks, licensed victuallers, hotel keepers, beerhouse keepers, restaurant keepers, lodging-house keepers, ice manufacturers and merchants, tobaccoists, farmers, dairymen, yeast dealers, grain sellers and driers, timber merchants, brick makers, finings manufacturers, and isinglass merchants.

Form 150.

(4) To buy, sell, manipulate, and deal both wholesale and retail in commodities, articles and things of all kinds which can conveniently be dealt in by the coy in connection with any of its objects.

(5) To lend or advance money to such parties, and on such terms as may seem expedient, and in particular to customers of, and persons having dealings with the coy, and to give any guarantee or indemnity that may seem expedient, and to discount bills, and to receive money on deposit at interest or otherwise, or valuables, and to transact any of the business of a banker which may seem to the coy expedient.

(6) To carry on any other business, whether manufacturing or otherwise, which may seem to the coy capable of being conveniently carried on in connection with any of the above businesses or objects, or calculated directly or indirectly to enhance the value of or render profitable any of the coy's property or rights for the time being.

Add selection of common forms, Forms 97 et seq.

As to the importance of clause 5 in enabling a brewery company to deduct bad debts in respect of loans to customers from profits of the general business for purposes of income tax, see *Reid's Brewery Co. v. Male*, (1891) 2 Q. B. 1, and p. 99.

As to restricting the clause with reference to the Money Lenders Act, 1900, see notes to Form 138, *supra*.

(1) *[If necessary, insert one of Forms 85 to 96.]*

Form 151.

(2) To carry on all or any of the businesses following: namely, cotton spinners and doublers, flax, hemp, and jute spinners, linen manufacturers, flax, hemp, jute, and wool merchants, wool combers, worsted spinners, woollen spinners, yarn merchants, worsted stuff manufacturers, bleachers and dyers, and makers of vitriol, bleaching, and dyeing materials, and to purchase, comb, prepare, spin, dye, and deal in flax, hemp, jute, wool, cotton, silk, and other fibrous substances, and to weave or otherwise manufacture, buy and sell and deal in linen, cloth, and other goods and fabrics, whether textile, felted, netted, or looped, and to supply power.

Cotton
spinners

[Add selection of common forms, Forms 97 et seq.]

(1) *[If necessary, insert one of Forms 85 to 96.]*

Form 152

(2) To carry on the business of a telephone, telegraph, and electric light, heat, and power supply coy, and in particular to establish, work, manage, control, and regulate telephone exchanges and works

Telephone
company.

Form 152. for the supply of electric light, heat, and motive power, and to transmit and facilitate the transmission of telephonic and telegraphic communications and messages, and to undertake the lighting of towns, streets, buildings, and other places, and the supply of electric heat and motive power for public or private purposes.

(3) To carry on any other business directly or indirectly connected with the supply or employment of electricity, or capable of being conveniently carried on in connection with any of these objects, or calculated directly or indirectly to render profitable any of the ppty or rights of the coy.

(4) To construct, maintain, lay down, carry out, work, sell, let on hire, and deal in telephones and all kinds of works, machinery, apparatus, conveniences, and things capable of being used in connection with any of these objects, and in particular any cables, wires, lines, stations, exchanges, reservoirs, accumulators, lamps, meters, and engines.

[Add selection of common forms, Forms 97 et seq.]

Form 153.

Drapers,
warehouse-
men, fur-
nishers and
outfitters,
general store-
keepers, &c.
(universal
providers.)

(1) [If necessary, insert one of Forms 85 to 96.]

(2) To carry on the business of drapers and furnishing and general warehousemen in all its branches.

(3) To carry on all or any of the businesses of silk mercers, silk weavers, cotton spinners, cloth manufacturers, furriers, haberdashers, hosiery, manufacturers, importers, and wholesale and retail dealers of and in textile fabrics of all kinds, milliners, dressmakers, tailors, hatters, clothiers, outfitters, glovers, lace manufacturers, feather dressers, boot and shoe makers, manufacturers and importers, and wholesale and retail dealers of and in leather goods, household furniture, ironmongery, turnery, and other household fittings and utensils, ornaments, stationery, and fancy goods, dealers in provisions, drugs, chemicals, and other articles and commodities of personal and household use and consumption, and generally of and in all manufactured goods, materials, provisions, and produce.

(4) To carry on all or any of the businesses of undertakers, coach and carriage builders, saddlers, house decorators, sanitary engineers, electrical engineers, and contractors in all their branches, gasfitters, land, estate and house agents, builders, contractors, auctioneers, cabinet makers, upholsterers, furniture removers, owners of depositories, warehousemen, carriers, storekeepers, warehouse keepers, manufacturers of and dealers in hardware, jewellery, plated goods, perfumery, soap, and articles required for ornament, recreation, or amusement; gold and silversmiths, booksellers, dealers in musical instruments, manufacturers of and dealers in bicycles, tricycles, and motor carriages; and also refreshment contractors, restaurant keepers, hotel, boarding and lodging-house keepers, letters of furnished or unfurnished houses, flats or apartments, with or without servants or

other accessories or conveniences, licensed vintners, wine and spirit merchants, tobacconists, and dealers in general, distilled, and other liquors; farmers, dairymen, market gardeners, nurserymen, and florists.

Form 153.

(5) To buy, sell, manufacture, repair, alter and exchange, let on hire, export, and deal in all kinds of articles and things which may be required for the purposes of any of the said businesses, or commonly supplied or dealt in by persons engaged in any such businesses, or which may seem capable of being profitably dealt with in connection with any of the said businesses.

(6) To receive money, valuables, and goods and materials of all kinds on deposit or for safe custody.

(7) To provide and conduct refreshment rooms, newspaper rooms, reading and writing rooms, dressing rooms, telephones, and other conveniences for the use of customers and others.

(8) To grant to ticket-holders and others any special privilege and advantages, and to make arrangements with persons engaged in any trade, business, or profession for the concession to the coy's members, ticket-holders and their friends, of any special privileges or advantages.

(9) To carry on the business of a co-operative store and general supply society in all its branches, and to transact all kinds of agency business.

(10) To carry on any other business (manufacturing or otherwise), except the issuing of policies of assurance on human life, which may seem to the coy capable of being conveniently carried on in connection with any of the above specified businesses, or calculated directly or indirectly to enhance the value of or render profitable any of the coy's property or rights.

Add selection of common forms, Forms 97 et seq.]

1. *If necessary, insert one of Forms 85 to 96.]*

2. To carry on the business of iron foundries, mechanical engineers, and manufacturers of agricultural implements and other machinery, tool-makers, brass-founders, metal-workers, boiler-makers, millwrights, machinists, iron and steel converters, smiths, wood-workers, builders, painters, metallurgists, electrical engineers, water supply engineers, gas-makers, farmers, printers, carriers, and merchants, and to buy, sell, manufacture, repair, convert, alter, let on hire, and deal in machinery, implements, rolling-stock, and hardware of all kinds, and to carry on any other business (manufacturing or otherwise) which may seem to the coy capable of being conveniently carried on in connection with the above, or otherwise calculated, directly or indirectly, to enhance the value of any of the coy's property and rights for the time being.

Form 154.

Mechanical
engineer, &c.

Form 154. 3. To carry on any business relating to the winning and working of minerals, the production and working of metals, and the production, manufacture, and preparation of any other materials which may be usefully or conveniently combined with the engineering or manufacturing business of the coy, or any contracts undertaken by the coy, and either for the purpose only of such contracts or as an independent business.

4. To undertake and execute any contracts for works involving the supply or use of any machinery, and to carry out any ancillary or other works comprised in such contracts.

Add selection of common forms, Forms 97 et seq.]

Form 155. To carry on in the United Kingdom or elsewhere the trade or business of purchasing, hiring, or otherwise acquiring, and making, building or manufacturing railway carriages and wagons, and other carriages, wagons, carts, trucks, vehicles, locomotives, engines, rolling-stock, and conveyances of all kinds, whether for railway, trainway, road, field, or other traffic or purposes, and also rails and railways and tramway plant, and all machinery, materials, and things applicable or used as accessory thereto, and of letting or supplying all or any of the things hereinbefore specified to coal proprietors, railway and other cos, and other persons, from year to year or for a term of years, or otherwise, at annual or other rents, and of repairing and maintaining the same resply, whether belonging to this coy or not, and of selling, exchanging, and otherwise dealing in the same resply.

Add selection of common forms, Forms 97 et seq.]

Form 155a. (1) To establish in England and elsewhere art galleries for the exhibition of paintings, engravings, sculptures, bronzes, enamels, jewellery, gems, coins, medals, and other works of art, and for social, musical, theatrical, and other entertainments, and for lectures and other purposes, whether of a like or of a different kind, which may seem expedient.

Art exhibitions and art sections.

(2) To form a collection of works of art suitable for exhibition in such galleries, and to encourage the exhibition in such galleries of loan and other collections of works of art

(3) To buy, sell, and deal in works of art of all kinds, and to provide expert advice of all kinds for customers and others.

(4) To carry on all kinds of agency business, and all kinds of guarantee and indemnity business.

[Add selection of common forms, Forms 97 et seq.]

(1) To purchase or otherwise acquire any interests in any patents. **Form 156.**
brevets d'invention, licences, concessions and the like conferring an exclusive or non-exclusive or limited right to use, or any secret or other information as to any invention in relation to [e.g., the production, treatment, storage, application, distribution and use of electricity, and of any apparatus therefor], or generally any invention which may seem to the coy capable of being profitably dealt with, and in particular to acquire from A. B., of &c., the benefit of certain existing inventions in relation to, &c., and with a view thereto to enter into and carry into effect the agreement referred to in clause 3 of the arts of asson of this coy with such modifications (if any) as may seem expedient.

"Special
patents
company.

(2) To use, exercise, develop, grant licences in respect of, or otherwise to turn to account any such patents, *brevets d'invention*, licences, concessions, and the like, and information aforesaid.

(3) To carry on business as [here insert specification of business connected with such invention].

(4) To carry on [subsidiary business].

Add selection of common forms, Forms 97 et seq.]

(1) To acquire and take over as a going concern the undertaking of the — Coy, Limtd (incorporated in —), and all or any of the assets and liabilities of that coy, and with a view thereto to enter into an agreement in the terms of the draft referred to in clause 3 of the coy's arts of asson, and to carry the same into effect with or without modification. **Form 157.**

Cycle manu-
facturers.

(2) To carry on the business of manufacturers of cycles, bicycles, tricycles, velocipedes, and carriages of all kinds, and of all articles and things used in the manufacture, maintenance, and working thereof, and also all apparatus and implements and things for use in sports or games.

(3) To carry on the business of mechanical engineers, machinists, fitters, millwrights, founders, wire drawers, tube makers, metallurgists, saddlers, galvanizers, japanners, annealers, enamellers, electroplaters, painters, and packing case makers.

(4) To buy, sell, repair, alter, and deal in apparatus, machinery, materials, and articles of all kinds which shall be capable of being used for the purposes of any business herein mentioned or likely to be required by customers of any such business.

[Add selection of common forms, Forms 97 et seq.]

Form 157a. (1) *[If necessary, insert one of the Forms 85 to 96.]*Aerial
conveyances.

(2) To establish, maintain, and work lines of aerial conveyances between London and Liverpool, and between London and Paris, and between other places to be from time to time selected by the company.

(3) To manufacture, buy, sell, prepare, let on hire, and deal in aerial conveyances of all kinds, and the component parts thereof, and all kinds of machinery and apparatus for use in connection therewith.

(4) To acquire, provide, and maintain hangars, garages, sheds, aerodromes, and accommodation for or in relation to aerial conveyances.

(5) Generally to carry on business as mechanical engineers.

[Add selection of common forms, Forms 97 et seq.]

Form 158.

Cricket club.

(1) To provide a cricket ground at or near —, in the county of —, and to lay out and prepare such ground for cricket and other purposes of the coy, and to provide pavilions, lavatories, refreshment rooms and other conveniences in connection therewith. *[Add if suitable, "and with a view thereto to enter into [or adopt] an agreement, &c." [latter part of Form 85].]*

(2) To promote the game of cricket and other athletic sports and pastimes.

(3) To hold or arrange cricket and other matches and competitions, and offer and grant, or contribute towards the provision of prizes, awards, and distinctions.

(4) To subscribe to, become a member of, and co-operate with any other association, whether incorporated or not, whose objects are altogether or in part similar to those of this coy.

(5) To buy, sell, and deal in all kinds of apparatus and all kinds of provisions, liquid and solid, required by persons frequenting the coy's cricket grounds.

(6) To purchase, take on lease, or otherwise acquire any lands, buildings, easements, or ppty, real and personal, which may be requisite for the purposes of, or capable of being conveniently used in connection with, any of the objects of the coy.

(7) To raise money by subscriptions, and to grant any rights and privileges to subscribers.

[Add selection of common forms, Forms 97 et seq.]

Form 159.

Laundry.

[If necessary, insert one of Forms 85 to 96.]

To carry on at —, in the county of —, and elsewhere the business of a steam and general laundry, and to wash, clean, purify, scour, bleach, wring, dry, iron, colour, dye, disinfect, renovate, and

prepare for use all articles of wearing apparel, household, domestic and other linen, and cotton and woollen goods and clothing and fabrics of all kinds, and to buy, sell, hire, manufacture, repair, let on hire, alter, improve, treat and deal in all apparatus, machines, materials, and articles of all kinds, which are capable of being used for any such purposes.

To carry on business as proprietors of swimming and other baths, wash-houses, and mechanical engineers, and to carry on any other business, &c.

[Add selection of common forms. Forms 97 et seq.]

Form 159.

(1) [If necessary, insert one of Forms 85 to 96.]

(2) To carry on the businesses of manufacturers of and dealers in tobacco, cigars, cigarettes, matchlights, pipes, and any other articles required by or which may be convenient to smokers, and of snuff grinders and merchants and box merchants, and to deal in any other articles and things commonly dealt in by tobaccoists.

[Add selection of common forms. Forms 97 et seq.]

Form 160.

Tobacco.

To carry on business as tourist agents and contractors, and to facilitate travelling, and to provide for tourists and travellers, or promote the provision of conveniences of all kinds in the way of through tickets, circular tickets, sleeping cars or berths, reserved places, hotel and lodging accommodation, guides, safe deposits, inquiry bureaus, libraries, lavatories, reading rooms, baggage transport and otherwise.

To carry on business as hotel keepers, lodging house and restaurant keepers, transport agents, insurance agents and bankers.

[Add selection of general objects. Forms 97 et seq.]

Form 160a

Tourist
agents.

(1) [If necessary, insert one of Forms 85 to 96.]

(2) To carry on the businesses of stationers, printers, lithographers, stereotypers, electrotypers, photographic printers, photolithographers, engravers, die-sinkers, envelope manufacturers, bookbinders, account book manufacturers, machine rulers, numerical printers, paper makers, paper bag and account book makers, box makers, cardboard manufacturers, type founders, photographers, manufacturers of and dealers in playing, visiting, railway, festive, complimentary and fancy cards and valentines, dealers in parchment, dealers in stamps, agents for the payment of stamp and other duties, advertising agents, designers, draughtsmen, ink manufacturers, booksellers, publishers, paper manufacturers, and dealers in

Form 161.

Stationers, &c.

- Form 161.** the materials used in the manufacture of paper, engineers, cabinet makers, and dealers in or manufacturers of any other articles or things of a character similar or analogous to the foregoing, or any of them, or connected therewith.

[Add selection of common forms, Forms 97 et seq.]

- Form 162.** (1) *If necessary, insert one of Forms 85 to 96.*
 Brickmakers, (2) To carry on the business of manufacturers of bricks, tiles, potters, pipes, pottery, earthenware, china and terra cotta, and ceramic ware of all kinds. paviors, &c.

(3) To carry on the businesses of paviors and manufacturers of and dealers in artificial stone, whether for building, paving, or other purposes.

(4) To carry on business as manufacturing chemists.

[Add selection of common forms, Forms 97 et seq.]

- Form 163.** (1) *If necessary, insert one of Forms 85 to 96.*
 Newspaper (2) To establish, print, and publish a newspaper or newspapers proprietors. in —, and to carry on the business of newspaper proprietors, printers, publishers, type-founders, booksellers, stationers, and advertising agents, and to carry on any other, &c.

[Add selection of common forms, Forms 97 et seq.]

Such companies are common nowadays. The Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60, s. 18), declares that the provisions of the Act as to the registration of newspaper proprietors are not to apply to a joint stock company registered under the Act of 1862.

A company may be liable to an action for a libel. *Whitfield v. South Eastern Ry. Co.*, E. B. & E. 115; and see *Edwards v. Midland Ry.*, 6 Q. B. D. 287, 703; *Cornford v. Carlton Bank*, (1899) 1 Q. B. 392. *Nevill v. Fine Arts, Ltd.*, (1895) 2 Q. B. 156, and *Citizens' Life Assurance Co. v. Brown*, (1904) A. C. 423.

Directors of a company that prints or publishes a newspaper containing a libel are not liable criminally any more than they are civilly (*Emmens v. Pottle*, 16 Q. B. D. 354) if they had no knowledge of the libel. *Reg. v. Judd*, 37 W. R. 143.

Enquiries involving imputations on the solvency of persons, contained in a paper issued only to the members by a voluntary society for the protection of trade, are not published on a privileged occasion. *Elkington v. London Assoc. for the Protection of Trade*, 28 T. L. R. 117.

- Form 164.** (1) *[If necessary, insert one of Forms 85 to 96.]*
 Newspaper (2) To carry on business as proprietors and publishers of newspapers, journals, magazines, books, and other literary works and proprietors. undertakings.

(3) To carry on all or any of the businesses of printers, stationers, lithographers, type-founders, stereotypers, electrotypers, photographic printers, photo-lithographers, chromo-lithographers, engravers, die-sinkers, bookbinders, designers, draughtsmen, paper and ink manufacturers, booksellers, publishers, advertising agents, engineers, and dealers in or manufacturers of any other articles or things of a character similar or analogous to the foregoing or any of them or connected therewith. **Form 164.**

(4) To establish competitions in respect of contributions or information suitable for insertion in any publication of the coy, or otherwise for any of the purposes of the coy, and to offer and grant prizes, rewards, and premiums of such character and on such terms as may seem expedient.

(5) To undertake and transact all kinds of agency or business which an ordinary individual may legally undertake.

(6) To provide for and furnish or secure to any members or customers of the coy, or to any subscribers to or purchasers or possessors of, any publication of the coy, or of any coupons or tickets issued with any publications of the coy, any chattels, conveniences, advantages, benefits, or special privileges which may seem expedient, and either gratuitously or otherwise.

Add selection of common forms, Forms 97 et seq.

(1) *If necessary, insert one of the Forms 85 to 96.*

Form 164a.

(2) To carry on the business of proprietors or managers of theatres, palaces and halls, cinematographic shows, and exhibitions, and to permit the coy's premises to be used for such other purposes as may seem expedient. **Cinematograph shows.**

(3) To purchase, hire, or otherwise acquire any photographic and other apparatus in connection with cinematograph shows and exhibitions.

[Add selection of forms, 97 et seq.]

(1) *If necessary, insert one of the Forms 85 to 96.*

Form 164b.

(2) To establish in the city of — and elsewhere in the Republic of —, tea shops and in connection therewith to carry on the business of tea-shop keepers, restaurant keepers, and suppliers of provisions both solid and liquid. **Tea shops.**

[Add selection of common forms, 97 et seq.]

Form 165.Coffee
taverns.

- (1) *[If necessary, insert one of Forms 85 to 96.]*
- (2) To establish at — coffee taverns, and to carry on there the business of refreshment-house keepers, upon the principle that no intoxicating liquors shall be sold by the coy, and to provide and work, upon the same principle, refreshment stalls, carts, and barrows.
- (3) To establish libraries, reading rooms, and other conveniences, and to provide for the recreation and instruction of the coy's customers and their friends.

[Add selection of common forms, Forms 97 et seq.]

Form 166.Refreshment
rooms.

- (1) *[If necessary, insert one of Forms 85 to 96.]*
- (2) To carry on the business of [temperance] refreshment-rooms proprietors and refreshment caterers and contractors in all its respcive branches.
- (3) To carry on business as bakers, confectioners, butchers, milk-sellers, butter-sellers, dairymen, grocers, poulterers, greengrocers, farmers, and ice merchants.

(4) To manufacture, buy, sell, refine, prepare, grow, import, export, and deal in provisions of all kinds, both wholesale and retail, and whether s. lid or liquid.

(5) To establish and provide all kinds of conveniences and attractions for customers and others, and in particular reading, writing, and smoking rooms, lockers, and safe deposits, telephones, telegraphs, clubs, stores, shops, lodgings, and lavatories.

[Add selection of common forms, Forms 97 et seq.]

Form 166a.Workmen's
homes.

- (1) To provide clean, comfortable, and inexpensive sleeping accommodation for workmen and others, and in connection therewith to afford to such persons facilities and conveniences for washing, bathing, cooking, reading, writing and finding employment, and for the purchase, sale, and consumption of provisions, both liquid and solid, and for the safe custody of goods.

(2) To work, construct, and maintain buildings, works, and conveniences of all kinds suitable for any of the purposes of the coy.

(3) To carry on any other business, whether manufacturing or otherwise, which may seem to the coy capable of being conveniently carried on in connection with any of the above specified objects.

[Add selection of common forms, Forms 97 et seq.]

Form 167.

Public hall.

1. To provide at — a hall and other suitable rooms, buildings, and places, and to permit the same or any pt thof to be used on such terms as the coy shall think fit, for any purposes, public or private, and in particular for public meetings, exhibitions, concerts, lectures,

dinners, theatrical performances, and other entertainments, and for reading, writing, and newspaper rooms, libraries, baths, laundries, refreshment rooms, dressing rooms, shops, business offices, and residences. [Add, if necessary, a reference to some agreement in the articles as in Form 85.] 2. To furnish the coy's ppty with such furniture, implements, machinery, and conveniences as may be thought desirable with a view to the sale, letting, or user thof. 3. To provide gardens, greenhouses, and grounds for recreation and amusement. 4. To carry on the business of an hotel and restaurant proprietor and wine merchant. 5. To provide amusement, entertainment, and instruction for shareholders of the coy and others.

[Add selection of common forms, Forms 97 et seq.]

Form 167.

(1) To purchase, take or lease, or otherwise acquire, the land and hereditaments known as the ——— estate, situate, &c. [Add, if necessary, a reference to some agreement in the articles as in Form 85.]

(2) To carry on the business of a racecourse coy in all its branches, and in particular to lay out and prepare any lands for the running of horse races, steeplechases, or races of any other kind, and for the drilling or reviewing of troops, and for any kind of athletic sports, and for playing thon games of cricket, bowls, golf, curling, lawn tennis, polo, or any other kind of amusement, recreation, sport or entertainment, and to construct grand or other stands, booths, stabling for horses, paddocks, refreshment rooms, and other erections, buildings, and conveniences, whether of a permanent or temporary nature, which may seem directly or indirectly conducive to the coy's objects, and to conduct, hold, and promote race meetings and athletic sports, polo, lawn tennis, and other matches, agricultural, horse, flower, and other shows and exhibitions, and otherwise utilize the coy's ppty and rights, and to give and contribute towards prizes, cups, stakes, and other rewards. (3) To establish any clubs, hotels, or othe conveniences in connection with the coy's ppty. (4) To carry on the business of hotel keepers, tavern keepers, licensed victuallers, refreshment purveyors, and market gardeners, &c.

[Add selection of common forms, Forms 97 et seq.]

Form 168.

Racecourse.

1. [If necessary, insert one of Forms 85 to 96.]

2. To carry on the business of a storekeeper in all its branches, and in particular to buy, sell, manufacture, and deal in goods, stores, consumable articles, chattels and effects of all kinds, both wholesale and retail, and to transact every kind of agency business, and generally to engage in any business or transaction which may seem to the coy directly or indirectly conducive to the interests or convenience of the coy's members or ticket-holders or their friends, or any section thof.

Form 169.

Co-operative store.

Form 169.

3. To make arrangements with persons engaged in any trade, business, or profession, for the concession to the coy's members, ticket-holders, and their friends, of any special rights, privileges, and advantages, and in particular in regard to the supply of goods.

Add selection of common forms, Forms 97 et seq.

Form 170.

Hotel
company.

(1) *[If necessary, insert one of Forms 85 to 96.]*

(2) To carry on the business of hotel, restaurant, café, tavern, beer-house, refreshment-room, and lodging-house keepers, licensed victuallers, wine, beer, and spirit merchants, brewers, maltsters, distillers, importers and manufacturers of aerated, mineral, and artificial waters and other drinks, purveyors, caterers for public amusements generally, coach, cab, and carriage proprietors, livery-stable keepers, jobmasters, farmers, dairymen, ice merchants, importers and brokers of food, live and dead stock, and colonial and foreign produce of all descriptions, hairdressers, perfumers, chemists, proprietors of clubs, baths, dressing rooms, laundries, reading, writing, and newspaper rooms, libraries, grounds, and places of amusement, recreation, sport, entertainment, and instruction of all kinds, tobacco and cigar merchants, agents for railway and shipping cos and carriers, theatrical and opera box office proprietors, entrepreneurs and general agents, and any other business which can be conveniently carried on in connection therewith.

[Add selection of common forms, Forms 97 et seq.]

Form 171.

Library.

(1) To establish and maintain in the city of — and elsewhere, circulating libraries, and also reading and writing rooms, and a reference library, and to furnish the same resply with books, reviews, magazines, newspapers, and other publications, including instrumental and vocal music. *[Add, if necessary, a reference to some agreement in the articles, as in Form 85.]* (2) To carry on the business of booksellers, stationers, publishers, and restaurant proprietors, and to carry on the business of booking seats at theatres and other places of entertainment.

[Add selection of common forms, Forms 97 et seq.]

Form 172.

School or
college.

(1) To establish and carry on at — a school *[or, college]* where students may obtain on moderate terms a sound religious, classical, mathematical, and general education of the highest order. *[If necessary, add a reference to some agreement in the articles, as in Form 85.]* (2) To provide for the delivery and holding of lectures, exhibitions, public meetings, classes, and conferences calculated

directly or indirectly to advance the cause of education, whether **Form 172.**
 general, professional, or technical.

Add selection of common forms, Forms 97 et seq.

A considerable number of school and college companies have been incorporated. Sometimes they obtain a licence from the Board of Trade to register without the word "limited" and with a more suitable name than "company." See *supra*, pp. 498 et seq.

(1) [If necessary, insert one of Forms 85 to 96.] (2) The accumulation of capital by means of monthly subscriptions or otherwise from members, and also by borrowing money from members or any other persons on such security and on such terms as may from time to time be arranged. (3) To advance or lend any of the aforesaid capital or other moneys of the company for the time being on the security of freeholds, leaseholds, bills of exchange, promissory notes, bonds, stock-in-trade, chattels, and other property, real or personal. (4) To acquire any real and personal property which the company may think it desirable to acquire by way of investment, or with a view to re-sale or otherwise, and in particular any freeholds, leaseholds, mortgages, shares and securities. **Form 173.**

Loan club.

Add selection of common forms, Forms 97 et seq.

A great many loan clubs have been formed within recent years. In Nottingham there seems to be a mania for them. In most cases they are formed as unlimited companies with a share capital not of any fixed amount, divided into shares of, say, 100l., to be paid by monthly instalments. The articles generally authorize the directors to make general rules as to the payment of entrance fees, loans, repayments, fines, &c., and declare that they are to be binding. The common plan is to have a monthly meeting for payment of subscriptions, and advances are made in accordance with lots drawn, provided sufficient security is found. Many of these clubs are held at inns or taverns, and are named accordingly, e.g., "The Unicorn Inn Third Thursday Mutual Loan Club." An unlimited company, if its memorandum and articles so provide, may allow a member to withdraw. See *Borough Commercial Soc.*, (1893) 2 Ch. 242.

As to the necessity for registering such a company under the Money Lenders Act, 1900, see notes to Form 138, *supra*.

(1) To purchase, take on lease or in exchange, or otherwise acquire any lands and buildings in the county of — or elsewhere, and any estate or interest in, and any rights connected with, any such lands and buildings [and in particular to acquire a certain piece or parcel of land and buildings situate, &c., and with a view thereto to enter into the agreement, &c., as in Form 85]. (2) To develop and turn to account any land acquired by or in which the company is interested, and in particular by laying out and preparing the same for building purposes, constructing, altering, pulling down, decorating, maintaining, **Form 174.**

**Building
 estate.**

Form 174. furnishing, fitting up, and improving buildings, and by planting, paving, draining, farming, cultivating, letting on building lease or building agreement, and by advancing money to and entering into contracts and arrangements of all kinds with builders, tenants, and others. (3) To construct, maintain, improve, develop, work, control, and manage any waterworks, gasworks, reservoirs, roads, tramways, electric power, heat and light supply works, telephone works, hotels, clubs, restaurants, baths, places of worship, places of amusement, pleasure grounds, parks, gardens, reading rooms, stores, shops, dairies, and other works and conveniences which the coy may think directly or indirectly conducive to these objects, and to contribute or otherwise assist or take part in the construction, maintenance, development, working, control, and management thereof. (4) To carry on all or any of the following businesses, namely, builders and contractors, decorators, merchants, and dealers in stone, sand, lime, bricks, timber, hardware, and other building requisites, brick and tile and terra-cotta makers, jobbers, carriers, licensed victuallers, and house agents. (5) To lend money, either with or without security, and generally to such persons and upon such terms and conditions as the coy may think fit, and in particular to persons undertaking to build on or improve any ppty in which the coy is interested, and to tenants, builders, and contractors. (6) [Form 110.] (7) To undertake and execute any trusts the undertaking of which may seem to the coy desirable.

[Add selection of common forms, Forms 97 et seq.]

Form 175.

Land and
building
company.

(1) To purchase for investment or resale, and to traffic in land and house and other ppty of any tenure and any interest therein, and to create, sell, and deal in freehold and leasehold ground rents, and to make advances upon the security of land or house or other ppty, or any interest therein, and generally to deal in, traffic by way of sale, lease, exchange, or otherwise with land and house ppty and any other ppty whether real or personal.

Add selection of common forms, Forms 97 et seq.]

Form 176.

City
buildings.

1. To acquire by purchase, lease, exchange, or otherwise, land, buildings and hereditaments of any tenure or description situate in the City of — and its neighbourhood, and any estate or interest therein, and any rights over or connected with land so situate, and to turn the same to account as may seem expedient, and in particular by preparing building sites, and by constructing, reconstructing, altering, improving, decorating, furnishing, and maintaining offices, flats, houses, factories, warehouses, shops, wharves, buildings, works and conveniences of all kinds, and by consolidating, or connecting, or subdividing properties, and by leasing and disposing of the same. [Add,

if suitable, a reference to some agreement in the articles, as in Form 176.
Form 85.]

2. To manage land, buildings, and other ppty situate as aforesaid, whether belonging to the coy or not, and to collect rents and income, and to supply to tenants and occupiers, and others, refreshments, attendance, messengers, light, waiting rooms, reading rooms, meeting rooms, lavatories, laundry conveniences, electric conveniences, stables, and other advantages.

3. To acquire and take over any business or undertaking carried on upon, or in connection with, any land or building which the coy may desire to acquire as aforesaid, or become interested in, and the whole or any of the assets and liabilities of such business or undertaking, and to carry on the same, or to dispose of, remove, or put an end thereto, or otherwise deal with the same as may seem expedient.

4. To establish and carry on, and to promote the establishment and carrying on, upon any ppty in which the coy is interested, of any business which may be conveniently carried on upon or in connection with such ppty, and the establishment of which may seem calculated to enhance the value of the coy's interest in such ppty, or to facilitate the disposal thereof.

5. To advance and lend money to builders, tenants, and others who may be willing to build on or improve any land or buildings in which the coy is interested, and generally to advance money to such persons and on such terms as may be arranged.

Add selection of common forms, Forms 97 et seq.]

(1) To purchase or otherwise acquire any landed ppty in the State of — in the United States of America, and in particular an estate known as, &c. (2) To develop the resources of and turn to account the lands, buildings, and rights for the time being of the coy in such manner as the coy may think fit, and in particular by clearing, draining, fencing, planting, building, improving, farming, grazing, mining, and by promoting immigration, establishing towns, villages, and settlements. (3) To carry on the business of farmers, graziers, meat and fruit preservers, brewers, planters, miners, metallurgists, quarry owners, brickmakers, builders, contractors for the construction of works, both public and private, merchants, importers and exporters, printers, publishers, bankers, ship builders, ship owners, brokers, and any other businesses which may seem calculated directly or indirectly to develop the coy's ppty. (4) To construct, carry out, support, maintain, improve, manage, work, operate, control, and superintend railways, tramways, &c. [see Form 142, cl. 2], hotels, exchanges, churches, chapels, parks, schools, museums, places of recreation, racecourses, baths, washhouses, and any other works and conveniences which may seem directly or indirectly conducive to any

Form 177.

Colonization
and land.

Form 177. of these objects, and to contribute to or otherwise aid or take part in the construction, carrying out, support, maintenance, improvement, management, working, operating, controlling, and superintending the same. (5) To lend money and other ppty, to guarantee the performance of contracts and obligations of all kinds, to act as agents in the management, sale, and purchase of ppty, and generally to transact business as capitalists, bankers, and financiers. (6) To carry on and transact any other businesses and operations, manufacturing, commercial, or otherwise, except the issuing of policies of assurance on human life, which the coy may think directly or indirectly conducive to any of its objects, or capable of being conveniently carried on in connection therewith.

Add selection of common forms, Forms 97 et seq.

Form 178.

**African
concessions.**

1. To acquire the concessions granted to --- by ---, King of the --- nation, and, with a view thereto, to enter into the agreement referred to in clause 3 of this coy's arts of assn. and to carry the same into effect with or without modification.

2. To acquire from any other sovereign, state, or authorities in Africa or elsewhere any concessions, grants, decrees, rights, powers and privileges whatsoever, which may seem to the coy capable of being turned to account, and to work, develop, carry out, exercise and turn to account the same.

3. To prospect, examine, and explore any territories and places in Africa and elsewhere, and to employ and equip expeditions, commissions, experts and other agents.

4. To develop the resources of and turn to account any lands and any rights over or connected with land belonging to or in which the coy is interested, and in particular by clearing, draining, fencing, planting, cultivating, building, improving, farming, irrigating, grazing, and by promoting immigration and emigration and the establishment of towns, villages, and settlements.

5. To carry out, establish, construct, maintain, improve, manage, work, control, and superintend any roads, ways, tramways, railways, bridges, harbours, reservoirs, watercourses, wharves, embankments, fortifications, hydraulic works, telegraphs, telephones, saw-mills, smelting works, furnaces, factories, warehouses, hotels, viaducts, exchanges, mints, transport and postal arrangements, stores, shops, churches, chapels, stations, and other works and conveniences, and to contribute to, or assist in the carrying out, establishment, construction, maintenance, improvement, management, working control, or superintendence of the same.

6. To govern any territories in Africa, and to make and enforce such laws and ordinances as may seem expedient, and to provide for the administration of justice, and for the establishment and maintenance of good order, and for the welfare of the inhabitants.

and for the advancement of trade and commerce, and for the protection of such territories from invasion or attack. **Form 178.**

7. To promote the abolition of slavery, and the advance of civilization.

8. To negotiate, arrange, and effect treaties and arrangements with any chiefs, rulers, or authorities, supreme, local, or otherwise, in Africa and elsewhere, and to subsidise any such chiefs, rulers, or authorities.

9. To grant monopolies, patents, and other special rights and privileges, whether as regards the carrying on of any particular trade or business, or the use of any invention or process, or the growth, preparation, or manufacture or sale of any particular article, or as regards any of these operations or matters, and to grant the same for a term of years, or in perpetuity or otherwise.

10. To buy, sell, import, export, manipulate, prepare for market, and deal in merchandise of all kinds, and generally to carry on business as merchants, importers, and exporters.

11. To carry on business as miners, store-keepers, farmers, cattle breeders, stockmen, carriers, provision preservers, mechanical engineers, builders, and contractors.

12. To promote the establishment, carrying on, and development of trades and businesses of all kinds within any territories in which the coy is interested, and to subsidise, grant special rights to, or otherwise assist, support, protect, and encourage all persons and cos engaged or proposing to engage therein.

13. To undertake, transact, and execute all kinds of agency business, and also trusts of all kinds.

14. To carry on and undertake all kinds of guarantee and insurance business (except life assurance), and all kinds of banking and financial business and operations.

15. To form, constitute, and promote cos, syndicates, associations, and undertakings of all kinds.

16. To enter into partnership or into any arrangements for sharing profits, union of interests, reciprocal concessions, or co-operation with any partnership, person, or coy, and either in perpetuity or otherwise.

17. To lend or advance money, and to issue or place any stocks, bonds, shares, or securities of any government, sovereign, state, or coy.

18. To make donations to such persons and in such cases as may seem expedient, and to subscribe for any purposes, whether charitable or benevolent, or for any public, general, or useful object.

19. Generally to undertake and carry out any operations or transactions whatsoever (except the issuing of policies of assurance on human life) which may lawfully be undertaken and carried out by capitalists, and which the coy may think it expedient to undertake and carry out.

[Add selection of common forms, Forms 97 et seq.]

Form 178a.

Quarry
masters and
paviors.

(1) To carry on business as quarry masters and stone merchants, and to buy, sell, get, work, shape, hew, carve, polish, crush, and prepare for market or use stone of all kinds.

(2) To carry on business as road and pavement makers and repairers and manufacturers of and dealers in lime, cement, mortar, concrete, and building materials of all kinds, and as builders and contractors for the execution of works and buildings of all kinds in the construction of which stone is required.

Add selection of common forms, Forms 97 et seq.

Form 179.

Mining.

(1) To purchase, take on lease, or otherwise acquire, any mines, mining rights, and metalliferous land in the county of — [or, the kingdom of —], or elsewhere, and any interest therein, and to explore, work, exercise, develop, and turn to account the same.

Add, if suitable, a reference to some agreement in the articles, as in Form 85.] (2) To crush, win, get, quarry, smelt, calcine, refine, dress, amalgamate, manipulate, and prepare for market, ore, metal, and mineral substances of all kinds, and to carry on any other metallurgical operations which may seem conducive to any of the coy's objects. (3) To buy, sell, manufacture, and deal in minerals, plant, machinery, implements, conveniences, provisions, and things capable of being used in connection with metallurgical operations, or required by workmen and others employed by the coy. (4) To construct, carry out, maintain, improve, manage, work, control, and superintend any roads, ways, tramways, railways, bridges, reservoirs, water-courses, aqueducts, wharves, furnaces, saw-mills, crushing works, hydraulic works, electrical works, factories, warehouses, shops, and other works and conveniences which may seem directly or indirectly conducive to any of the objects of the coy, and to contribute to, subsidise, or otherwise aid or take part in any such operations.

Add selection of common forms, Forms 97 et seq.]

Form 179a.

Petroleum.

(1) *[If necessary, insert one of the Forms 85 to 96.]*

(2) To carry on the business of extracting, pumping, drawing, transporting, and purifying and dealing in petroleum and other mineral oils.

(3) To search for, inspect, examine and explore, work, take on lease, purchase, or otherwise acquire lands and places which may seem to the coy capable or possibly capable of affording a supply of mineral oil, and to establish, utilize and turn to account pumping stations, pipe-lines and other works and conveniences suitable for the purpose.

Add selection of common forms, Forms 97 et seq.]

(1) To acquire gold mines, mining rights and auriferous land [in **Form 180.**
Western Australia, or elsewhere in Australasia], and any interest (Gold mining.
therein, and in particular to acquire the mines known as, &c., situate
&c., and with a view to the acquisition of such last-mentioned mines, to
adopt and carry into effect, with or without modification, the agreement
referred to in clause 3 of the company's articles of association.

(2) To search for, win, get, quarry, reduce, amalgamate, dress,
refine and prepare for market, auriferous quartz and ore, and other
mineral substances (whether auriferous or not) and precious stones,
and generally to carry on any metallurgical operations which may
seem conducive to any of the company's objects.

(3) To buy, sell, refine and deal in bullion, specie, coin and precious
metals.

[Add selection of common forms, *Forms 97 et seq.*]

In the case of mining companies it is very common to take still wider powers,
e.g., to clear lands, make roads and other public works, open stores, &c., and
to insert paragraphs 2, 4, 5, 10, 11, 13 of Form 178, p. 555, *supra*.

(1) [If necessary, insert one of *Forms 85 to 96.*]

(2) To carry on the trades or businesses of iron masters, steel
makers, steel converters, colliery proprietors, coke manufacturers,
miners, smelters, engineers, tin-plate makers and iron founders, in all
their respective branches.

(3) To search for, get, work, raise, make merchantable, sell and
deal in iron, coal, ironstone, brick-earth, bricks, and other metals,
minerals and substances, and to manufacture and sell patent fuel.

(4) To carry on business as manufacturers of chemicals and
manures, distillers, dye makers, gas makers, metallurgists, and
mechanical engineers, and to carry on, &c. [Form 97].

[Add selection of common forms, *Forms 97 et seq.*]

Form 181.

Coal, iron,
and steel.

(1) [If necessary, insert one of *Forms 85 to 96.*] (2) To purchase,
charter, hire, build, or otherwise acquire, steam and other ships or
vessels, with all equipments and furniture, and to employ the same
in the conveyance of passengers, mails, troops, munitions of war, live
stock, meat, corn and other produce, and of treasure and merchandise
of all kinds, between such ports in any part of the world as may seem
expedient, and to acquire any postal subsidies. (3) To buy, sell,
prepare for market, and deal in coal, timber, live stock, meat, and
other merchandise or produce. (4) To carry on the business of
merchants, carriers by land and water, shipowners, warehousemen,
wharfingers, barge owners, lightermen, forwarding agents, under-
writers and insurers of ships, goods and other property, and ice merchants
and refrigerating store keepers.

[Add selection of common forms, *Forms 97 et seq.*]

Form 182.

Shipowners.

Form 183.Single
steamship.

(1) To purchase or otherwise acquire the [steam] ship "Strand" [or a steamship now in course of construction at — and intended to be called], together with all requisite equipment for the same [and with a view thereto to enter into the agreement, &c. *Form 85*].

(2) In the event of the loss or sale of the sd vessel or any substituted vessel, to build, purchase, contract for, or otherwise acquire from time to time one or more other vessels or shares therein, but so that the coy shall not work, trade with, or carry on the business of a shipowner with more than one vessel at one time, and in any such case the objects herein mentd shall apply to any vessel from time to time so purchased or acquired.

(3) To charter, hire, equip, load on commission, or otherwise use, repair, let out on hire, and trade with the sd vessel or substituted vessel.

(4) To purchase goods, produce, cattle and other live stock, and any other merchandise whatsoever, for the purpose of freighting the sd vessel or substituted vessel, and to dispose of the same by sale or otherwise.

(5) To carry on the business of a shipowner in all its branches with respect to the sd vessel or substituted vessel only.

(6) To employ as ship's husband and managing agent of and for the sd vessel or substituted vessel, any person, firm, or coy, whether limtd or not, and that although he or they may not be entld to any share or interest in the vessel in question, or in the coy.

(7) To effect all such insurances in relation to the carrying on of the coy's business and any risks incidental thereto as may seem expedient, and, if thought fit, to join or become a member of any mutual insurance coy.

(8) To subscribe to any assn, institution, or coy calculated to benefit the coy, or persons employed by the coy, or persons having dealings with the coy.

[Add selection of common forms, *Forms 97 et seq.*]

The formation of "single ship" companies has made extensive progress at the chief ports. A well-known Liverpool firm were among the first to set the example. In the month of May, 1880, they transferred eighteen vessels to as many private companies, and since then large numbers of other firms and individuals have followed this example. Very commonly the company is formed for the purpose of buying a ship which is in course of construction. In some cases the capital is divided into sixty-four shares, but 107 shares are frequently adopted, and are found more convenient. All the shares, except, perhaps, a few for extra subscribers, are issued to the owner or owners as the consideration for the transfer or sale of the ship. The owner or owners are generally appointed manager or managers, and the control of the company is vested in them subject to general meetings of the members. Sometimes directors are appointed. The name is usually framed thus, "The Egeria Steamship Company, Limited," or "The Ship Carmen, Limited." (See *supra*, p. 450.) It seems probable that these private companies for working single ships will be generally adopted.

Their advantages are obvious, inasmuch as they invest the members with the clearly-defined powers and privileges of members of a statutory company, and relieve them from the difficulties and uncertainties incident to the ownership in common of a ship. Moreover, they relieve the members from many onerous liabilities in which they might be involved by the negligence, misconduct, or improvidence of their servants.

An English company may be the owner of a British ship, though some or even all the shareholders are foreigners. *Reg. v. Arnaud*, 9 Q. B. 806; and see *Princess of Reuss v. Bos*, L. R. 5 H. L. 176.

Inconvenience has in some cases been caused by the objects being too limited. *e.g.*, after conversion of several ships, it was found that the funds of one company could not, as desired, be lent to another. No *ad valorem* duty is payable on the conveyance of a ship or on an agreement for sale of it. See p. 338, *supra*.

But a majority of the co-owners of a ship have no right to change the character of the ownership without the consent of all parties, *e.g.*, by turning the co-ownership into a limited company, and if they do so a minority of holders of shares in the ship may obtain an order for sale. See *The Hereward*, (1895) P. 284.

Form 183.

1) To purchase, take in exchange, or otherwise acquire and hold ships and vessels, or any shares or interests in ships or vessels, and also shares, stocks, and securities of any cos possessed of, or interested in, any ships or vessels, and to maintain, repair, improve, alter, sell, exchange, or let out to hire or charter, or otherwise deal with and dispose of any ships, vessels, or shares, or securities aforesaid.

Form 184.

General
shipowners.

(2) To carry on all or any of the businesses of shipowners, ship-brokers, insurance brokers, managers of shipping ppty, freight contractors, carriers by land and sea, barge owners, lightermen, forwarding agents, ice merchants, refrigerating storekeepers, warehousemen, wharfingers, and general traders.

(3) To insure with any other coy or person against losses, damages, risks, and liabilities of all kinds which may affect this coy, and also to carry on the business of marine insurance and marine accidental insurance in all its respective branches, and to effect re-insurance and counter insurance.

Add selection of common forms, Forms 97 et seq.]

(1) *If necessary, insert one of the Forms 85 to 96.]*

Form 184a.

Lines of
steamships.

(2) To establish and maintain lines of steam and other ships between the ports of — and —, and any other ports which may seem to the company expedient, and generally to transport passengers, mails, troops, munitions of war, live stock, meat, corn and other produce, and of treasure and merchandise of all kinds, and to purchase, charter, hire, build, or otherwise acquire ships and vessels accordingly, and to obtain postal subsidies and to comply with the terms on which the same are granted.

Add selection of common forms, Forms 97 et seq.]

Form 185. (1) *[If necessary, insert one of Forms 85 to 96.]*

Carriers.

(2) To carry on all or any of the following businesses, that is to say, general carriers, railway and forwarding agents, warehousemen, bonded carmen, and common carmen, and any other businesses which can conveniently be carried on in connection with the above.

[Add selection of common forms, Forms 97 et seq.]

Form 186.

Meat and
cattle
importers.

(a) To acquire and amalgamate the undertakings of, &c., and with a view thereto to adopt, &c. *[Form 85].*

(b) To carry on the business of importers of meat, live cattle, and sheep, and also that of dealers in cattle and sheep generally, and in all branches of such respective trades or businesses.

(c) To buy and sell by wholesale or retail in the United Kingdom, the Empire of — or elsewhere, all kinds of meat, and generally to carry on the trade or business of a meat salesman in all its branches.

(d) To acquire by purchase or otherwise estancias, ranches, and sheep farms, and to carry on the trades or businesses of cattle rearers and sheep farmers, fellmongering, tanning, and warehousing generally, preserved meat manufacturers, dealers in hides, fat, tallow, grease, offal, and other animal products.

(e) To erect and build abattoirs, freezing-houses, warehouses, sheds and other buildings necessary or expedient for the purposes of the coy.

(f) To purchase, charter, hire, build, or otherwise acquire, steam and other ships or vessels, and to employ the same in the conveyance of passengers, mails, and merchandise of all kinds, and to carry on the business of ship owners, barge owners, and lightermen in all its branches.

[Add selection of common forms, Forms 97 et seq.]

Form 186a.

Colour process
engravers, &c.

To carry on the business of colour process and half-tone engravers, stationers, printers, lithographers, stereotypers, electric photographic printers, photo-lithographers, engravers, die-sinkers, advertising agents, traders, draughtsmen, ink manufacturers, &c.

[Add selection of common forms, Forms 97 et seq.]

Form 186b.

Shoemakers.

To carry on business as boot and shoe manufacturers and dealers, leather merchants and manufacturers, leather dressers, tanners, dealers in hides, skins and other materials, manufacturers of and dealers in rubber goods.

[Add selection of common forms, Forms 97 et seq.]

(1) [If necessary, insert one of Forms 85 to 96.]

Form 187.

(2) To carry on all or any of the businesses of importers, exporters, refrigerators, shipowners, shipbuilders, charterers of ships or other vessels, warehousemen, merchants, ship and insurance brokers, carriers, forwarding agents, wharfingers, sheep farmers, stock owners and breeders, pasturers, graziers, manufacturers of extract of meat, preservers and packers of provisions of all kinds, brewers, metallurgists, quarry owners, brickmakers, wool washers, tallow melters, tanners, artificial manure makers, coopers, carpenters, and mechanical engineers.

Colonial
importers.

Add selection of common forms, Forms 97 et seq.]

(1) [If necessary, insert one of Forms 85 to 96.]

Form 188.

(2) To carry on the business of manufacturers of and dealers in anatomical, orthopaedic, and surgical appliances of all kinds.

Surgical
instrument
makers.

(3) To carry on the businesses of bootmakers, staymakers, corset makers, artificial eye and limb makers, bandage makers, crutch, chair, and stretcher makers, carriage makers, ambulance makers, chemists and druggists, and providers of all requisites for hospitals, patients, and invalids.

Add selection of common forms, Forms 97 et seq.

(1) [If necessary, insert one of Forms 85 to 96.]

Form 189.

(2) To carry on the businesses of chemists, druggists, drysalter, oil and colour men, importers and manufacturers of and dealers in pharmaceutical, medicinal, chemical, industrial, and other preparations and articles, compounds, cements, oils, paints, pigments and varnishes, drug, dyeware, paint and colour grinders, makers of and dealers in proprietary articles of all kinds, and of electrical, chemical, photographic, surgical, and scientific apparatus and materials.

Chemists.

(3) To buy, sell, manufacture, refine, manipulate, import, export, and deal in all substances, apparatus, and things capable of being used in any such business as aforesaid, or required by any customers of or persons having dealings with the company, either by wholesale or retail.

Add selection of common forms, Forms 97 et seq.]

(1) [If necessary, insert one of Forms 85 to 96.]

Form 190

(2) To carry on the business of jobmasters, omnibus, cab, fly and other public or private conveyance proprietors, livery-stable keepers, horse, omnibus, carriage, cab, fly and cart dealers, omnibus, coach, carriage, cab, fly, cart or other vehicle manufacturers and repairers, coach-house and stable builders and horse breeders and dealers, farmers, graziers, dealers in corn, straw, fodder of all kinds, carriers, and saddlery and harness makers in all their respective branches.

Omnibus pro-
prietors, &c.

Form 190.

3. To manufacture, buy, sell, exchange, alter or improve and deal in vehicles of any kind so constructed as to progress by means of automatic power, whether by means of electricity, steam, gas, oil, or otherwise.

4. To manufacture, buy, sell, exchange, alter, improve, manipulate, prepare for market, and otherwise deal in all kinds of plant, machinery, apparatus, tools, utensils, substances, materials, and things necessary or convenient for carrying on any of the above specified businesses or proceedings, or usually dealt in by persons engaged in the like.

Form 190a.

Motor
omnibuses.

(1) [*If necessary, insert one of Forms 85 to 96.*]

(2) To carry on in the City of — and elsewhere in the kingdom of — the business of running motor omnibuses of all kinds and on such lines as the company may think fit, and to transport passengers and goods, and generally to carry on the business of common carriers.

(3) To carry on the business of manufacturers of motor omnibuses, and generally of all kinds of omnibuses and vehicles for the transport of persons and goods, whether propelled or moved by electricity, steam, oil, vapour, or other motive or mechanical power.

(4) To carry on the business of mechanical engineers in all its branches and carriage builders in all their respective branches.

Add selection of common forms, Forms 97 et seq.]

Form 191.

Patent
medicines.

(1) To acquire and take over as a going concern the undertaking of —, and all or any of its assets and liabilities, and in particular the recipes and full information as to the processes of manufacturing, and the right to manufacture and deal in certain medicinal preparations known as, &c., and with a view thereto, &c.

(2) To carry on the manufacture and sale of the said medicines and preparations, and generally to carry on the business of manufacturers, buyers, and sellers of and dealers in all kinds of medicines and medical preparations and drugs whatsoever.

(3) To carry on all or any of the businesses of chemists, druggists, chemical manufacturers, and dealers, drysalts, importers, and manufacturers of and dealers in pharmaceutical and medicinal preparations.

(4) To manufacture, buy, sell, and deal in mineral waters, wines, cordials, liqueurs, soups, broths, and other restoratives or food, specially suitable or deemed to be suitable for invalids and convalescents.

(5) To assist, promote, establish, and contribute to, manage, control or support sick funds, and any associations or institutions for providing, upon any terms or conditions, medicines, drugs, medical

and surgical preparations and apparatus, and restoratives or food used during sickness or illness.

(6) To adopt such means of making known the products of the coy as may seem expedient, and in particular by advertising in the Press, by circulars, by purchase and exhibition of works of art or interest, by publication of books and periodicals, and by granting prizes, rewards and donations.

(7) To construct, maintain, and alter any building or works necessary or convenient for the purposes of the coy.

Add selection of common forms, Forms 97 et seq.

As to the rights of co-owners to use secret process, see *Heyl-Dia v. Edmunds*, W. N. (1899) 222.

(1) [If necessary, insert one of the Forms 85 to 96.]

(2) To manufacture, buy, sell, prepare for market, and deal in foods of all kinds suitable for infants and invalids, and in particular, condensed milk, cocoa.

Add selection of common forms, Forms 97 et seq.

Form 191.

Form 191a.

Infant and invalid food.

1. [If necessary, insert one of Forms 85 to 96.]

2. To cultivate tea, coffee, cinchona, rubber and other produce, and to carry on the business of tea planters in all its branches, to carry on and work the business of cultivators, winners and buyers of every kind of vegetable, mineral, or other produce of the soil, to prepare, manufacture and render marketable any such produce, and to sell, dispose of and deal in any such produce, either in its prepared, manufactured or raw state, and either by wholesale or retail.

3. To acquire the business and all or any part of the assets and ppty of any other coy.

[Add selection of common forms, Forms 97 et seq.]

Form 192.

Tea, &c. planters.

(1) [If necessary, insert one of the Forms 85 to 96.]

(2) Generally to purchase, take on lease, or otherwise acquire, hold and work any lands producing rubber trees, or suitable for the planting, cultivation and growth of rubber trees, and any concessions, rights, powers, and privileges over any such lands.

(3) To carry on the business of planters and cultivators of rubber plants, and any other plants producing anything of a similar character.

(4) To carry on business as tea-planters, cinchona planters, &c.

[Add selection from Forms 177 and 178, and also selections from the common Forms 297 et seq.]

Form 192a.

Rubber.

Form 193.

Saw mills.

1. [If necessary, insert one of Forms 85 to 96.]
2. To carry on business as timber merchants, saw-mill proprietors, and timber growers, and to buy, sell, grow, prepare for market, manipulate, import, export, and deal in timber and wood of all kinds, and to manufacture and deal in articles of all kinds in the manufacture of which timber or wood is used, and to carry on business as shipowners and carriers by land and sea, and, so far as may be deemed expedient, the business of general merchants, and to buy, clear, plant, and work timber estates, and to carry on any other businesses which may seem to the coy capable of being conveniently carried on in connection with any of the above, or calculated directly or indirectly to render profitable or enhance the value of the coy's ppty or rights for the time being.

[Add selection of common forms, Forms 97 et seq.]

Form 194.

American railroad.

- (1) To purchase or otherwise acquire the whole or any of the ppty and rights formerly possessed by the N. Railroad Coy, but recently sold under certain decrees and orders of the Circuit Court of the United States, for — in a suit, &c., and with a view thereto to enter into an agreement [Form 85].
- (2) To equip, work, maintain, improve, and operate the sd railroad and any other railroads and tramways which the coy may be possessed of or interested in, or over which it may have running powers.
- (3) To construct, purchase, take on lease, or otherwise acquire, any railways or tramways, which may seem capable of being worked in connection with any of the coy's lines for the time being, or calculated directly or indirectly to benefit the coy, and to acquire rights over or in connection with any such railways or tramways.
- (4) To carry on the business of a telegraph and telephone coy in their respective branches.
- (5) To carry on the business of rolling stock manufacturers, mechanical engineers, shipowners, shipbuilders, carriers by land or water, warehousemen, forwarding agents, and insurance agents against loss or damage to goods by accident or otherwise.
- (6) [Add, if desired, the clauses 1, 2 and 3 of Form 178, and some of the clauses of Form 142.]
- (7) To improve, work, and facilitate the navigation of any rivers, lakes, canals, and other waters.

[Add selection of common forms, Forms 97 et seq.]

When a foreign company, e.g., a railway company, gets into difficulties, it is not at all uncommon to form an English company to acquire and work the undertaking. In some cases where this has been done the line has been bought up in the first instance by a financier, who subsequently has sold his bargain to the company in consideration of deferred shares. Occasionally it is found desirable to form a local company to work the line, all the shares being held by nominees of the English company. Sometimes the English company is formed in the first place to acquire certain securities of the foreign company.

and then to acquire the line by foreclosure. The above form can readily be adapted to a company formed to acquire a concession, *e.g.*, "To acquire and undertake a concession granted by the Republic of — for the construction of a railway from — to —, and with a view, &c., and to carry out and perform the works and obligations specified in the said concession, with or without modification."

If the foreign company has been acting under statutory powers, difficulties may arise as to the transfer of such powers.

Form 194.

(1) To construct, purchase, lease, or otherwise acquire tramways and light railways in the county of —, and in the vicinity thereof, and in particular to enter into and carry into effect the agreement referred to in clause 3 of the company's articles of association.

Form 195.**Tramways.**

2) To equip and maintain and work by electricity, steam, horse, or other mechanical power all tramways and railways belonging to the company, or in which the company may be interested.

(3) To carry on the business of tramway, railway, omnibus, and van proprietors and carriers of passengers and goods, and of manufacturers of and dealers in tramways, carriages, trucks, locomotives, accumulators, dynamos, and other chattels and effects and conveniences required for making, maintaining, equipping and working tramways.

(4) To carry on in the town of — and, and in the vicinity thereof, the business of suppliers of electricity, whether for the purpose of light, heat, motive power, telephonic, telegraphic, industrial or other purposes, and generally to provide, work, maintain, and carry out all necessary cables, wires, accumulators, lamps, exchanges, telephones, and apparatus connected with the generation and distribution, supplying, accumulation and employment of electricity.

(5) To carry on any other business, manufacturing or otherwise (except the issuing of policies of assurance on human life), which may seem to the company capable of being conveniently, &c.

(6) To enter into contracts with any other company or persons as to interchange of traffic, running powers, or otherwise, which the company may think expedient.

Add selection of common forms, Forms 97 et seq.

Under the Tramways Act, 1870 (33 & 34 Vict. c. 78), the Board of Trade can make provisional orders in certain cases authorizing the construction of tramways. One of the rules of the Board provides that if the promoters require incorporation, they must register themselves under the Companies Act, 1908, and many companies have been registered under this rule. The rules can be obtained from the publishers of this work, and forms of provisional orders will be found in the Schedule to the Confirmatory Acts passed each year. And see Wheeler's Practice of Private Bills, 269.

Tramway undertakings can be sold with the sanction of the Board of Trade. Sects. 43 and 44 of the Act of 1870. *Hartlepool Electric Tramways Co. v. West Hartlepool Corp.*, 9 L. G. R. 1095. But it has now been held by the

Form 195. Court of Appeal, overruling a series of decisions, that a tramway company cannot delegate its power of sale to its debenture holders. *Marshall v. South Staffordshire Tramways Co.*, (1895) 2 Ch. 36.

And on the same principle—that an undertaking sanctioned by Parliament as one of public utility must not be interfered with or destroyed—there is no power to appoint a receiver and manager. *Gardner v. London, Chatham & Dover Co.*, 2 Ch. 202, applies.

Form 196.

Gasworks
company.

(1) *[Insert, if necessary, one of Forms 85 to 96.]* (2) To manufacture, sell, and supply light in the town of —, and elsewhere in the parishes of, &c., in the county of —, and to carry on the business of a gasworks coy in all its branches. (3) To deal with, manufacture, and render saleable, coke, coal-tar, pitch, asphaltum, ammoniacal liquor, and other residual products obtained in the manufacture of gas. (4) To construct, manufacture, and maintain works for holding, receiving, and purifying gas, and all other buildings and works, meters, pipes, fittings, machinery, apparatus, and appliances convenient or necessary for the purposes of the coy. (5) To manufacture, buy, sell, let on hire, and deal in, stoves, engines, and other apparatus and conveniences which may seem calculated, directly or indirectly, to promote the consumption of gas.

Add selection of common forms, Forms 97 et seq.

The Gas and Water Works Facilities Act, 1870, enables the Board of Trade in certain cases to make provisional orders, authorizing the construction of gas and water works and the acquisition of land, &c. One of the rules of the Board is—as in the case of tramways, *supra*—that if the promoters desire incorporation, they must register themselves under the Companies Act, 1908, and a considerable number of companies have been formed in compliance with this rule. Copies of the rules can be obtained from the publishers of this work, and forms of orders can be found in the schedule to the Confirmatory Acts passed each year. See, also, the Gas and Water Works Facilities Act, 1870, Amendment Act, 1873 (36 & 37 Vict. c. 89), as repealed by S. L. Rev. Act, 1882; and see 38 & 39 Vict. c. 55, and 45 & 46 Vict. c. 242; also Michael and Will, 5th ed. (1901), and Reeson's Gas and Water, ed. 1902.

It is now generally thought desirable to take powers to supply electric light as well as gas. See Form 147.

Form 197.

Exchange.

(1) To provide, regulate, and maintain a suitable building, room, or rooms, for a [—] exchange, in the city of — [and with a view thto to enter into the agreemt, &c., *Form 85*]; to adjust controversies between its members: to establish just and equitable principles in the — trade (hmftr called the trade): to maintain uniformity in rules, regulations, and usages of the trade; to adopt standards of classification in the trade; to acquire, preserve, and disseminate useful information connected with the trade throughout all markets: to decrease the local risks attendant upon the business.

and generally to promote the trade of the city of . . . , increase its amount, and augment the facilities with which it may be conducted.

(2) To communicate with chambers of commerce and other mercantile and public bodies throughout the world, and concert and promote measures for the protection of the trade and persons engaged therein.

(3) To subscribe to, become a member of, subsidise, and co-operate with, any other association, whether incorporated or not, whose objects are altogether, or in part, similar to those of this coy, and to procure from, and communicate to, any such association, such information as may be likely to forward the objects of the society.

Add selection of common forms, Forms 97 et seq.

Form 197.

To establish, maintain, and conduct a club 'of a non-political character' for the accommodation of members of the coy and their friends, and to provide a club-house and other conveniences, and generally to afford to members and their friends all the usual privileges, advantages, convenience, and accommodation of a club. *[Add reference to an agreement, if necessary, as in Form 85.]*

Form 198.

Club.

Add selection of common forms, Forms 97 et seq.]

A club can be formed as a company limited by shares or by guarantee. The latter form is the more convenient. The necessary capital can be provided out of entrance fees or by way of loan.

Sometimes a club is formed on the footing that the members of the company are to be the members of the club, as in the above form, and sometimes on the footing that the company shall own the club house, and that the club shall be a separate unincorporated association—a members' club. In the past, one reason for making the club a separate association was, that the licensing difficulty was thus avoided. See *Graff v. Evans*, 8 Q. B. D. 373, in which it was held that a *bona fide* unincorporated members' club was not bound to take out a licence for the sale of intoxicating liquors on the ground that the members were joint holders of the property, and that where a member took and paid for goods the transaction was not a sale, as he was himself a part owner of the goods. On the other hand, it was held that a proprietary club required a licence. *Bouryer v. Percy Supper Club*, (1903) 2 Q. B. 154; *National Sporting Club v. Cope* (1900), 48 W. R. 446. But now, by the Licensing Act, 1902 (2 Edw. 7, c. 24), Pt. III., all clubs in which intoxicating liquor is supplied to the members or their guests have to be registered under the Act, and there are heavy penalties for supplying or keeping liquor in an unregistered club. And by sect. 24, intoxicating liquor shall not be supplied in a club for consumption off the premises except to a member on the premises, thus modifying *Davies v. Bennett*, (1902) 1 K. B. 666. Sect. 28 of the Act provides for striking a club off the register. See *Plaistow Working Men's Club v. Harrod*, (1910) 1 K. B. 382. Where a company owns a club house and the club is a separate association, it is very commonly provided that no person shall be a member of the club unless he holds a share in the company, and that any person ceasing to be a member of the company shall cease to be a member of the club. The object of this is to prevent divergence of interest. "Clubs," says Lord Lindley, in *Wise v. Perpetual Trustee Co.*, (1903) A. C. P. C. 139, 148, "are associations of a peculiar nature; they are societies, the members of which are perpetually

Form 198. changing. They are not partnerships. They are not associations for gain, and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the fund of the society or to anyone else any money beyond the subscription required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by everyone, that clubs are formed, and this distinguishing feature has been often judicially recognized." But these expressions relate to members' clubs, not to clubs formed as companies. See further, *Encyclopedia of the Laws of England*, 2nd ed.

Form 199. To provide a club-house and other conveniences for the use of the members of the — club now in course of formation, and if any club established in succession thereto; and to furnish and maintain the same, and to permit the same to be used by the members of the said club and their friends, either gratuitously, or upon such terms as shall be agreed on, and, if thought fit, to manage the affairs of the club, or any of them, and generally to do whatever may seem best calculated to promote the interests of the club, and in particular to lend money to or subsidise the club. *Add, if necessary, reference to some agreement, as in Form 85.*

Add selection of common forms, Forms 97 et seq.]

Form 200. (1) To afford to its members all the usual privileges, advantages, conveniences, and accommodation of a club. (2) To take over the effects and liabilities of the present unincorporated assn, known as the — [Liberal] club. *Refer to an agreement, if necessary, Form 85.* (3) To promote the cause of [Liberalism], and to provide means of social intercourse between persons professing [Liberal] principles. (4) To consider and discuss all questions affecting the interests of the community, or the alteration or administration of the law. (5) To procure the delivery of lectures on political and other subjects. (6) To form and maintain a library of political, historical, and other literature in —. (7) To render voluntary aid to [Liberal] candidates in the parliamentary, municipal, and other elections in the boroughs of — and the counties of —. (8) To petition Parliament. (9) To purchase, hire, or otherwise acquire, for the purposes of the club, any real or personal ppty, and in particular any lands, buildings, furniture, club and household effects, utensils, books, newspapers, periodicals, musical instruments, fittings, apparatus, appliances, conveniences, and accommodation, and, so far as the law or the licence of the Board of Trade may from time to time allow, to sell, demise, let, mortgage, or dispose of the same. (10) To erect, maintain, improve, or alter any buildings for the purposes of the club. (11) To borrow or raise money by the issue of or upon bonds, debentures, bills of exchange, promissory notes, or other

Club
(political).

obligations or securities of the club, or by mortgage or charge of all or any pt of the ppty of the club. (12) To do, &c. **Form 200.**

Add selection of common forms. Forms 97 et seq.

The above is taken from the memorandum of a Liberal club which was registered by licence of the Board of Trade without the word "limited." See p. 498.

But the Board will not now license clubs to dispense with the word "limited."

1) To support and protect the character, status, and interest of the legal profession generally, and particularly of solors practising within a circuit having a radius of twenty-five miles from the Guildhall of the city of —. (2) To promote honourable practice, to repress malpractice, to settle disputed points of practice, and to decide all questions of professional usage or courtesy between or amongst solors. (3) To consider all questions affecting the interests of the profession, and to initiate and watch over, and, if necessary, to petition Parliament or promote deputations in relation to general measures affecting the profession, and to procure changes of law or practice, and the promotion of improvements in the principles and administration of the law. (4) To acquire by purchase, donation, or otherwise, the library now belonging to the society known as the — Law Society, and to maintain, extend, and improve such library. (5) To provide rooms and other facilities for the holding and conducting of sales of ppty, meetings of creditors, arbitration meetings, and other like matters. (6) To acquire by purchase, taking on lease, or otherwise, lands and buildings, and all other ppty, real and personal, which the society, for the purposes thof, may from time to time think proper to acquire, and which may lawfully be held by them, and to re-sell, under-lease, or sub-let, surrender, turn to account, or dispose of, such ppty, or any part thof, and to erect upon any such land any building, for the purposes of the society, and to alter or add to any building erected upon any such land. (7) To borrow [&c.]. (8) To encourage the study of law by articled clerks of solors, and for that purpose the donation, on such terms and conditions as may from time to time be prescribed, of a prize or prizes, or other rewards or distinctions. (9) To promote information on legal subjects by lectures, discussions, books, correspondence with public bodies and individuals, or otherwise. (10) *[Add selection of common forms. Forms 97 et seq.]* **Form 201.**
Law society.

Taken from a form recently passed by the Board of Trade. This form, with slight variation, has also been adopted in the case of societies of local accountants.

1. To protect the members of the society against persons whose character or circumstances render them unworthy of mercantile credit, and to facilitate the prompt and economical realisation of the **Form 202.**
Trade protection.

Form 202. estates of bankrupts and persons making or seeking to make arrangements or compositions with their creditors.

2. To diffuse information as to sound principles of trading, and to impress upon the mercantile community the necessity of maintaining an intimate knowledge of the state of their affairs by periodical investigations, and by keeping correct sets of business books.

3. To procure information for members as to the standing and responsibility of parties with whom they propose to transact business.

4. To collect debts for members upon such terms as may be determined.

5. To communicate with chambers of commerce, and other mercantile and public bodies throughout the United Kingdom, and concert and promote measures for the protection and advancement of trade and traders.

6. To consider, originate, and support improvements in the commercial laws.

7. To subscribe to, become a member of, and co-operate with any other assen, whether incorporated or not, whose objects are, altogether or in part, similar to those of this society, and to procure from and communicate to any such assen such information as may be likely to forward the objects of this society.

[Add selection of common forms, Forms 97 et seq.]

Taken from a form which has been approved by the Board of Trade on several occasions.

Form 203.

Chamber of
commerce.

(1) To promote and protect the home, colonial and foreign trade and commerce, and the manufactures of the United Kingdom, and in particular the trade, commerce, and manufactures of the [borough] of

— (2) To consider all questions connected with such trade, commerce, and manufactures. (3) To promote or oppose legislative and other measures affecting such trade, commerce, and manufactures. (4) To collect and circulate statistics, and other information, relating to such trade, commerce, and manufactures. (5) To act as arbitrator in the settlement of disputes arising out of commercial transactions. (6) To borrow any moneys required for the purposes of the chamber upon such securities as may be determined.

[Add selection of common forms, Forms 97 et seq.]

Taken from a form passed by the Board of Trade on several occasions.

1. To take over the whole or any of the assets and liabilities of the unincorporated assen known as the Builders' Society, established 1834, and with a view thereto to enter into an agreement, &c. [Form 85.] **Form 204.** Builders' institute.

2. To promote the conson and discussion of all questions affecting the building trade (which expression in this memdum includes the trade of builders and of contractors for the execution of public and private works, and all ancillary and allied trades, and every branch of any such trade), and generally to watch over and protect the interests of persons engaged in the building trade.

3. To give the Legislature and public bodies and others facilities of conferring with and ascertaining the views of persons engaged in the building trade as regards matters directly or indirectly affecting that trade.

4. To confer with the Royal Institute of British Architects, the County Councils, Local Boards, and any other public bodies, in regard to all matters affecting the building trade.

5. To originate and promote improvements in the law, and to support or oppose alterations therein, and to effect improvements in administration, and, for the purposes afoe, to petition Parliament, and take such other steps and proceedings as may be deemed expedient.

6. To diffuse among its members information on all matters affecting the building trade, and to print, publish, issue, and circulate such papers, periodicals, books, circulars, and other literary undertakings as may seem conducive to any of these objects.

7. To improve and elevate the technical and general knowledge of persons engaged in, or about to engage in, the building trade, or in any employment, manual or otherwise, in connection therewith, and with a view thereto to provide for the delivery of lectures and the holding of classes, and to test by examination or otherwise the competence of such persons, and to award certificates and distinctions, and to institute and establish scholarships, grants, rewards, and other benefactions.

8. To promote excellence in the construction of buildings, and just and honourable practice in the conduct of business, and to suppress malpractice.

9. To establish, form, and maintain a library and collection of models, designs, drawings, and other articles of interest in connection with the building trade.

10. To arrange and promote the adoption of equitable forms of contracts and other documents used in the building trade, and to encourage the settlement of disputes by arbitration, and to act as or nominate arbitrators and umpires on such terms and in such cases as may seem expedient.

11. To encourage the discovery of and investigate and make known the nature and merits of inventions which may seem capable of being

Form 204.

used by persons engaged in the building trade, and to acquire any patents or licences relating to any such inventions with a view to the use thereof by the members of the institute and others, either gratuitously or upon such terms as may seem expedient.

12. To establish, subsidise, promote, co-operate with, receive into union, become a member of, act as or appoint trustees, agents, or delegates for, control, manage, superintend, lend monetary assistance to, or otherwise assist any associations and institutions, incorporated or not incorporated, with objects altogether or in part similar to those of the institute and not being a trade union.

13. To establish, undertake, superintend, administer, and contribute to any charitable or benevolent fund from whence may be made donations or advances to deserving persons who may be or have been engaged in the building trade, or connected with any person engaged therein, and to contribute to or otherwise assist any charitable or benevolent institutions or undertakings.

14. To undertake and execute any trusts which may seem to the institute conducive to any of its objects.

15. To provide facilities for social intercourse between the members of the institute and their friends, and, if thought fit, to afford them all or any of the usual privileges, advantages, conveniences, and accommodation of a club.

16. To admit any persons (whether eligible or not eligible for membership) to be associates or honorary members of the institute on such terms, and to confer on them such rights and privileges as may seem expedient.

17. To borrow any moneys required for the purposes of the institute upon such terms and on such securities as may be determined.

18. Subject to the provisions of sect. 19 of the Cos (Consolidation) Act, 1908, to purchase, take, lease, exchange, hire, or otherwise acquire any real and personal property and any rights or privileges necessary or convenient for the purposes of the institute. To construct, alter, and maintain any buildings required for the purposes of the institute.

19. To obtain an Act of Parliament for the dissolution of the institute and the re-incorporation of its members for any of these objects, and any other Act which may seem conducive to any of these objects.

20. To sell, improve, manage, develop, lease, mortgage, dispose of, turn to account, or otherwise deal with all or any part of the property of the institute.

21. To invest the moneys of the institute not immediately required upon such securities or otherwise in such manner as may from time to time be determined.

22. To do all such other lawful things as are incidental or conducive to the attainment of the above objects or any of them.

Provided that the institute shall not support with its funds or impose on its members or endeavour to procure the observance of any regulation which, if an object of the institute, would make it a trade union.

Form 204

Passed by the Board of Trade.

(1) To promote commerce, and in particular in relation to the industry. — Form 204a.

(2) To enable assons for the time being and from time to time of — manufacturers to unite or co-operate by becoming members or associates of the coy, by themselves or their nominees, and to act as the representative mouthpiece of such assons.

A federation of trade societies.

(3) To promote the settlement of disputes by conciliation or arbitration, and to assist in the formation, development, and maintenance of boards of conciliation and arbitration.

Add clauses 3, 5, 6, 7, 12, 13, 14, 16, 17, 18, 20, 21, 22 of Form 204.

Passed by the Board of Trade.

(1) To acquire and take over, &c. Form 85.

Form 205.

(2) To carry on the business of soap manufacturers.

Soap manufacturers.

(3) To buy, sell, manufacture, refine, prepare, and deal in all kinds of oils and oleaginous and saponaceous substances, and all kinds of unguents and ingredients.

(4) To carry on business as pharmaceutical, manufacturing, and general chemists and druggists, and manufacturers of and dealers in all kinds of toilet requisites, and manufacturers of all kinds of boxes and cases wholly of card, wood, metal or otherwise, and printers, colour printers, publishers, stationers, candle makers, manufacturers of perfumes, collectors of flowers and perfume-producing vegetation.

Add selection of common forms, Forms 97 et seq.

(1) To encourage temperance and to discourage intemperance, and with a view thto to adopt all such measures as may seem to the coy expedient, whether huftr specified or not. Form 206.

Public-house trust.

(2) To manage and conduct public-house and other licensed premises so that whilst all reasonable facilities shall be given for the purchase of alcoholic drinks, equal or greater facilities shall be given for the purchase and consumption of food and non-alcoholic drinks of the best quality in the most attractive form, and that there shall be no pressure, temptation, or inducement to purchase alcoholic drinks,

Form 206. and that it shall be in the interest of those employed to sell non-alcoholic drinks and food rather than alcoholic drinks.

(3) To carry on the business of public-house, restaurant, inn, tavern, beerhouse, hotel, refreshment room and canteen keepers and licensed victuallers; and to buy, sell, manufacture and deal in provisions and goods of all kinds which may be conveniently supplied in connection with any of the sd businesses, and to establish and conduct clubs, reading, writing, and newspaper rooms and libraries.

(15) To make provision for the applicon of any of the profits or assets of the coy to any charitable, benevolent, provident or public purposes whatsoever which may seem expedient, and whether the same shall or shall not be conducive to any of the above objects.

[Add selection of general objects, Forms 97 et seq.]

Form 207. To oppose and resist any proceedings in Parliament or elsewhere which may seem calculated to deprive the inhabitants of — of their accustomed rights over the open space, known as the — Common, and to watch over and protect those rights, &c.

Protection
of common
rights.

[Add selection of common forms, Forms 97 et seq.]

Form 208. To promote the study, practice and knowledge of music in the town of —, and the neighbourhood, and to give or arrange concerts and musical entertainments, and to employ writers and composers, and to purchase copyrights, and to give prizes and awards, &c.

Musical
society.

[Add selection of common forms, Forms 97 et seq.]

Form 209. To acquire the buildings and grounds known as —, formerly belonging to the poet —, and to maintain and preserve the same, and to collect and preserve memorials of the sd poet, and to open the same for public inspection on such terms as may seem expedient, and to promote the study of the works of the sd poet, both at home and abroad, &c.

Memorial
to poet.

[Add selection of common forms, Forms 97 et seq.]

CAPITAL CLAUSES

The fifth clause of the memorandum of association of a company limited by shares must specify "the amount of the capital with which the company proposes to be registered, divided into shares of a certain fixed amount." See sect. 3 of the Act of 1908, replacing sect. 8 of the Act of 1862, and Form 79, *supra*, p. 490. The Act allows a company complete freedom as to its capital. It may be fixed at a high figure or at a low one, at, say, 1*l.* divided into 240 shares of 1*d.* each, or at, say, 10,000,000*l.* divided into 1*l.* shares; if thought expedient, the clause can divide the shares into different classes, whether preferred, ordinary, deferred, founders', or otherwise; but even where there is no such division in the share capital, it is customary to provide therein for the issue of shares with preferential or special rights attached. This practice owed its origin to the doubts (occasioned by the decision in *Hutton v. Scarborough Cliff Co.* (1865), 2 De G. J. & S. 672) whether, in the absence of qualifying words, the memorandum did not by implication place all shares on an equality, and therefore preclude the issue of preference shares. But *Harrison v. Mexican Rail. Co.*, 19 Eq. 358, and *South Durham Brewery Co.*, 31 C. D. 261 (C. A.), made it clear that this implication of equality could be controlled by apt provisions in the original articles of association, and the Court of Appeal in *Andrews v. Gas Meter Co.*, (1897) 1 Ch. 361, in effect decided that there was really no such implication of equality arising on the memorandum. Hence, the words are no longer necessary: they are a survival only from past controversies, and are inserted merely to preclude discussion.

Requirements of the Act.

Provision for issue of preference shares.

Besides these words, it will be seen that others are added to the effect that where shares are issued with any preferential or qualified rights or privileges attached thereto, such rights shall not be alterable otherwise than in accordance with the provisions of the accompanying articles of association. The object of these words is to fortify the position of such shares by precluding the alteration of the rights attached to a class without the consent of the holders of a specified majority of the members of the class. This protective proviso is commonly deemed expedient having regard to the decisions in *Andrews v. Gas Meter Co.*, (1897) 1 Ch. 361; and *Allen v. Gold Reefs of West Africa*, *supra*, that preferential and other special rights attached only by the articles may be altered by special resolution. See *supra*, p. 480.

Protection against alteration of preferential rights.

Where it is intended at once to divide the initial capital into two or more classes of shares, it is generally desirable to effect the division in the memorandum, and to set out therein the rights and privileges and conditions to be attached, *e.g.*, as in Form 210. At one time there was a question whether, where rights and privileges

When to specify preferential and special rights in memorandum.

were attached in this way by the memorandum, it was allowable to make therein provision for altering those rights if occasion arose, the suggestion being on the authority of *Ashbury v. Watson*, 30 C. D. 376, that the specification of the rights in the memorandum made them a condition, and so unalterable by sect. 12 of the Act of 1862 (now replaced by sect. 41 of the Act of 1908).

Power to
modify rights
may be
reserved.

*Ashbury v.
Watson*
distinguished.

This important question came before the Court of Appeal in *Welsbach Incandescient Gas Co.* (1904) 1 Ch. 87. There the capital was, by the memorandum of association, divided into several classes of shares, with special rights attached thereto, as in Form 215, *infra*, but the memorandum (which was settled by the writer) also contained express power to modify those rights. See paragraph (f) of the form. Circumstances having arisen which rendered it desirable to exercise this power of modification, it was (under the advice of the writer) exercised in connection with a reduction of capital, and the Court was then asked to sanction such reduction. Buckley, J., held the power to have been validly exercised and sanctioned the reduction, and the Court of Appeal affirmed this decision, holding that the power to modify was valid, and that *Ashbury v. Watson*, *supra*, was distinguishable on the ground that there the rights were unconditionally attached by the memorandum, whereas the presence in the memorandum of the Welsbach Company of the power to modify showed that the intention was to attach the rights conditionally, not unconditionally, and that sect. 12 of the Act of 1862 (sect. 7 of the Act of 1908) did not make such rights unalterable. The difficulties discussed in the last edition but one of this work were thus removed. Briefly then, where the initial capital is, by the memorandum, to be divided into several classes of shares, it is desirable, as a rule, to insert therein power by reference to the articles or otherwise to modify those rights, whether there is a likelihood of the share capital being consolidated or equalised or not. But if it is contemplated that it may be desirable before long to abrogate altogether the distinction between the classes and to unify them, it is best to effect the division into classes by the articles, with power to modify or deal with the same [clause 50, *infra*, p. 685], in which case, if they are altered so as to unify the classes, there will be nothing in the memorandum to call attention to the original division.

In framing the capital clause, where there are to be several classes of shares, the following points, as well as those above referred to, must be borne in mind:—

1. As to Preference Shares.

Preference
shares.

- (a) Are they to confer a right to a cumulative dividend, *i.e.*, a dividend which, if the profits of one year are not sufficient to pay it, will accumulate as a charge against subsequent

profits; or are they to be non-cumulative, *i.e.*, payable as to each year only if and so far as the profits of that year suffice?

Primâ facie where the clause defining the preferential rights declares that the preference shares are to be entitled to a preferential dividend at a specified rate per cent., the dividend is cumulative. See *Henry v. The Great Northern Co.*, 1 De G. & J. 606; *Webb v. Earle*, 20 Eq. 556; but for the benefit of the lay mind the word "cumulative" is sometimes inserted in the definition of rights, *e.g.*, a fixed cumulative preferential dividend, &c. This prevents any mistake.

Cumulative
dividend

If the dividend is to be non-cumulative, the clause must be carefully framed accordingly, *e.g.*, it should say that "the preference shares are to confer the right to receive out of the profits of each year a preferential dividend for such year" at the specified rate per cent., or the definition may declare that the profits of each year available for dividend are to be applied first to the payment of a dividend for such year on the preference shares at the specified rate, and that the surplus shall be applicable to dividend on the other shares. All that is necessary is that it should appear with sufficient clearness that the preferential dividend for each year is to come out of the profits of that particular year only. If this intention is plain, the Court will give effect to it even though imperfectly expressed. *Staples v. Eastman Photographic Materials Co.*, (1896) 2 Ch. 303; *Re Taylor's Trusts*, (1905) 1 Ch. 734. In addition to a fixed preferential dividend, preference shares are sometimes given the right to participate in surplus profits.

Non-
cumulative
dividend.

See further, *infra*, p. 814.

These rights as to dividend are only some of the special rights and privileges commonly attached to preference shares.

See further, *infra*, pp. 814-819 *et seq.*

The right of a preference shareholder is *primâ facie* confined to a preferential dividend. Unless otherwise provided he is not entitled to have his capital on a winding-up paid off in priority to the other shareholders (*London India Rubber Co.*, 5 Eq. 519); but preferential rights as to capital may be and often are attached. Then the clause sometimes runs that the preference shareholders are to be entitled, not only to a preferential dividend, but to priority as regards capital in the winding-up. If so, the capital paid up on the preference shares in accordance with the clause must, in winding-up, be paid off out of the surplus assets before the ordinary shareholder can get anything.

No preference
in capital
unless
provided

See *Bangor, &c. Co.*, 20 Eq. 59. The ordinary shareholders are then to be paid off, and any surplus remaining is distributable *prima facie* among all the members in proportion to their shares. *Birch v. Cropper*, 14 App. Cas. 525.

But very commonly the preference shareholders are precluded from sharing in such surplus, and in such cases the further questions arise—

- (b) Are the preference shares to confer the right to participate in surplus profits, *e.g.*, after a like dividend in each year has been paid on the ordinary shares?
- (c) Are they to confer the right in a winding-up to priority in return of capital?
- (d) Are they in a winding-up to confer a right to participate in the surplus after paying off the whole of the paid-up capital?
- (e) Are they to have any special voting rights or none?

See these questions further considered, *infra*, p. 814.

2. As to Founders' Shares.

- (a) Are they to confer a right to a percentage of the divisible profits of each year or of the surplus profits after paying specified dividends on the other shares?
- (b) What rights are they to confer in a winding-up?
- (c) Are they to confer any special voting rights?

See further as to classes of shares, pp. 812 *et seq.*, *infra*.

Form 210.

Cumulative
preference
shares.

The capital is 400,000*l.*, divided into 20,000 preference shares of 10*l.* each, and 20,000 ordinary shares of 10*l.* each; and such preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 5 p.c.p.a. on the capital for the time being paid up thereon, and shall rank as regards return of capital in priority to the ordinary shares but shall not confer the right to any further participation in profits or assets. And upon any increase of capital the coy. is to be at liberty to issue any new shares with any preferential, deferred, qualified, or special rights, privileges or conditions attached thereto. [The rights for the time being attached to the preference shares in the initial capital or to any shares having preferential, deferred, qualified, or special rights, privileges or conditions attached thereto, may be altered or dealt with in accordance with clause [50] of the accompanying arts of assen, but not otherwise.]

In framing such a clause it must be considered whether the dividend is or is not to be cumulative (see *supra*, p. 576), and whether in a winding-up the preference shares are to confer a right to participate in surplus assets after paying off the whole of the paid-up capital. *Prima facie* they are entitled so to

participate. *Birk v. Cropper, Re Bridgewater Navigation Co.*, 14 A. C. 525. **Form 210.**
If it is desired that they should so participate, omit the words in brackets, which commence "but shall not confer." See further, *infra*, Forms 213 and 214, and p. 812.

It seems that under such a clause pre-preference shares might be created upon any increase of capital. *Underwood v. London Music Hall*, (1901) 2 Ch. 309; *Welsbach Incandescent Gas Light Co.*, (1904) 1 Ch. 87. If desired, it can be altered by adding "but not so as to prejudice the preferential rights hereby attached to the preference shares in the initial capital."

Sometimes after the word "thereon" the words following are inserted: "and the right in the event of a winding-up for the purpose of reconstruction or amalgamation to a bonus of [15] per cent. on their nominal value." In such case insert before the words "in priority" the words "and the said bonus."

As to the meaning of reconstruction or amalgamation, see *infra*, Chapters XX. and XXII., and *Wild v. South African Supply, &c. Co.*, (1904) 2 Ch. 268.

The rights and privileges hereby attached to the *sd* preference shares and preferred ordinary shares may be altered or dealt with as regards each class by an agreement in writing made by some member of the class on behalf of the class and ratified by the holders of at least two-thirds of the shares of the class, but not otherwise. **Form 211.**

Power to alter without reference to the articles.

The rights hby attached to the preference [and founders'] shares **Form 211a.**
resply. may be altered by special resolution passed with the approval in writing of the holders of two-thirds of the issued shares of such class, but not otherwise. **Form 211a.**

Power to alter.

See also paragraph (f) of Form 215, which was held valid, and *supra*, p. 480 (*Welsbach Incandescent Co.*, (1904) 1 Ch. 87), and may generally be adopted.

One person holding all the preference shares may for this purpose constitute a meeting. *East v. Bennett Brothers, Ltd.*, (1911) 1 Ch. 163.

The capital is £ —, divided into — preference shares of £ — each, and — ordinary shares of £ — each. The *sd* preference shares shall confer on the holder the right to be pd out of the profits of each year a fixed dividend for such year at the rate of 5 p.c.p.a. on the capital for the time being pd up thereon, and such shares shall rank, &c., as above in Form 210. **Form 212.**

Non-cumulative preference shares.

Another mode of expressing this is to say, "the right to a fixed preferential dividend at the rate of 5 per cent. per annum on the capital paid up thereon, such dividend to be paid, as regards each year, out of the profits of such year only."

The capital of the coy is 100,000£., divided into 125,000 preference shares of 10s. each, and 75,000 ordinary shares of 10s. each. The *sd* preference shares shall be entld to be pd out of the profits of each year, in priority to all other dividends, a fixed dividend for that year at the rate of 8 p.c.p.a. on the capital paid up thereon, and shall be **Form 213.**

Preference shares fixed dividend and to participate *pari passu* in surplus.

Form 213. entitled to participate *pari passu* with the ordinary shares in the surplus profits of each year which shall remain after paying the fixed dividend aforesaid for such year on the said preference shares, and a like dividend for such year on the capital paid up on the ordinary shares, and such preference shares shall be entitled in a winding-up to have the capital paid up thereon to be paid off in priority to the other shares. Dividends may be paid in cash or by the distribution of specific assets. The rights, &c.

Form 214. Subject as hereafter provided the rights following shall be attached to the preference shares aforesaid:

Preference shares fixed dividend and half surplus profits.

- (1) The holders of the said preference shares shall be entitled to a fixed cumulative preferential dividend at the rate of 7 p.c.p.a. on the capital for the time being paid up on the said preference shares respectively, and to half the surplus profits, which in respect of each year it shall from time to time be determined to distribute, remaining after paying or providing for the payment of a dividend for such year at the rate of 10 p.c.p.a. on the capital for the time being paid up on the ordinary shares.
- (2) The holders of the said preference shares shall in a winding-up have priority as to return of capital [and payment off of arrears of the said preferential dividend whether declared or not up to the commencement of the winding-up] over all other shares in the capital for the time being of the company, but shall not have any further right to participate in profits or assets.
- (3) The rights hereby attached to the said preference shares may be modified in accordance with clause — of the accompanying arts of assent, but not otherwise, and that clause and also clauses — and — of the said articles shall be deemed to be incorporated herein and have effect accordingly.

Form 215.

Preference shares.

The rights following shall be attached to the shares aforesaid *inter se* subject as hereafter provided, that is to say:—

- (a) The said preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 5 p.c.p.a. on the capital for the time being paid up thereon respectively, and shall rank both as regards such dividend and as to capital in priority to all other shares in the original capital, but shall not confer any further right to participate in profits or assets.
- (b) Subject as aforesaid, the ordinary shares shall confer on the holders the right to a fixed cumulative dividend at the rate of

7 p.c.p.a. on the capital for the time being pd up thereon resply, and shall rank both as regards such dividend and as to capital next after the sd preference shares. **Form 215.**

- (c) Subject as aforesaid, the sd deferred shares shall confer the right to a fixed cumulative dividend at the rate of 7 p.c.p.a. on the capital for the time being pd up thereon resply, and shall rank both as regards such dividend and capital next after the ordinary shares.
- (d) Subject as aforesaid, any profits which it may at any time be determined to distribute amongst the members, and in a winding-up any surplus assets, after repayment of capital, shall be divided as to one-half between the holders of the ordinary shares aforesaid in proportion to the ordinary shares held by them resply, and as to the other half among the holders of the deferred shares aforesaid in proportion to the deferred shares held by them resply.
- (e) Any shares issued as fully paid pursuant to the agreement referred to in clause 3 of the accompanying arts of assen shall for the purposes of dividend be treated as having been pd up at the date of the incorporation of the coy.
- (f) The rights for the time being attached to the sd several classes of shares resply may be modified or dealt with in the manner mentd in clause 52 of the accompanying arts of assen, but not otherwise, and that clause and also clauses 157 and 159 of the sd arts shall be deemed to be incorporated herein and have effect accordingly.

Upon any increase of capital, &c.

The above is the form used in the *Weldbach Incorporated Company*, (1904) 1 Ch. 87, and referred to above, p. 480.

The capital of the coy is 500,000*l.*, divided into 50,000 shares of 10*l.* each, to be converted as and when pd up into equal moieties of preferred stock and deferred stock, the preferred stock to bear a fixed cumulative preferential dividend at the rate of 6 p.c.p.a., and is to rank, both as regards dividend and capital, in priority to the ordinary stock. **Form 216.**

Preferred and
deferred
stock.

The capital of the coy is 22,000*l.*, divided into 20,000 ordinary shares of 1*l.* each, and 2,000 B shares of 1*l.* each, and each of the sd B shares shall confer on the holder the right to rank for dividend and in a distribution of assets in a winding-up and for voting purposes as if it were five ordinary shares of 1*l.* each fully pd up in the company's capital. **Form 217.**

B shares
confering
spec. rights.

Sometimes a vendor instead of taking a mass of paper capital takes B shares as above.

Form 218.

Founders'
Shares.

The capital of the coy is 2,000,000*l.*, divided into 200,000 shares of 10*l.*, whof 199,800 shall be called ordinary shares, and 200 (to be numbered 1 to 200 inclusive) are to be called founders' shares, and are to confer on the holders thof rateably and in proportion to the number of the founders' shares held by them resply the rights following, that is to say

- (1) The right to half the surplus profits of the coy of each year which shall remain after paying or providing for the payment out of such profits of a dividend to the close of such year at the rate of 10 p.c.p.a. on the capital pd up on the ordinary shares, and of a dividend to the close of such year at such rate (not exceeding the sd rate) as may be attached to any further shares, whether in the original or any increased capital hereafter issued, and after making such provision for reserve as may seem expedient.
- (2) The right to one-half of any part of the reserve fund afcd, or the income thof, which it may at any time be determined to divide among the members.
- (3) The right to one-half the surplus assets which in the winding-up of the coy shall remain, after paying off the whole of the pd-up capital, including that pd up on the founders' shares.

Any of the shares in the capital, original or increased, may be issued with any preferential, special or qualified rights or conditions as regards dividends, capital, voting, or otherwise attached thof, but so that the rights hby attached to the founders' shares shall not be infringed. Dividends may be pd in cash or by the distribution of specific assets or otherwise as provided by the regulations of the coy.

Form 219.

Another.

The holders of the founders' shares shall be entld rateably in proportion to the founders' shares held by them resply (a) to 5 p.c. of the profits which in each year it shall be determined to distribute by way of dividend, and (b) to 5 p.c. of the surplus assets of the coy which, in a winding-up, shall remain after paying off the whole of the pd-up capital, including that pd up on the founders' shares

In the case of founders' and deferred shares, the terms of issue not unfrequently lead to difficulty and dispute as regards the determination of the amount of the profits to be distributed. The holders of the founders' shares may complain that too much is carried to reserve, that the profits are ascertained on too conservative a basis, and that the directors unduly favour the other shareholders. On the other hand, if dividends on a large scale are paid on the founders' shares, the other shareholders commonly complain that the founders get too much, that the directors unduly favour them, and that the desire to pay a dividend to the founders leads to speculative business and diverts to the founder shareholders' pockets what ought to go to reserve. These difficulties can, to a

great extent, be met by giving to the holders of the founders' shares, as in the above form, a fixed aliquot share in the profits which it shall be determined to distribute, and not merely in the surplus profits themselves.

Where the expression "surplus assets" is used it is necessary to make it clear whether surplus after paying debts and liabilities is meant, or surplus after paying debts and liabilities and paid-up capital. *Re Penbody Gold Mining Co., W. N. (1897) 170; Ramel v. Syndicate, Ltd., (1911) 1 Ch. 740.*

Form 219.

The capital of the coy is 330,000*l.*, divided into 22,000 cumulative preference shares of 5*l.* each, entitl to the preferential payment of dividend and return of capital, mentd in the arts of asson registered herewith, and 215,000 ordinary shares and 5,000 management shares of 1*l.* each, which management shares are to confer on the holders thof, rateably and in proportion to the number of such shares held by them resply, the rights following, that is to say

Form 220.

Management
shares

1. the right to half the profits or other moneys of the coy av^l Table for dividend which it shall from time to time be determined to distribute, and which shall remain in each year after paying or providing for the payment out of such profits or other moneys (a) of a cumulative preferential dividend at the rate of 5½ p.c.p.a. on the capital pd up on the sd preference shares; (b) of a dividend for such share at the rate of 7 p.c.p.a. on the capital pd up on the sd ordinary shares; (c) of the remuneration payable to the directors for that year under the regulations of the coy for the time being; and (d) of a dividend for such year at such rate (not exceeding 7 p.c.p.a.) as may be attached to any further shares whether in the original or any increased capital hereafter issued.
- (2) The right to one-half of the surplus assets which in the winding-up of the coy shall remain after paying off the whole of the coy's pd-up capital.

1. The capital of the coy is £—, divided into — preference shares of £— each, — management shares of £— each, and — ordinary shares of £— each, with power to divide the shares in any increased capital into several classes, and to attach thereto resply any preferential, qualified, special or deferred rights, privileges or conditions.

Form 221.

Preference
and manage-
ment shares

2. The sd management shares shall confer on the holders for the time being thof resply the right to the management of the business and the control of the coy, and they alone resply shall be capable of being directors of the coy.

3. Save as provided by clause — of the accompanying arts of asson in regard to the preference shares afd, the shares in the capital for the time being, other than the management shares, shall not confer on the holders the right to stand a —, either in person or

Form 221. by proxy, at any general meeting, or to have notice of such meeting, or to have any voice in the management of the business or control of the coy, or to interfere in such management or control, or to inspect the account books and documents of the coy (except as by law entld), and such holders shall be bound by the accounts from time to time furnished by the directors and passed at a general meeting.

4. The sd preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of — p.c.p.a. on the capital for the time being pd thereon respectively, and shall have preference as to dividend and capital over the sd management shares and the ordinary shares, and all other shares in the capital for the time being of the coy, but shall not confer any further right to participate in the profits or assets.

5. The rights and privileges hby attached to the management shares shall not be altered; they are fundamental. The rights and privileges attached to the sd preference shares, and to any shares hereafter created with preferential or special rights attached thereto, shall not be alterable otherwise than pursuant to the provisions contained in clause — or — of the accompanying arts of asson, which clauses shall as regards such shares be deemed to be incorporated herein.

Form 221a. 1. The capital of the coy is £ — divided into — shares. One of these shares, namely, that for which A. B. subscribes the memdum, shall be numbered 1, and shall, whilst held by him, be called the Life Governor's share.

Life governor's share.

2 The Life Governor's share, whilst the sd A. B. holds such share and also at least — p.c. of the issued capital for the time being of the coy, shall confer on the holder the rights and privileges following, that is to say:—

- (a) The right to — p.c. of the surplus profits of the coy of each year which shall remain after a dividend for such year at the rate of 10 p.c. shall have been pd on the other shares in the capital.
- (b) The right to — p.c. of the surplus assets of the coy which shall in a winding-up remain after payment off of the whole of the pd-up capital.
- (c) The right at any time by notice in writing to the coy to take office as a director and to hold such office as long as he chooses, and at any time by notice in writing to the coy to resign, and at any time to take office again as afd.
- (d) The right from time to time and at any time by notice in writing to the coy to appoint any other persons to be directors of the coy, and by notice in writing to the coy to remove any director so appointed, but so that not more

than four directors shall at any time be in office by virtue of **Form 221a.**
such appointment.

- e) The right at every general meeting to one-third of the votes in the coy, that is to say, to one vote as against every two votes conferred by all the other outstanding shares for the time being in the capital of the coy.
- f) The right whether the holder is or is not a director to attend and vote either in person or by proxy at all meetings of the directors of the coy, and to have due notice of all such meetings, but any proxy must be appointed by writing under the hand of the appointor.
- g) The right when such share ceases to be held by the sd A. B. to rank as an ordinary share.

3. Upon any increase of capital any new shares may be issued with any preferential or special rights or conditions attached thereto, but so that the rights attached to the Life Governor's share shall not be altered or modified without the consent in writing of the holder thof.

1. The holders of the ordinary shares for the time being issued shall be exclusively entld to participate in the profits of the coy until the dividends actually declared on the 250,000 ordinary shares forming the first issue shall in the aggregate amount to a sum equal to the capital pd up thereon, and that whether such dividends are pd or satisfied or to be pd or satisfied in cash or other assets, and whether at the time when such event happens the whole or part only of the ordinary shares shall have been issued, and whether the whole or only part of the amount thof shall have been called or pd up.

Form 222.

Ordinary and deferred: the former taking all profits till 100 per cent. paid.

2. After the happening of the event afsd and from thenceforth the profits of the coy, which it shall from time to time be determined to distribute, shall be applied as to one-half in paying dividends on the shares other than the deferred shares afsd, and as to the other half in paying dividends on the deferred shares *pari passu*.

3. In case of a winding-up of the coy before the happening of the event afsd, the assets available for distribution among the members shall be applied, first, in paying off the capital pd up on the shares other than the deferred shares afsd; secondly, in paying to the holders of the first issue of 250,000 ordinary shares afsd such a sum as, with the dividends then already pd thereon, shall be equal to a dividend of 200 p.c. on the capital pd up thereon at the commencement of the winding-up; and, thirdly, the balance (if any) shall be divided, as to one-half among the holders of the shares other than the deferred shares afsd, rateably in proportion to the number held, and as to the other half among the holders of the deferred shares afsd rateably in proportion to the number held.

4. In case of a winding-up of the coy after the happening of the event afsd, the assets afsd shall be divided as to one-half among

Form 222. the holders of the shares other than the deferred shares rateably in proportion to the number held, and the other half shall be divided among the holders of the deferred shares rateably in proportion to the number held.

5. The deferred shares aforesaid shall also confer on the holders rateably in proportion to the number of the deferred shares held by them respectively the right to subscribe for at par and take up one-half of the shares in the capital not subscribed in the memorandum of association which it shall from time to time be determined to issue, and each holder of the deferred share or shares aforesaid shall in the manner provided in the arts of association be given notice of every such determination, and shall have not less than fourteen days within which to subscribe for his proportion or less amount.

6. The deferred shares aforesaid shall confer on the holders present in person or by proxy at any general meeting of the company the right to as many votes as the number of votes conferred by all the other shares for the time being issued, and each holder of deferred shares aforesaid present in person or by proxy at any such meeting shall be entitled to such proportion of the votes conferred by the deferred shares collectively as the number of his deferred shares bears to the full number of the deferred shares.

7. The shares in the initial capital of the company not subscribed for in this memorandum of association and any shares created by increase of capital may be divided into several classes, and may be issued with any preferential, special or qualified rights, privileges and conditions attached thereto, but so that the rights hereby attached to the deferred shares shall not be altered or infringed except as above mentioned.

Form 223. The capital of the company is £—, divided into — ordinary shares of £— each, and — founders' shares of £— each, and there shall be attached to the said ordinary shares and founders' shares respectively the rights, privileges, and conditions in that behalf specified in the accompanying arts of association.

Ordinary and founders'.

The above clause is framed so as to mention the two classes in the memorandum, and thus to secure their position. See *Collins v. Birmingham Breweries*, 15 T. L. R. 180, and *supra*, p. 575. But, of course, they take subject to any qualifying provisions in the articles.

Form 223a. Each of the 200 founders' shares shall confer on the holder the right to one two-hundredth part of 5 p.c. of the profits which it shall from time to time be determined to distribute, and in a winding-up to the same fraction of 5 p.c. on the surplus assets remaining after paying off the paid-up capital of the company.

Another.

The holders of the founders' shares shall, in respect thereof, be collectively entitled to as many votes as the holders of all the other shares for the time being issued shall be entitled to in respect of such other shares, and each of the founders' shares shall confer on the holder a rateable proportion of such votes.

Form 224.

Special voting power to holders of founders' shares.

Founders' Shares.

Founders' shares are far from being a new invention. As appears from the first edition of this work, published in 1877, they were then well known, and to the writer's knowledge companies with founders' shares were registered under the Act of 1862 as early as the year 1873. Founders' shares are generally few in number and of small nominal value. Thus, with a capital of hundreds of thousands of pounds, or perhaps millions, the founders' shares may be only 200 of 10*l.* each or of 1*l.* each. Founders' shares are generally created for and appropriated to the remuneration of the founders or promoters of the company, they undertaking to pay the preliminary expenses and guarantee the placing of the shares which are to be offered for public subscription or part thereof. But occasionally the vendor stipulates that as part of the consideration for the sale to the company of his mine, business, concession, or other property, he shall have some founders' shares; and sometimes the founders' shares are offered as a bait to subscribers for the ordinary shares—that is to say, the prospectus states that for every 1,000*l.* of ordinary shares subscribed the subscriber will be entitled to an allotment of one founders' share; or the subscribers to the memorandum are allowed each to subscribe for one founders' share for every 5,000*l.* of ordinary shares subscribed for by them respectively.

One reason why founders' shares have from time to time found favour, is the phenomenal prices to which the founders' shares in several well-known companies have risen. In some cases 10*l.* founders' shares have risen to 5,000*l.*, 8,000*l.*, and 10,000*l.* each, and a rise to 200*l.*, 300*l.*, or 500*l.* has been considered quite disappointing. Another reason for the more extensive adoption of founders' shares was the decision of Kay, J., in *Faure Electric Accumulator Co.*, 40 C. Div. 141, November, 1888, to the effect that a company could not legally pay commission for placing its capital, a decision now rendered obsolete by sect. 89 of the Companies Act, 1908. Prior to this decision it was common enough for a company to pay a moderate commission to those who underwrote or agreed to place its capital, but that decision rendered it doubtful whether such payments could be supported, and accordingly, in many cases, the expedient was adopted of having founders' shares imposing on the subscribers the obligation to pay preliminary expenses, and to guarantee the placing of the ordinary shares, e.g., 500*l.* ordinary for each founders' share subscribed for.

By this means it became practicable, without infringing the principles laid down in the case referred to, to get the capital effectually and legitimately underwritten, for in the case of a promising undertaking a man may be ready to underwrite 1,000*l.* of ordinary shares, provided he gets at par a 10*l.* founders' share, which may rise in value to 500*l.* or for that matter to 5,000*l.* And this mode of remuneration is still available. *Hilder v. Dexter*, (1902) A. C. 474.

Where there are founders' shares, it is well to have them subscribed for in the memorandum of association. However, it must not be supposed that it is essential to have the founders' shares so subscribed for: for where the subscription of the founders' shares imposes onerous liabilities, e.g., to pay expenses, and the shares are of purely speculative value, it would seem that the directors

Form 224.

may, under a general power to allot (Form 152, clause 5), allot such founders' shares at par to any *bonâ fide* and reasonable subscribers, including themselves.

But, of course, in such cases as this, the directors have a discretion, and are not bound to allot. What they do—they must remember—will be open to observation, *e.g.*, if they allot to themselves or their relations an undue proportion; and it may, of course, be contended that as the directors are trustees of their powers for the company, they ought not to allot at par if the shares are worth much more, and so present themselves with a premium, though *primâ facie* it seems that if the company gets par for its shares it ought not to complain. See *London and Colonial Finance Corporation*, 13 T. L. R. 576 (C. A.); *Shaw v. Holland*, (1900) 2 Ch. 305, *infra*, p. 647; *Perceval v. Wright*, (1902) 2 Ch. 421; *Hilder v. Dexter*, per Lord Davey, *supra*.

Not uncommonly the rights and obligations attached to the founders' shares are specified in the memorandum of association, in order to get the benefit of the decision in *Ashbury v. Watson*, 30 C. Div. 376, and thus render their rights impregnable; for there have been cases in which the rights attached to founders' shares, being naturally unpopular, have led to hostile action on the part of the other shareholders.

Sometimes it is provided that the share of profits appropriated to the founders' shares shall be divided among them, but it has not yet been settled whether this provision can be enforced as against the company. An action will lie for a dividend, but only after it has been declared, and the declaration vests in the directors' discretion. On the other hand, according to the decision in *Ashbury v. Riche*, L. R. 7 H. L. 653, a company is not only prohibited from altering the conditions contained in its memorandum of association, but from doing anything in contravention of those conditions. If, therefore, a company proposes to apply the share of profits belonging to the founders' shares otherwise than in accordance with the rights attached to those shares, it might, no doubt, be restrained at the suit of any holder of founders' shares, and it would seem that the Court would have jurisdiction to order a division among the holders of founders' shares of profits which ought, in accordance with the contract contained in the memorandum of association, to be divided among them. The point, however, is one of considerable difficulty. See *Bond v. Bayard Hematite Co.*, (1902) 1 Ch. 353, 362; *Burland v. Earle*, (1902) A. C. 83.

As appears from the forms below, founders' shares are usually given a right to a share (say one-third) of the surplus profits of the company, after paying a fixed dividend (say seven per cent. per annum) on the other shares; and the reason why founders' shares attain such high prices, in some cases, is that such share of surplus profits, though not very large in itself, may, when spread over a few founders' shares, amount to a very large percentage. Thus, if the surplus is 6,000*l.*, it follows that there will be 2,000*l.* for distribution among 200 founders' shares of 1*l.* each, giving them a dividend of 1,000 per cent.

It is not uncommonly deemed expedient to give the holders of founders' shares the right to a specified proportion of the surplus assets of the company in a winding-up. Unless this is done there is a danger that the other shareholders, if the founders' shares take a large amount of profit, may grow jealous and reconstruct the company, and thus, in effect, squeeze out the founders' shares, for they in winding-up, *primâ facie*, would only be entitled to share in the surplus assets in such proportion as the nominal amount of the founders' shares bears to the whole nominal amount of the issued capital (*Birch v. Cropper*, 14 App. Cas. 525); *e.g.*, suppose that the issued capital is 198,000*l.*, ordinary shares and 200 founders' shares of 10*l.* each, and that there is a surplus of 6,000*l.*, the founders would take only 60*l.*, whereas, if entitled to one-third, they would get 2,000*l.* It must be remembered, however, that any interference with the rights of a class of shareholders by a majority proposing

to benefit themselves at the expense of such class would be restrained by the Court as unfair and oppressive. See *Menier v. Hooper's Telegraph Co.*, L. R. 9 Ch. 350; and *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656. See also sect. 45 of the Companies Act, 1908, dealing with the re-organization of capital.

Occasionally founders' shares are, by the memorandum of association, given special voting powers, so that they may be able to protect themselves and to exercise some authority in the direction of the company, but such a provision is not at all usual. It was adopted in one case where a goodwill of great value was made over to a company in consideration of founders' shares. Sometimes, also, the holders of founders' shares are given a right to appoint a director, but this, again, is not very common.

Sometimes when the subscribers for founders' shares are bound to pay the preliminary expenses, an agreement is made with some third party or company to indemnify them. See Form 19 in 7th edition.

In determining the rights to be attached to founders' and other deferred shares, it is necessary to bear in mind the decision of Chitty, J., in *Floating Dock of St. Thomas*, (1895) 1 Ch. 691. It follows from that case that if founders' shares are made to rank, as regards capital, after the other shares, and the company sustains a loss equal to or exceeding the amount of the founders' shares, it can, by special resolution, reduce its capital by extinguishing those shares, subject to the sanction of the Court. Now, as founders' shares are generally of small nominal amount, a very trifling loss may thus expose them to the danger of destruction; but this is a danger which can be avoided by taking care that in a winding-up they rank for payment, at any rate *pari passu* with the ordinary shares, taking perhaps a share of the surplus assets.

Underwriting obligations. Sometimes the memorandum of association provides that a subscriber for founders' shares shall be treated as underwriting so many ordinary shares. See *supra*, Form 22.

Where the memorandum provided that the holder of every founders' share should apply for and take at least fifty ordinary shares, it was held that the company were justified in placing a person who subscribed only for founders' shares on the register for the corresponding ordinary shares, viz., fifty for each founders' share. *Gen. Phosphate Corp. v. Horrocks*, 8 T. L. R. 359.

As to the power to reorganize the capital, see sect. 45 of the Act of 1908.

One-half the amount of every share in the initial capital shall not be capable of being called up, except in the event and for the purpose of the coy being wound up.

Form 224.

Form 225.

Reserve capital.

Such a provision in the memorandum is effective, though it does not operate under the Companies Act, 1908, s. 59. But where the provision is only contained in the original articles it is alterable. *Mallison v. 2nd Canal, &c. Co.*, (1894) 1 Ch. 538. Such reserve capital can, however, be constituted at any time by special resolution under 59 of the Act, and can be wiped out by reducing the capital. See *infra*, Chap. XVII.

The capital of the coy is 250,000*l.* divided into 25,000 shares of 10*l.* each, with power to increase, and to attach to the shares in such increased capital such preferential, deferred, or special rights, privileges, or conditions as may be determined upon by or in accordance

Form 226.

Statement of capital and shares where

Form 226.

company
formed to
acquire
mining
property in
France (stamp
duty lessened).

with the regulations of the coy. The sd A. B. hby brings into the coy by way of contribution (*apport*) the concession of the mines and the undertaking, and all the other ppty mentd in paragraph — hof, and in consideration thof he shall receive an allotment of 24,000 of the sd shares fully pd up, which shall be issued to him after the completion of the formalities necessary to the transcription of the ppty required by French law, and undertakes to execute and do all further acts and things which may be necessary to effectuate the sd contribution (*apport*) according to French law. Each of the seven subscribers hto is hby bound to contribute to the capital of the coy the sum of 10*l.*, and accordingly shall be allotted the share set opposite his signature hto fully pd up.

This form was adopted in the case of a company which was formed here to acquire and work a mining property in France. According to French law, the stamp duty on a transfer of property brought into a company by way of contribution is much less than the duty on a sale to a company of the same property. The transaction was succes-fully carried through.

ON THE CONSTRUCTION OR INTERPRETATION OF MEMORANDA AND ARTICLES OF ASSOCIATION.

CHAPTER VII.

It may be convenient here to set forth some of the leading rules applicable to the construction or interpretation of the memoranda and articles of association * of a company.

Some leading rules of construction.

Some of these rules are of a special character and override the ordinary rules applicable to the construction of instruments in writing, but, so far as not excluded, the ordinary rules apply. "I cannot," said Selwyn, L. J., in *International Contract Co.*, 17 W. R. 159; 20 L. T. 100, "at all accede to the argument of counsel that there is any such rule of this Court as he has alluded to, as to the necessity of the Court taking upon itself to construe memoranda and articles of association in the strictest possible manner, or in any other manner than that in which the Court construes documents of an ordinary kind. I think that the ordinary rules of construction apply to memoranda and articles of association just as much as to any other kind of document."

Ordinary rules apply where no special ones.

* The term "articles of association" in this note is to be taken to mean the regulations for the time being of the company, that is to say, the regulations which the members of the company are for the time being and from time to time under an implied statutory covenant to observe, whether contained in articles of association, or in Table A, or in regulations adopted by special resolution, or partly in articles of association and partly in Table A, and partly as adopted by special resolution.

The following are definitions given by the Companies Act, 1908:—

285. In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them (that is to say):—

"Articles" means the articles of association of a company, as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in Table B in the Schedule annexed to the Joint Stock Companies Act, 1856, or in Table A in the First Schedule annexed to the Companies Act, 1862, or in that Table as altered in pursuance of section seventy-one of that Act, or in Table A in the First Schedule to this Act;

"Memorandum" means the memorandum of association of a company, as originally framed or as altered in pursuance of the provisions of this Act.

1. Memorandum controls articles,

but may be explained by latter.

1. The memorandum of association is the dominant instrument. In specifying the objects of the company it limits and restricts the company's powers to such objects and to things incidental or conducive thereto. *Supra*, p. 455 *et seq.* It effectually controls the articles of association in the sense that any provision in the articles inconsistent with the provisions contained in the memorandum is invalid. "The memorandum," as Lord Cairns said in *Ashbury Railway Co. v. Riche*, L. B. 7 H. L. 653, 670, "is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit." In that case a power in the articles to extend the company's objects by special resolution was held inconsistent with the memorandum and *ultra vires*, and so in *Ashbury v. Watson*, 30 C. D. 376, an article providing for the distribution of the company's profits in a manner inconsistent with the provisions in the memorandum of association was held to be invalid. Nevertheless it has been held that, although the articles cannot alter or control the memorandum, yet they may in some cases be referred to for the purpose of explaining an ambiguity in the memorandum. Thus, in *Anderson's case*, 7 C. D. 75, 1878, Jessel, M. R., considered that it was allowable to explain an ambiguity in the memorandum in regard to the capital by reference to contemporaneous articles. "I am not now," said his Lordship, "speaking of those portions of the memorandum of association which the Act of Parliament requires to be stated in the memorandum. Something might be said on that question, but all the Act of Parliament requires to be stated is the amount of capital for which the company is proposed to be registered divided into shares of a fixed amount. It does not prevent your stating that the shares are to be paid for partially in money and partially in property, or even partially in property and partially in remuneration for services. There is nothing about that in the Act of Parliament. Where there are two contemporaneous documents, executed and assented to by the same persons at the same time (and these really are so substantially and are therefore to be treated as contemporaneous documents), it appears to me that the ordinary rule applies, according to which contemporaneous documents are to be read together so that, if there is any ambiguity in one it may be explained by the other, and even if there is any inconsistency, you must take the two documents together and see how you can explain the inconsistency." But this principle must be acted on with great caution, having regard to the criticisms of Bowen, L. J., in *Guinness v. Land Corporation of Ireland*, 22 C. D. 377: "The memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors and the outside public as well as shareholders. The articles are the internal regulations of the company. How can it be said that in all cases the fundamental con-

ditions of the charter of incorporation and the internal regulations of a company are to be construed together? . . . In any case it is, as it seems to me, certain that for anything which the Act of Parliament says shall be in the memorandum, you must look to the memorandum alone. If the Legislature has said one instrument is to be dominant, you cannot turn to another instrument and read it in order to modify the provisions of the dominant instrument."

2. Both the memorandum and articles of association must be read and construed subject to the provisions of the Companies Act, 1908 (consolidating the Companies Acts, 1862 to 1908), for any provision inconsistent with the Act or derogating from rights given by the Act is void. See the cases last mentioned, and in particular *Trevor v. Whitworth*; also *Welton v. Saffery*, (1897) A. C. 299; *Re Peveril Mines*, (1898) 1 Ch. 122; and *Re Sharpe*, (1892) 1 Ch. 154.

2. Companies Acts to be borne in mind.

3. In considering whether any clause in the articles is or is not inconsistent with the Act or Acts, the provisions contained in Table A should be borne in mind, for it must be assumed, *prima facie*, that those provisions and similar provisions, as approved by the Legislature, were regarded by the Legislature as legal. Witness *Lock v. Queensland, &c. Co.*, (1896) A. C. 461, in which it was held that a company could pay interest on calls paid in advance, even though there were no profits; and *Trevor v. Whitworth*, 12 App. Cas. 409, in which the fact that Table A contained provisions for forfeiture of shares was referred to as showing the validity of such provisions.

3. Assumed validity of Table A provisions.

4. The documents must be read and construed with due regard to the general law. Thus, if they contain provisions contrary to the general law, they are *pro tanto* invalid; e.g., if they contain clauses in undue restraint of trade, those clauses cannot be relied on. See *supra*, p. 458.

4. Applicability of general and common law and Acts relating to particular classes of companies.

On the other hand, the law supplements the documents in various respects. Thus, under the Labouring Classes Dwelling Houses Act, 1866, companies established for trading or manufacturing purposes, in the course of whose business persons of the labouring classes are employed, may be and are by the Act authorized to erect dwellings for the accommodation of the persons of the labouring class employed by them, and may borrow money for the purpose.

Again, the common law rules apply in so far as the same are not validly excluded by the memorandum or articles of association. Thus, *prima facie* questions arising at a general meeting are to be decided in the first instance by a show of hands (*Horbury Bridge, &c. Co.*, 11 C. D. 109), and there is a *prima facie* right to demand a poll. (*Reg. v. Wimbledon*, 46 L. T. 47; 8 Q. B. D. 459.) Again, unless otherwise provided, the common law rule applies that no notice need be given of an adjourned meeting.

No also the rules of equity apply, and accordingly a director cannot be interested in any contract with the company unless the articles

otherwise provide. See *Albion, &c. Co. v. Martin*, and other cases cited at p. 732, *infra*.

Again, a director cannot hold an incompatible office. See *Milman v. Thatcher*, and other cases cited at p. 729, *infra*.

The doctrine of the fiduciary relationship of the promotor supplies another illustration.

5. "Expressed" intention to be given effect to.

5. In construing the documents the expressed intention is to be sought for and given effect to—not the intention, but the *expressed* intention.

"It is unquestionable that the object of exposition of all the written instruments must be to ascertain the expressed meaning or intention of the writer; the expressed meaning being equivalent to the intention." Per Coleridge, J., *Shaw v. Wellesley*, 9 Cl. & Fin. 355.

"The question is not what the parties to a deed may have intended to do by executing it, but what is the meaning of the words used in that deed." Per Lord Wensleydale, *Money Penny v. Money*, 9 H. L. C. 146.

"To construe is nothing more than to arrive at the meaning of the parties to the agreement." Per Lord Chelmsford, *Scott v. Corporation of Liverpool*, 2 De G. & J. 360; it should be added, "as expressed by the language they have used."

6. Whole document, not picked clauses, to be read.

6. The whole document must be read; it is not allowable to pick out one clause and treat it as indicating the intention of the parties, without regard to the rest of the document, for that may throw light on and qualify the particular clause.

"Every part of the deed ought to be compared with the other, and one entire sense ought to be made thereof." *Throgmorton v. Tracey*, 1 Plowd. 161.

"It is the duty of the Court to collect the intention from the whole instrument taken together." Per Lord Ellenborough, C. J., *Barlon v. Fitzgerald*, 15 East. 540; and see *Oakbank Oil Co. v. Crum*, 8 App. Cas. 65, where, to ascertain the meaning of an expression in the articles, the whole of the articles were scrutinised.

"One rule of construction which must prevail is that you must give effect to every part of a document if you can—you must read the whole." Per Lord Halsbury, L. C., *Elderslie Steamship Co. v. Borthwick*, (1905) A. C. 96.

7. Surrounding circumstances at time of signature.

7. It is allowable to refer to the surrounding circumstances at the time when the instrument was signed, so that the interpreter may be put as nearly as may be in the situation of the parties to the instrument. *Gray v. Pearson*, 6 H. L. C. 106.

"That which he has written is to be construed by every part of it being taken into consideration, according to its grammatical construction and the ordinary acceptance of the words used, with the assistance of such parol evidence of the *surrounding circumstances* as is admissible to place the Court in the position of the [writer]." Per Lord Wensleydale, *Roddy v. Fitzgerald*, 6 H. L. C. 876.

The Court it is which when once it is in possession of the circumstances surrounding the instrument, and of any peculiarity of meaning which may be attached by the custom of trade to any of the words of that contract has to place the construction upon the contract." Per Lord Cairns, *Bowen v. Shand*, 2 App. Cas. 468.

8. In construing the document the general rule is applicable that, in the case of a contract reduced to writing, "evidence is not allowed to be given of what passed between the parties, either before the written contract was made or during the time it was in a state of preparation, so as to add to or subtract from or in any manner to vary or qualify the written contract." Per Lord Denman, C. J., *Goss v. Lord Nugent*, 5 B. & Ad. 65; *Inglis v. John Battery & Co.*, 3 App. Cas. 554; *Lee v. Alexander*, 8 App. Cas. 853.

8. Parol modifications of written contract not valid:

Everything that takes place before a written contract signed by the parties is entirely to be disregarded in construing the contract by which they are bound." *North British Railway Co. v. Tod*, 12 Cl. & Fin. 722, 738.

Thus, in construing the memorandum or articles, it is not permissible to refer to the drafts thereof, or to the instructions for the same, or to any preliminary correspondence or other matters, as tending to throw light on the meaning of the words used.

e.g., reference to drafts or instructions, correspondence, &c.:

Moreover, acts or declarations of the parties subsequent to the registration of the company are not admissible for the purpose of construing documents. *Monro v. Taylor*, 8 Hare, 51; *Lewis v. Nicholson*, 18 Q. B. 503.

or subsequent acts or declarations.

9. In reading the instrument the words are to be taken, *prima facie*, to be used, as to popular words, in their popular sense, and, as to technical or scientific words, in their technical or scientific sense; but the *prima facie* meaning is to be displaced if it sufficiently appears from the context that the word is used in some other than its primary sense.

9. Popular words and technical or scientific words.

In my view, the principle on which words are to be construed in instruments is very plain. Where there is a popular and common word used in an instrument, that word must be construed *prima facie* in its popular and common sense. If it is a word of a technical or legal character, it must be construed according to its technical or legal meaning. If it is a word which is of a technical or scientific character, then it must be construed according to that which is its primary meaning—namely, its technical and scientific meaning. But before you can give evidence of the secondary meaning of a word, you must satisfy the Court, from the instrument itself or from the circumstances of the case, that the word ought to be construed, not in its popular or primary signification, but according to its secondary intention." Per Fry, J., *Holt v. Collier*, 16 C. D. 720; and see *Leach v. Jay*, 9 C. D. 45, as to technical words.

"If the parties have used terms which bear not only an ordinary

meaning, but also one peculiar to the department of trade or business to which the contract relates: the parties must have intended to use the words in the peculiar sense." Per Cockburn, C. J., *Miers v. Sarll*, 3 El. & El. 306, 315.

But it is for those who allege that the words used have some special meaning to establish the fact. "It was," said Lord Cairns, in *Bowes v. Shand*, 2 App. Cas. 468, "competent to those who were resisting the application of this natural construction of the contract to have said, We will prove by evidence that, according to the custom of trade, these words, which have this natural signification, are used in a wider or different sense. . . . That, of course, would according to the well-known rule of law which admits parol evidence not to contradict a document, but to explain the words used in it, supply, as it were, the mercantile dictionary in which you are to find the mercantile meaning of the words which are used. That would be a legitimate and well-known mode of construing the document."

10. Decisions
as to meaning
of words.

10. Again, where a word or expression is used to which a special meaning has been attached by decisions of the Court, the word or expression is *prima facie* to be taken to be used in the sense thus attached; for, as Jessel, M. R., said, in *Wallis v. Smith* (1882), 21 C. D. 254, "If cases have laid down a rule that in certain events words are to have a particular meaning, and that has become a settled rule, it may be assumed that persons in framing their agreement have had regard to settled law, and may have properly used words which, though on the face of them they may have a different meaning, they know by reason of the decided cases must bear a particular or special meaning." Thus, by the decision in *Pulbrook v. Richmond, &c. Co.*, 9 C. D. 610, a special meaning was attached to the expression "in his own right" in a qualification clause in articles of association. This decision was acted on for many years; and when, in *Bainbridge v. Smith*, 41 C. D. 462, it was called in question, it was held to be too late to overrule the case, as it had no doubt been largely acted on. Lindley, L. J., said (p. 474), "If we had not to consider for the first time what the meaning of the phrase 'holding in his own right' is, I am not sure that I should take the view which I understand the Master of the Rolls did take, but it is one thing to say that, and another thing to overrule the construction then put upon the phrase, and to overthrow the practical acknowledgment acted upon ever since that decision. The words in question were acquired, by usage and upon the strength of that decision, a conventional meaning which I for one am not inclined to disturb." So also in *Cooper v. Griffin*, (1892, 1 Q. Lord Herschell said that he agreed "with Lindley having regard to the constant transactions depending upon the construction of articles of association, it would be dangerous to interfere

with the decision which has remained unopposed for so many years. To do so would be an injustice to persons who have acted on the faith of the decision.

11. Where the language is clear and unambiguous the effect must be given to it and no other effect taken to express the intention.

11. Language clear and unambiguous.

In construing a written instrument the grammatical and ordinary sense of the words is to be adhered to, unless that could lead to absurdity or repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity, repugnance or inconsistency, but no further." Per Lord Wensleydale in *Grey v. Pearson*, 11 L. C. 106.

12. Where language is used in a sense which in its primary meaning is unambiguous, and in which that meaning is not excluded by the context, and is sensible with reference to the extrinsic circumstances

12. Primary meaning where no ambiguity

which the writer was placed at the time of writing, such primary meaning must be taken conclusively to be that in which the writer

Such meaning in that case conclusively states the writer's and no evidence is receivable to show that in fact the writer

intended in any other sense or had any other intention. Per Lord Alderson in *Scott v. Wilson*, 9 Cl. & Fin. 355.

However capricious, unreasonable, or unjust, may be the intention, yet if it is clear and unequivocally expressed, every instrument is governed by it unless it is plainly controlled by other parts of the instrument. Per Lord Abinger in *Hume v. Riddell*, 2 Sim. & S. 41. See also 7 H. L. C. 89. See also per Lord Cottenham, *Lloyd v. Lloyd*, 1837, 2 My. & Cr. 191, 31 L. J. 202.

Intention, if plainly expressed must be given effect to.

Thus, where the articles of association provided that dividends were to be paid to the members "in proportion to their shares in

it was held that dividends must be paid according to the amount of the shares a greater amount was paid to

Oakbank Oil Co. v. Crom, 8 App. Cas. 651.

It was argued that it could not have been intended that A., who had only paid up 5*l.* on his 10*l.* share, should get as much as B., who had paid up 10*l.* on his 10*l.* share; but the House of Lords held that the words were plain and must have effect.

So, where the articles of association provided that, if the company should be wound up, the surplus assets should be applied first in repaying to the holders of the preference shares the amount paid up thereon, and that the residue, if any, should be divided amongst the members in proportion to the shares held by them respectively, and in the winding-up the surplus, after paying off the preference shares, was not sufficient to pay off the ordinary shares, it was held nevertheless that the words must have full effect and that the surplus ought to be divided in proportion to the shares, though in the result the preference shares got more than par while the ordinary shares got less than par. "I cannot think," said the Lord Chancellor, in that

[the *Hotel Metropole, Blackpool* case, "that the language is either doubtful or ambiguous. I think that it was competent for the subscribers to make such a bargain; and if it was so unreasonable and unjust, as suggested, I do not think that this Court or any other can place upon language so clear and unambiguous as this language any other meaning than the sense conveyed by the ordinary and natural meaning of the words and sentences employed." This case was decided in the House of Lords, 6th Aug. 1900.

And in cases where the words are clear and unambiguous, the mere fact that giving effect to them will involve hardship to one class of the members is no justification for departing from the words. Thus, where there were two classes of shares, preference and ordinary, and the preference shares were given a preferential right to dividend, but no provision was made in regard to winding-up, it was held that on a winding-up both classes ranked *pari passu* for repayment of capital *Griffith v. Paget*, 6 C. D. 517.

"Of course," said Jessel, M. R., in that case, "some observations were made on the possible hardship of such a result; but the answer is simple. People who enter into these partnerships under articles of association—that is, articles of partnership—must be taken to have read and understood them; and if they are to be taken to have read them and to have understood them, which they ought to do before entering into these contracts, they cannot complain if the contract is afterwards carried out. That appears to me a conclusive answer to any notion of hardship. Whether it is conclusive in fact or not is a matter upon which men who have experience in the world may have different opinions, but I must hold it to be conclusive in the law. See also *Peel's case*, 2 Ch. 674. So also, in *Oakbank Oil Co. v. Crum*, *supra*, Lord Selborne, L. C., said: "We cannot decide the case upon any *a priori* argument at all; we must see what the actual contract is. Each party must be taken to have made himself acquainted with the terms of the written contract contained in the articles of association and the Acts of Parliament so far as they are important. He also, in law, must be taken—though that is sometimes different from what the fact may be—to have understood the terms of the contract according to their proper meaning; and, that being so, he must take the consequences, whatever they may be, of the contract which he has made."

14. Ambiguous words—the more reasonable construction to apply.

14. Ambiguous words. Where the words are ambiguous and equivocal, and one construction is reasonable and the other unreasonable, or less reasonable, unjust, or capricious, that construction should be preferred which is most consonant with justice and best calculated to give effect to what must be assumed to be the intention of the parties.

"Where by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary

mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable." Per Lord Cranworth. *Abbott v. Middleton* (1858), 7 H. L. C. 88.

It is now, I believe, universally admitted that, in construing that writing, the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer to be extracted from the whole instrument, should follow from so reading it. Then the sense may be modified, extended or abridged, so as to avoid those consequences, but no further." Per Lord Wensleydale, in the same case.

"I take it," said Jessel, M. R., in *Selby v. Whittaker*, 6 C. D. 239, that no rule of construction is better settled than that where two meanings are open to a judge, and the one is reasonable and sensible, and the other, though not absolutely unreasonable in the sense of supposing the testator to be a lunatic, yet is extremely unlikely, he ought to select that meaning which is consonant to ordinary reason and not liable to the imputation of excessive caprice."

15. If any clause be found obscure or doubtful, the proper mode of discovering its true meaning is to compare it with the other clauses and find out the sense of one clause from the obvious intent of another. See Co. Litt. 381a; *Trenchard v. Hoskins*, Winch. 93; *Oakbank Oil Co. v. Crum*, 8 App. Cas. 65.

16. The meaning of a word may sometimes be ascertained by reference to the meaning of words associated with it: *noscitur ex sociis*.

Thus, where the objects of a company were to make and sell, or lend on hire, railway carriages or waggons, and all kinds of railway plant, fittings, machinery, and rolling stock, and to carry on the business of mechanical engineers and general contractors, to purchase, lease, work, and sell mines, minerals and buildings, purchase and sell as merchants timber, coal, metals, and other minerals, and to buy and sell any such materials on commission or as agents: it was held that the rule "*noscitur ex sociis*" applied to the words "general contractors," and accordingly that the company was not entitled to enter into a contract for the construction of a railway. "It appears to me," said Lord Cairns, L. C., in that case, "upon all ordinary principles of construction, these words must be referred to the part of the sentence which immediately precedes them. The sentence which I have read is divided into four classes of works - first, to make and sell, or lend on hire railway carriages . . . that is an object *sui generis* and complete in the specification which I have read. The second is to

15. Context.

16. Meaning of word from associated words.

Noscitur ex sociis, or *Ejusdem generis*.

E.g., "general contractors."

carry on the business of mechanical engineers and general contractors. That, again, is the specification of an object complete in itself, and according to the principles of construction the term 'general contractors' would be referred to that which goes immediately before, and would indicate the making generally of contracts connected with the business of mechanical engineers—such contracts as mechanical engineers are in the habit of making and are in their business required to find it convenient to make, for the purpose of carrying on their business. . . . My Lords, if the term 'general contractors' were not to be interpreted as I have suggested, the consequence would be that it would stand absolutely without any limit of any kind. It would authorize the making, therefore, of contracts of any and every description, and the memorandum, in place of specifying a particular kind of business, would virtually point to the carrying on of business of any kind whatever, and would therefore be altogether unmeaning." *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653.

Attempts to make rule subordinate to the alleged "main object" of the company.

But this canon of construction must be applied with great caution. See *Bath's case*, 8 C. D. 334. And in some cases the Court appears to have been run away with by the rule. See *German Date Coffee Co.*, 20 Ch. D. 169; *Haven Gold Mining Co.*, 20 Ch. D. 151; *Crown Bank*, 44 C. D. 834; *Amalgamated Syndicate* (1897), 77 L. T. 432; and *Coolgardie Consolidated Gold Mines* (1897), 76 L. T. 269; *Stephens v. Mysore Reefs (Kangundy) Mining Co.*, (1902) 1 Ch. 745, in which there are *dicta* to the effect that in construing a memorandum the Court should search for what may be regarded as the main or primary object of the company and read all the other objects as merely subsidiary and ancillary to that. For criticisms on this novel rule of construction, see *supra*, p. 469 *et seq.*

Advisable to provide in memorandum that each object paragraph is independent of others.

To preclude such a misconstruction of the objects, it is now very common to insert words expressly providing that certain of the objects are to be construed as independent objects. See *supra*, p. 470.

Again, it is a common thing in a memorandum of association to provide for the carrying on of a specified business, or the acquisition of property in some named country or place, "or elsewhere," so that the power may not be limited to the named country or place. Now *prima facie* the words "or elsewhere" are world-wide, even in a criminal case (see *Trial of Earl Russell* before the King in Parliament), (1901) A. C. 446; yet, strange to say, the Courts have on more than one occasion read these words in a memorandum in a non-natural sense, and as referring not to the rest of the world, but to some place in close proximity to the country or place named. See, for example, *Coolgardie Consolidated Gold Mines* (1897), 76 L. T. 269, and *Stephens v. Mysore Reefs (Kangundy) Mining Co.*, (1902) 1 Ch. 745. In neither case, it is submitted, was there anything in the

context sufficient to justify a departure from the plain meaning of the words used. But in view of such unfortunate misconstructions, it seems desirable to fortify the expression "or elsewhere" by other expressions, *e.g.*, as in Form 119, *supra*, p. 513. They have not, however, passed unchallenged, for in *Pedlar v. Road Block Gold Mines*, (1905) 2 Ch. 427, Warrington, J., held that the words "in Mysore or elsewhere," were to have full effect. The object therefore, said his Lordship, was gold mining generally, and not the working of a particular gold mine. To say otherwise was to reduce the clause to an absurdity. See also *Butler v. Northern Territories of Australia*, 96 L. T. 41.

As to the construction of general words in the memorandum, to the effect that the company may do all such things as are conducive to the above objects, see *supra*, p. 471 *et seq.*

17. The *ejusdem generis* doctrine is sometimes applicable, according to which general words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated. Per Erle, C. J., *Hallam v. Blackburn*, 17 C. B. N. S. 678.

"Conducive clause."

17. "*Ejusdem generis*" doctrine—general words following specific words.

But this statement is too wide. General words should be given their full force. "Nothing can be plainer than that, *primâ facie*, general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before. . . . I reject the supposed rule that general words are *primâ facie* to be taken in a restricted sense." Per Lord Esher, M. R., *Anderson v. Anderson*, (1895) 1 Q. B. 749. In the same case Rigby, L. J., said that, "the doctrine known as that of *ejusdem generis* has, I think, frequently led to wrong conclusions on the construction of instruments."

The doctrine is not applicable, for instance, where the particular words exhaust the whole *genus*. In such case the general words must be taken to refer to a larger *genus*. *Fenwick v. Schmalz*, Willes, J., L. R. 3 C. P. 313; *Bath's case*, 8 C. D. 334. In the case last mentioned the objects were expressed in some detail, and were followed by general words empowering the company to make and effect assurances against all and every kind of risk which might be effected according to law; and Jessel, M. R., said: "I cannot see that there is any ground for restricting the meaning of the terms of the latter part of that clause, or for applying that which is so often called the doctrine '*noscitur a sociis*,' when you cannot suggest a single instance of a risk, having any connection with life insurance, which is not included in the express terms of the prior part of the clause. It seems to me that the only fair mode of reading the latter part of the third clause is to read it in its natural and unrestrained sense."

In *Smelting Company v. Inland Revenue*, (1897) 1 Q. B. 175, 182. Rigby, L. J., said: "The rule of construction which is called 'the *ejusdem generis* doctrine' or sometimes 'the doctrine *noscitur ex sociis*' is one which I think ought to be applied with great caution, because it implies a departure from the natural meaning of words in order to give them a meaning which may or may not have been the intention of the Legislature."

For many years the jurisdiction of the Court in winding-up was crippled by the application of this *ejusdem generis* rule restricting the words in sect. 79 of the Act of 1862 (sect. 129 of the Act of 1908), empowering the Court to make a winding-up order "whenever" it "is of opinion that it is just and equitable that the company should be wound up," to cases similar to those enumerated in the four preceding clauses. This construction has now been deliberately abandoned. See *Amalgamated Syndicate*, (1897) 2 Ch. 600; *T. E. Brinsmead & Sons*, (1897) 1 Ch. 45, 406; *Sailing Ship Kentmere*, W. N. (1897) 58.

When the word "whatsoever" follows the general words, that word, as a rule, excludes the application of the *ejusdem generis* construction. See *Earl of Jersey v. Guardians of Poor of Neath*, 22 Q. B. D. 555.

In that case, Fry, J., said that "where you find the word 'whatsoever' following, as it does, upon certain substantives, it is often intended to repel, and in this case does effectually repel, the implication of the so-called doctrine of *ejusdem generis*, which I think, has often been urged for the sake of giving not the true effect to the contracts of parties, but a narrower effect than they were intended to have." In the same case Bowen, L. J., said: "The words 'all mines and minerals whatsoever' are as large as they can be, and I do not think that they can be cut down by the previous words 'coal, culm, and iron.' It seems to me, although that is a question of construction, that they are intended to be words which exclude the operation of the rule of construction of *ejusdem generis*."

18. *Expressio
omnis est
exclusio
alterius.*

18. The rule embodied in the maxim "*expressio unius est exclusio alterius*" is very often applied. Thus, where the articles give power to refuse to register transfers in certain specified cases, that implies that the right is confined to those cases (*Weston's case*, 4 Ch. 20); and where there is an express power to pay dividends in proportion to the shares, that impliedly negatives any power to pay in proportion to the capital paid up (*Oakbank Oil Co. v. Crum*, 8 App. Cas. 65).

Nevertheless, the Court is often too prone to adopt the rule as stated above, and by doing so to render general words practically inoperative.

19. *Relative
words usually
refer to last
antecedent.*

19. Relative words like "thereon" or "theretofore" must be taken ordinarily to refer to the last antecedent, but not so as to interfere with the general intent of the instrument. See *Ewing v. Ewing*,

8 App. Cas. 822, 831: *Mayor of Portsmouth v. Smith*, 10 App. Cas. 364, 373. In the case last cited Lord Blackburn said: "I do not think that the last 'antecedent' is necessarily the nearest, nor even that the word 'antecedent' is confined to what in the collocation of words comes before the word of relation." As to "such," see *Ex parte Burnes*, (1896) A. C. 146; *Eastern Counties Rly. v. Marriage*, 9 H. L. C. 32.

20. A liberal construction is to be put upon the words of a document so as to uphold them if possible, and carry into effect what appears to be the intention of the parties. 20. Liberal construction.

The memorandum ought to be read fairly, and not so as to make the scheme *ultra vires* which is otherwise unobjectionable." Per Davey, L. J., *New Zealand, &c. Co. v. Peacock*, (1894) 1 Q. B. 632.

Such a construction ought to be made of deeds *ut res magis valeat quam pereat*, and the deeds should take effect rather than the contrary." Per Willis, C. J., *Smith v. Packhurst*, 3 Atkins, 136.

Where words are capable of a twofold construction, even in the case of a deed . . . it is just and reasonable that such construction should be received as tends to make it good." Per Lord Talbot, L. C., *Atkinson v. Hutchinson*, 3 P. Wms. 258.

21. Where the directors of a company are invested by the regulations with certain powers, the authority thus conferred is to be read subject to the general rules applicable to the exercise by directors of the powers vested in them, and in particular to the rule that the directors are to exercise the powers for the benefit of the company and in the true interests of the company, and according to the best of their judgment, for they stand in a fiduciary position, and must act accordingly. *Gilbert's case*, 5 Ch. 559; *Alexander v. Automatic Co.*, (1900) 2 Ch. 56. 21. Powers of directors.

22. Where the articles define the respective powers of general meetings and directors, they must respectively keep within their respective realms. *Automatic Self Clearing Co. v. Cunningham*, (1906) 2 Ch. 34; *Gramophone and Typewriter*, (1908) 2 K. B. 89; *Salmon v. Quin & Axtens*, (1908) A. C. 433. 22. Powers of directors and general meetings.

23. The legality of a clause or provision depends "upon the natural and probable results of the due exercise of the power which it confers, and not upon the consequences of its possible abuse by unscrupulous or fraudulent directors." *Murray v. Scott*, 9 App. Cas. 519, 558, per Lord Watson. 23. On what the legality of a clause or provision depends.

"It would be, to my mind, a most perverse proceeding to construe these words in any different sense because, by some improper use of the power thus given, it might be made mischievous in its operation." *Lock v. Queensland Investment, &c. Co.*, (1896) A. C. 467.

24. Any rule of construction is liable to be excluded or modified

where from the instrument a contrary intention appears. *Earl of Jersey v. Guardians of Poor of Neath*, 22 Q. B. D. 561.

Points of construction on memoranda and articles may be decided on originating summons. R. S. C., Ord. LIV. See *Martin v. Shuppisser*, 81 L. T. 147; *Morgan's Brewery Co. v. Crosskill*, (1902) 1 Ch. 898. In the last case a company proposing to issue new preference shares, ranking *pari passu* with its existing preference shares, served on one of its preference shareholders (sued on behalf of himself and the other preference shareholders) an originating summons for the determination of certain questions, with reference to the proposed issue, arising on the construction of the articles of association. Buckley, J., refused to appoint the defendant to represent the class, and said that he would not decide the questions so as to bind the class of preference shareholders unless a meeting of them was first called and nominated a person to represent them, in which case he would appoint him to represent the class. He, however, decided the question as between the company and the defendant.

REGISTRATION

Of Companies—Contracts—Mortgages, Notices, &c.

CHAPTER VIII.

REGISTRATION OF COMPANIES UNDER PART I. OF THE
COMPANIES (CONSOLIDATION) ACT, 1908.

Registration
of companies.

The procedure is set forth at p. 447. *supra*.

The Companies (Consolidation) Act, 1908.

Form 227.

[5s. registration stamp.]

Statutory
declaration on
registration
of company.

DECLARATION OF COMPLIANCE *with the REQUISITIONS of the COM-
PANIES ACT, made pursuant to sect. 17 (2) of the Companies
Act, 1908 (8 Edw. 7, c. 69), on behalf of a Company
proposed to be Registered as*

THE ---, LIMITED.

Presented for filing by —

I, —, of —, solemnly and sincerely declare that I am [*state
qualification, as:—*

a solicitor of the High Court engaged in the formation of the sd coy; or,
a person named as a director of the sd coy in the arts of assen of the
sd coy; or,

a person named as the secretary of the sd coy in the arts of assen of
the sd coy]

and that all the requirements of the Cos (Consolidation) Act, 1908, in
respect of matters precedent to the registration of the sd coy and
incidental thereto have been complied with save only the payment of
the fees and sums payable on registration.

The official form does not contain the words in brackets, and the registrar
therefore objects to them; but without those words the declaration is not
uncommonly untrue, for the declaration is generally made before payment of the
fees, and yet the payment thereof is a condition precedent to registration.
The form ought therefore to be altered.

Form 227. And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act, 1835.

A declaration to the above effect must be produced to the Registrar of Companies on presenting the memorandum and articles for registration, and may be accepted by him as sufficient evidence of compliance with the Act. See Companies (Consolidation) Act, 1908, sect. 17, sub-sect. 2 of which is as follows:

(2) A statutory declaration by a solicitor of the High Court, and in Scotland by an enrolled law agent, engaged in the formation of the company or by a person named in the articles as a director or secretary of the company of compliance with all or any of the said requirements shall be produced to the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance.

The declaration must be made before a justice of the peace, notary public, or commissioner to administer oaths in the Supreme Court of Judicature.

Under the sub-section the registrar *may* accept the declaration as sufficient evidence of such compliance. He, therefore, has a discretion, and accordingly if, notwithstanding the declaration, he entertains any doubt or suspicion as to whether the requisitions have really been complied with, he can call for further evidence; but, practically, the only question is whether the document has been subscribed by seven persons, for almost all the other requisitions which have to be complied with are as to the form of the documents and the payment of fees.

It is sometimes thought advisable to name some one in the articles of association as the secretary of the company, so that the declaration may be made by him. Any question as to the effect of a solicitor admitting that he has been engaged in the formation of the company, or of one director being put forward too prominently, will thus be avoided.

Form 228.

The Companies (Consolidation) Act, 1908.

Consent to act
as director.

CONSENT TO ACT AS DIRECTOR OF THE —, LIMITED, *to be Signed and Filed pursuant to sect. 72 (1) (i).*

To the Registrar of Companies.

I we, the undersigned hereby testify my [our] consent to act as Director[s] of The —, Limtd. pursuant to sect. 72 (1) (i) of the Cos (Consolidation) Act, 1908.

[Tabular form in three columns headed:—(1) Signature, (2) address, (3) description. If a director signs by "his agent authorized in writing," the authority must be produced and a copy filed.]

Dated, &c.

The above form is not required where the company is a private company. Companies (Consolidation) Act, 1908, s. 72 (3).

I [we] the undersigned hereby testify my [our] consent to act as a director [directors] of The —, Ltd., pursuant to sect. 72 (1) of the Cos (Consolidation) Act, 1908, and to my [our] name[s] being inserted as a director [directors] in the prospectus of the above company which it is proposed to issue, and I [we] authorize Messrs. — of — to file this consent with the Registrar of Cos, pursuant to sect. 72 (2) of the Cos (Consolidation) Act, 1908.

Form 229.

Consent to act and be named in prospectus as director.

As witness my [our] hand[s] this — day of —

The consent is to be signed by the proposed director, or "by his agent authorized in writing." See sect. 72 (2).

If the consent is signed by an agent, add after the signature the words "by N. of —, the duly authorized agent of the said A. B."

The document should be filed before or along with the articles and before the prospectus is published. See sect. 72 (1) of the Act.

The above form is not required in the case of a private company. Companies (Consolidation) Act, 1908, s. 72 (3).

I [we] the undersigned hereby testify my [our] consent to my [our] name[s] being inserted as a director [directors] of The —, Ltd., in the prospectus that which it is proposed to issue, and I [we] authorize Messrs. — of —, to file, &c. [as in Form 229].

Form 230.

Consent to naming in prospectus merely.

The above form will be used where, after registration of the company, it is proposed to issue a prospectus offering shares for subscription and no such consent has previously been filed, unless the prospectus is to be issued more than one year after the date for commencing business. See note to Form 229.

The Companies (Consolidation) Act, 1908.

Form 231.

List of the persons who have consented to be directors of The —, Ltd., to be delivered to the Registrar pursuant to sect. 72 (2).

List of persons consenting to be directors.

To the Registrar of Joint Stock Cos.

I [we] the undersigned, hereby give you notice, pursuant to sect. 72 (2) of the Cos (Consolidation) Act, 1908, that the following persons have consented to be directors of The —, Ltd.

[Name, address, and description in tabular form under such headings.]

Signature, address, and description of }
applicant for registration.

Dated, &c.

This list must be delivered to the Registrar by the applicant for registration on making his application. See sect. 72 (2).

It is not required in the case of a private company, nor where the prospectus is to be issued more than one year from date for commencing business. Companies (Consolidation) Act, 1908, s. 72 (3).

Form 232.**The Companies (Consolidation) Act, 1908.**

Application
to register
when no
directors
named.

The — Coy. limtd by shares.

[5s. registration stamp.]

APPLICATION FOR A CERTIFICATE OF INCORPORATION *to be filed by a company which does not deliver a list of persons who have consented to be directors of the company. (Sect. 72 (2) of the Companies (Consolidation) Act, 1908.)*

[Name of proposed coy] — Limtd.

Presented for filing by —.

Coy limtd by shares.

Applicon by the subscribers to the memdum of assen of — Coy. Limtd (being a coy which does not deliver a list of persons who have consented to be directors of the coy), for a certificate of incorporation as a limtd coy under the Cos (Consolidation) Act, 1908.

We, the several persons whose names are subscribed, hby declare that The — Coy, Limtd, whose memdum of assen is delivered herewith, cannot deliver a list of persons who have consented to be directors of the coy, pursuant to sect. 72 (2) of the Cos (Consolidation) Act, 1908, because [*here state the reason—e.g., "no directors have been named or appointed"*].

[Names, addresses and descriptions of subscribers.]

Dated this — day of —.

[Witness to the above signatures.]

This form of application is only to be used where the company does not deliver a statement that it is a private company. (Sect. 72 (3) of the Act.)

Form 232a.**Commencement of Business.****The Companies (Consolidation) Act, 1908.**

Statutory
declaration
before
commencing
business,
where
prospectus
filed.
See sect. 87
(1), *supra*,
p. 20.

[5s. registration stamp.]

DECLARATION *made on behalf of The —, Limited, that the conditions of sect. 87 (1) have been complied with.*

I —, of —, being [the secretary or a director] of The —, Limtd, do solemnly and sincerely declare:—

That the amount of the share capital of the coy offered to the public for subscription is £ —.

That the amount fixed by the memorandum or articles and named in the prospectus as the minimum subscription upon which the company may proceed to allotment is £— **Form 232a.**

That shares held subject to the payment of the whole amount thereof in cash have been allotted to the amount of £—.

That every director of the company has paid to the company on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

Declared at, &c., on, &c., before me.

—, a Commissioner for Oaths.

The Companies (Consolidation) Act, 1908.

Form 233.

[5s. registration stamp.]

Another, where statement in lieu of prospectus is filed.

DECLARATION made on behalf of The —, Limited (which is a company that has filed with the Registrar of Joint Stock Companies a statement in lieu of prospectus, that the conditions of sect. 87 (1) have been complied with.

I —, of — [the secretary or a director of The —, Limited, do solemnly and sincerely declare:—

That the amount of the share capital of the company other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash is £—.

That the amount fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the company may proceed to allotment is £—.

That shares held subject to the payment of the whole amount thereof in cash have been allotted to the amount of £—.

That every director of the company has paid to the company on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares payable in cash.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

Declared at, &c.,

—, a Commissioner for Oaths.

Form 233a.

Cos (Consolidation) Act, 1908.

Return of
allotments.

[5s. registration stamp.]

Return of allotments from the — day of — 19— to the —
of — 19— of The — Limtd.

Made pursuant to sect. 88 (1) of the Cos (Consolidation) Act, 1908.

NOTE.—When the return relates to an allotment made on one particular date, that date only should be inserted, and the word "made" substituted for "from." When the return includes several allotments made on different dates, the actual dates of only the first and last of such allotments included in the return should be given.

The return must be registered within one month of the first date.

Number of* — shares allotted payable in cash	—
Number of — shares allotted payable in cash	—
Nominal amount of* — shares so allotted	£ —
Nominal amount of — shares so allotted	£ —
Amount paid or due and payable on each such* — share ...	£ —
Amount paid or due and payable on each such — share ...	£ —

Number of shares allotted for a conson other than cash*	—
Nominal amount of the shares so allotted	£ —
Amount to be treated as paid on each such share	£ —

The conson for which such shares have been allotted is as follows:—

* * * * *

Presented for filing by —

Names, addresses and descriptions of the allottees.

[Tabular form with five columns under heads of surname, Christian name, address, description and number of shares allotted (with sub-columns to fifth column for the different classes of shares).]

Signature —.

Officer —.

* Distinguish between Preference, Ordinary, &c.

Sect. 88 of the Companies (Consolidation) Act, 1908, is as follows:—

88.—(1) Whenever a company limited by shares makes any allotment of its shares, the company shall within one month thereafter file with the registrar of companies—

(a) a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses, and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; and

b) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(2) Where such a contract as above mentioned is not reduced to writing, the company shall within one month after the allotment file with the registrar of companies the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing, and those particulars shall be deemed to be an instrument within the meaning of the Stamp Act, 1891, and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be a stipulated under section twelve of that Act.

(3) If default is made in complying with the requirements of this section, every director, manager, secretary, or other officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding fifty pounds for every day during which the default continues:

Provided that, in case of default in filing with the registrar of companies within one month after the allotment any document required to be filed by this section, the company, or any person liable for the default, may apply to the court for relief, and the court, if satisfied that the omission to file the document was accidental or due to inadvertence or that it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such period as the court may think proper.

Paragraph (b) is in substitution for sect. 25 of the Companies Act, 1867, repealed by sect. 33 of the Companies Act, 1900. It is peculiarly framed, for in the case specified it requires the filing—

- (1) of a contract in writing constituting the title of the allottee to such allotment, and
- (2) of any contract of sale or for services, or for other consideration in respect of which such allotment was made, and
- (3) of a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

See further as to the construction of the section and its policy, *supra*, p. 61.

Penalty.

The penalty is very onerous, namely, 50*l.* per d*y*; but it is only to be enforced against a director, manager, secretary or other officer who is knowingly a party to the default. "Knowingly" means "knowing the facts," and a man commits the offence if he knows of the allotment or knows of the contract and does not procure compliance with the section. It is apprehended that the mere fact that he erroneously believed that he had complied with the section would not afford a defence. *Twyross v. Grant*, 2 C. P. D. 469.

Form 234.

Notice of
situation of
office.

Notices, &c. to Registrar of Companies.**The Companies (Consolidation) Act, 1908.**

**NOTICE OF THE SITUATION OF THE REGISTERED OFFICE OF THE
— COMPANY, LIMITED, pursuant to sect. 62.**

To the Registrar of Companies.

The — Coy, Limtd, hby give you notice, in accordance with the Cos (Consolidation) Act, 1908, that the registered office of the coy is situate at [the full address must be stated, including the number of the house and the name of the street or road (if any)].

Signature —
Officer —.

Dated, &c.

This notice is to be signed by a director, secretary, or other authorized officer of the coy.

See sect. 62 (2) of the Act.

Form 234a.

Notice of
change of
office.

Notice of Change of Office.**The Companies (Consolidation) Act, 1908.**

**NOTICE OF CHANGE IN THE SITUATION OF THE REGISTERED
OFFICE OF THE — COMPANY, LIMITED. Pursuant to sect. 62.**

To the Registrar of Companies.

The — Coy, Limtd, hby give you notice, in accordance with the Coys (Consolidation) Act, 1908, that the registered office of the coy is now situated at — [the full address must be stated, including the number of the house and the name of the street or road (if any)].

Signature —
Officer —.

Dated, &c.

This notice is to be signed by a director, secretary, or other authorized officer of the coy.

See sect. 62 (2) of the Act.

Form 234b. Notice of consolidation of shares and conversion of shares into stock.

See sect. 42 of the Act.

Notice of Increase of Capital or in Number of Members.**Form 235.**

See sect 44 (1) of the Act.

Notice of
increase of
capital.

The Companies (Consolidation) Act, 1908.

**NOTICE OF INCREASE IN THE NOMINAL CAPITAL OF THE ———
COMPANY, LIMITED. Pursuant to sect. 44 (1).**

This notice must be sent to the registrar within 15 days from the date of the passing of the resolution by which the increase has been authorized, under a penalty of 5*l.* per day for default.

To the Registrar of Companies.

The ——— Coy, Limtd, hby give you notice, in accordance with sect. 44 of the Cos (Consolidation) Act, 1908, that by a ——— resolution of the coy, passed the ——— day of ———, 19— [if necessary add "and confirmed the ——— day of ———, 19—"], the nominal capital of the coy has been increased by the addition thereto of the sum of ——— pounds, divided into ——— shares of ——— each, beyond the present registered capital of ——— pounds.

Signature ———.

Officer ———.

Dated, &c.

This notice is to be signed by a *director*, *secretary*, or other authorized officer of the coy.

In addition to a 5*s.* registration stamp, a notice of increase of capital or in number of members must be stamped as above mentioned, pp. 486, 487. And the duty of 5*s.* per 100*l.* payable under sect. 112 of the Stamp Act, 1891, as amended by sect. 7 of the Finance Act, 1899, and sect. 5 of the Revenue Act, 1903, must be paid. As to this, see p. 488.

The Companies (Consolidation) Act, 1908.

Form 236.

Coy limtd by shares.

Copy of
special
resolution(s).**SPECIAL RESOLUTION (pursuant to sect. 70 (1)) of the ———
COMPANY, LIMITED. Passed ———, 19—. Confirmed ———,
19—.**

At an extraordinary general meeting of the members of the sd coy, duly convened, and held at ———, in the county of ———, on the ——— day of ———, 19—, the following special resolution ——— duly passed; and at a subsequent extraordinary general meeting of the members of the sd coy, also duly convened, and held at the same place, on the ——— day of ———, 19—, the following special resolution ——— duly confirmed:—

Resolved—That, &c.

See note to next form.

Form 236a.

The Companies (Consolidation) Act, 1908.

Copy of
extraordinary
resolution(s).

Coy limtd by shares.

EXTRAORDINARY RESOLUTION (*pursuant to sect. 70 (1)*) of the
— COMPANY, LIMITED. *Passed* —, 19—.

At an extraordinary general meeting of the members of the sd
coy, duly convened, and held at —, in the county of —, on the
— day of —, 19—, the following extraordinary resolution —
duly passed:—

Resolved—That, &c.

A special or extraordinary resolution need not be advertised in the *Gazette*
unless it is for winding-up.

Where a special or extraordinary resolution has been passed pursuant to
sect. 69 of the Companies (Consolidation) Act, 1908, a copy is to be printed
and forwarded to the registrar and is to be recorded by him. See sect. 70 (1)
of the Act. It should be signed by a director, secretary, or some other duly
authorized official. See sect. 117 of the Act.

Form 237.

The Companies (Consolidation) Act, 1908.

Report to be
submitted
to statutory
meeting.
Sect. 65 of
the Act

5s. registration stamp.

REPORT (*pursuant to sect. 65 (5)*) of the — COMPANY, LIMITED.

To be certified by not less than two directors, or where there are less than two
directors by the sole director or manager, and forwarded at least seven days
before the statutory meeting to every member of the company, and to be filed
with the registrar forthwith after the sending thereof to the members. Sect. 65

(a) The total number of shares allotted is —, of which — are
allotted *state as "fully paid up" or "paid up otherwise than in*
cash to the extent of — per share" in conson of —, and upon
each of the remaining shares the sum of — has been pd in cash

(b) The total amount of cash received by the coy in respect of
the shares issued wholly for cash is £ —, and on the shares issued
partly for cash is £ —

(c) Abstract of the receipts of the coy on account of its capital
whether from shares and debentures and other sources, the pay-
ment thereout and parlars of balance in hand to a date within seven
days of the date of the report.

[Tabular form with two columns under headings of "Particulars of
Receipts" and "Particulars of Payments."]

The following is an account (or estimate) of the preliminary expenses of the coy. **Form 237**

[Tabular form in two columns (no headings)—the first for the items, and the second for the estimated amounts.]

(d) Names, addresses and descriptions of the directors, auditors (if any), manager (if any) and secretary of the coy.

[Tabular form in four columns under the headings of "Surname," "Christian Name," "Address," and "Description." The columns are to be continued for auditors (if any), manager (if any), and secretary.]

(e) Particulars of any contract the modification of which is to be submitted to the meeting for its approval, together with the parlars of the modification or proposed modification.

* * * * *

Dated, &c.

We hereby certify this report.

— { Directors.

We hereby certify that so much of this report as relates to the shares allotted by the coy and to the cash received in respect of such shares and to the receipts and payments of the coy on capital account is correct.

— { Auditors.

A private company, though it must hold the statutory meeting, need not forward and file the preliminary report. Companies (Consolidation) Act, 1908, s. 65 (10).

THE — COMPANY, LIMITED.

Form 236

LIST OF MEMBERS *to be submitted to the Statutory Meeting of the Company:*

List of members to be submitted to statutory meeting

[Names of members, addresses, descriptions, and number of shares held by each member.]

Sect. 65 of Act of 1908.

— - Secretary.

The directors shall cause to be shown the names, descriptions, and addresses of the members of the company, and the number of shares held by them respectively to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting. Sect. 65 (6) of the Companies (Consolidation) Act, 1908

Registration of Mortgages and Charges under Sect. 93 of the Companies (Consolidation) Act, 1906.

Registration
of mortgages
and charges
Notes on the
section

See the section in the Appendix: and Co. Prac., 1st Ed. III., pp. 165—181

With reference to this section, which takes the place of sect. 14 of the Act of 1900, as amended by sect. 29 of the Act of 1907, the following points may be noted.

1. The section does not touch a mortgage or charge created before 1st April, 1909. *Watson & Co. v. Spiral Hobbs Limited*, (1902) 2 Ch. 206.

2. It only applies to certain classes of mortgages or charges—those specified in paragraphs (a), (b), (c), (d), (e) and (f) of sub-sect. (1) (p. 618). A simple mortgage or charge not for the purpose of securing an issue of debentures or debenture stock—on a concession, patent, or copyright, or deposit of dock warrants, bills of exchange, or other mercantile documents, is not within the section.

But a mortgage pursuant to a provision in a trust deed securing debenture stock requires registration (*Cornbrook v. Land Debenture Corporation*, (1904) 1 Ch. 103), unless the registration has been effected under par. (3) of sub-sect. (1). See p. 617, *infra*.

As to what is a bill of sale, see sect. 4 of the Bills of Sale Act, 1878: a pledge of goods accompanied by delivery of possession to the pledgee is not a bill of sale (*Ex parte Hubbard* (1866), 17 Q. B. D. 639), nor is an oral agreement giving security followed by possession (*Chapinworth v. Mills*, (1892) A. C. 231; *Remsey v. Margrett*, (1896) 2 Q. B. 16); nor *prima facie* an inventory of goods with receipt attached (*Remsey v. Sharrett*, *supra*); nor sale and hiring agreements (*North Central Wagon Co. v. Haverharts Road Co.*, 13 App. Cas. 544).

A re-insurance contract involving book debts does not require registration if it creates no charge on the book debts. *Law Car and General Insur.*, 55 Sol. J. 407.

As to paragraph (f). A floating charge is a charge on property of a company present and future, so framed as to leave the company at liberty to deal with the property charged in the ordinary course of its business until the charge finally attaches by reason of a winding-up or the appointment of a receiver. See *Panama, &c. Co.*, 5 Ch. 318; *Government Stock Co. v. Manila Railway* (1897) A. C. 86. Such a charge takes effect as an immediate and continuing charge (*Florence & Co.*, 10 C. D. 541), and, *prima facie*, leaves the company at liberty to create specific mortgages ranking in priority to a floating charge (*Wheatley v. Silkstone Co.*, 29 C. D. 715); but the floating charge is valid against general creditors (*South American Co.*, 2 C. D. 337), though an execution creditor may obtain priority (*Evans v. Rival Granite Quarries*, (1910) 2 K. B. 979). Nevertheless, the provisions contained in sects. 107 and 212 must be borne in mind. As to a floating charge created within three months of winding-up, see *Orleans Motor Co.*, (1911) 2 Ch. 41. And as to what is payment "at the time of or subsequently to the creation" of the debenture in such a case see *Columbian Fire-proofing Co.*, (1910) 2 Ch. 120. Commonly a floating charge comprises the whole of the company's property, and a charge on the "undertaking" includes all the property, and operates as a floating charge. But a floating charge on part of the company's assets or property is within the section. *Illingsworth v. Houldsworth*, (1904) A. C. 355.

3. It is the security which is avoided. Under sub-sect. (1) the company has to repay the money lent at once.

4. Sub-sect. (1) of sect. 14 of the Act of 1900 used the expression "filed with the registrar for registration." As to this expression, the registrar was advised and acted on the footing that this meant *temporarily* filed. The new Act provides for filing particulars.

5. Sub-sect. (3) provides for a different mode of registration, viz., by registering certain specified particulars. *Harrogate Estates, Limited*, (1903) 1 Ch. 498. And this mode is now commonly adopted in the case of a series of debentures and debenture stock. *Cunard Steamship Co. v. Hopwood*, (1908) 2 Ch. 564.

6. The word "charge" includes an equitable charge.

A mortgage or charge is "created" when the deed is executed or the agreement made, though the advance takes place subsequently. *Watson & Co. v. Spiral Globe Co.*, (1902) 2 Ch. 299; *Re Harrogate Estates, Limited*, (1903) 1 Ch. 498; *Appleyard v. New London and Suburban Co.*, (1908) 1 Ch. 621.

As to what is a "floating charge," see Form 599, and Co. Prec., Pt. III.

7. "Book debts" are debts entered or commonly entered in books. See *Shirley v. Marshall*, 14 C. B. N. S. 566; *Tailby v. Official Receiver*, 10 App. Cas. 523; *Dawson v. Isle*, (1906) 1 Ch. 633. No registration is necessary unless there is a charge on the debts. *Law Car and General Insurance Corp.*, (1911) W. N. 101.

8. A mortgage made after the Act of substituted property comprised in a trust deed executed before the Act requires registration (*Cornbrook v. Land Debenture Corporation*, (1904) 1 Ch. 106), unless the company is not a party (*Practical United Breweries v. Abbott*, (1908) 1 Ch. 279). Or unless the trust deed has been registered under par. 3 of sub-sect. (1) of sect. 93 of the Act (*Cunard Steamship Co. v. Hopwood*, (1908) 2 Ch. 564).

9. Although the security is under the section avoided by non-registration the obligation of the company to repay the money lent remains as an unsecured liability, and matures at once. See sect. 95 (1).

10. Sect. 96 empowers the Court, on being satisfied that the omission to register a mortgage or charge within the required time, or that the omission or misstatement of any particular with respect to such mortgage or charge "was accidental or due to inadvertence (see *Jackson & Co.*, (1899) 1 Ch. 348) or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief to," to extend the time for registration on such terms and conditions as seem to the judge just and expedient. In exercising this discretionary power of relief the practice is to insert in the order the following words:—"This order to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." *Re Juptin Brewery Co.*, (1902) 1 Ch. 79; *Re Spiral Globe Co.*, (1903) 1 Ch. 396; *Re Abrahams & Sons*, (1902) 1 Ch. 605; *Cardiff Workmen's Cottage*, (1907) 2 Ch. 627; *Ehrmann Brothers*, (1906) 2 Ch. 697. In this last case the Court of Appeal explained that this proviso is only designed to protect rights acquired by execution, charge or otherwise, against the property of the company in the interval between the expiration of the twenty-one days for registering and the extended time allowed by the order. It does not protect the existing unsecured creditors who have not obtained any security or charge upon the property subject to the debentures, and see *J. O. Johnson & Co.*, (1902) 2 Ch. 101, C. A.

Where an order extending the time is made, and these words appear in it

but before actual registration a winding-up commences, the mortgage or charge, if subsequently registered, is not effective against the general body of creditors. *Anglo-Oriental Carpet Co.*, (1903) 1 Ch. 914.

An order for extension will not be made after a winding-up has commenced. *Re Abrahams & Sons*, (1902) 1 Ch. 695.

If an order for extension is not conveniently obtainable, the company may, in lieu thereof, call in and cancel the debentures, and issue new debentures to be registered in due course, but at the cost, of course, of new stamp duty. *Bowen v. Detrien & Co.*, (1904) 1 Ch. 37; *Renshaw & Co.*, W. N. (1908) 210.

Sect. 97 provides for entering satisfaction, and sect. 98 for an index to the register, and sect. 99 for penalties for default in complying with the Act as to registration.

The Court has power to extend the time, even when the default was made before January 1st, 1909. Sect. 38 of the Interpretation Act, 1889. *Herts and Essex Waterworks Co.*, W. N. (1909) 48.

The registrar's certificate of registration is conclusive. Sect. 93 (5); *Tolland, Husson & Birkett*, (1908) 1 Ch. 152; *Cunard Steamship Co.*, (1908) 2 Ch. 564.

Form 239.

The Companies (Consolidation) Act, 1908.

Particulars
of mortgage
or charge.

Particulars to be supplied to the registrar pursuant to sect. 93 of a mortgage or charge created by the —, Limtd, and being:

- (a) A mortgage or charge for the purpose of securing any issue of debentures; or
- (b) A mortgage or charge on uncalled share capital of the company; or
- (c) A mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or
- (d) A mortgage or charge on any land wherever situate or any interest therein; or
- (e) A mortgage or charge on any book debts of the company; or
- (f) A floating charge on the undertaking or property of the company.

Strike out the sub-heads (a), (b), (c), (d), (e) or (f), which do not apply

[Tabular form in five columns headed:—(1) Date of the instrument creating or evidencing the mortgage or charge and description thereof, (2) Amount secured by the mortgage or charge, (3) Short particulars of the property mortgaged or charged, (4) Names (with addresses and descriptions) of the mortgagors or persons entitled to the charge, (5) Amount or rate per cent. of the commission, allowance or discount (if any) paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any of the debentures included in this return.]

Signature —

The Companies (Consolidation) Act, 1908.

Form 240.

Particulars to be delivered to the registrar pursuant to sect. 93 (3), relating to a series of debentures containing, or giving by reference to any other instrument, any charge, to the benefit of which the debenture holders of the said series are entitled *pari passu*, created by the —, Limtd.

Particulars of debentures or debenture stock, sub-sect. 3

NOTE The deed, if any, containing the charge must be delivered with these particulars to the registrar within twenty-one days after the execution of such deed; or, if there is no such deed, one of the debentures must be so delivered within twenty-one days after the execution of any debentures of the series.

[Tabular form in columns headed:—(1) Total amount secured by the whole series, (2) Amount of the present issue of the series, (3) Dates of resolutions authorizing the issue of the series, (4) Date of the covering deed (if any) by which the security is created or defined; or, if there is no such deed, the date of the first execution of debentures of the series, (5) General description of the property charged, (6) Names of the trustees (if any) for the debenture holders, (7) Amount or rate per cent. of the commission, allowance or discount (if any) paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any of the debentures included in this return.]

Signature

The Companies (Consolidation) Act, 1908.

Form 241.

First issue

[A 5s. cos registration fee stamp must be impressed here.]

The —, Limtd.

Statement of particulars as required by sub-sect. 3 of sect. 93 when more than one issue is made of debentures in a series

NOTE.—Sub-sect. 3 of sect. 93 above mentioned provides:

- (1) For registration of particulars of the entire series (for which purpose Form No. 47A must be used), and
- (2) When there is more than one issue of debentures of the series—for the registration of the amount and date of each issue (for which purpose Form No. 48 must be used).

[Tabular form in columns headed:—(1) Date of present issue, (2) Amount of present issue, (3) Particulars as to the amount or rate per cent. of the commission, allowance, or discount (if any) paid, or made, either directly or

indirectly, by the company, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any of the debentures included in this return.]

Signature —.

The fees will be as follows:—

For registering any mortgage or charge created by a company—

Where the amount of the mortgage or charge or debenture does not exceed 200 <i>l</i>	£0 10 0
Where the amount of the mortgage or charge or debenture exceeds 200 <i>l</i>	1 0 0

Provided that in the case of a series of debentures the fee for registration of each debenture of the same series after the first shall be sixpence.

NOTE.—The original instrument evidencing the mortgage or charge must be presented with the return within twenty-one days after the date of its creation, 14 (1) accompanied by the particulars set out in the form.

Form 242.

Certificate of registration of debentures.

I hereby certify that a series of debentures created by The Coy, Limtd, on the — day of —, for securing the sum of £—, was this day registered pursuant to sect. 93 of the Cos (Consolidation) Act, 1908.

Given under my hand, at London, this — day of —,

—, Registrar of Companies.

Form 243.

Registration under sub-sect. 3.

Application having this day been made for the entry on the register of the particulars required by sub-sect. 3 of sect. 93 of the Cos (Consolidation) Act, 1908, in relation to a series of debentures containing a charge (to the benefit of which the debenture holders of the said series are entitled *pari passu*) created by —, Limtd, by resolution passed on the — day of —, 1909 (and one of such debentures having been duly produced), I hereby certify that the total amount secured or intended to be secured by the said series is 100,000*l*., and that all the particulars required by sub-sect. 3 of sect. 93 of the said Act in relation to the said series have been this day entered on the register.

Given under my hand, at London, this — day of —,

—, Registrar of Companies

Form 243a.

Certificate of registration of trust deed.

I hereby certify that a mortgage or charge, dated, &c., and created by The — Coy, Limtd, for securing debenture for the aggregate sum of £—, was this day registered pursuant to sect. 93 of the Cos Act, 1908.

Given, &c.

The Companies (Consolidation) Act, 1908.

Form 244.

MEMORANDUM OF SATISFACTION OF MORTGAGE OR CHARGE
CREATED BY THE —, LIMITED, to be entered on the Register
pursuant to sect. 97.

Memorandum
of satisfaction

Declaration verifying Memorandum of Satisfaction

[No stamp necessary.]

The — Limtd.

We, —, of —, a director of the above-named coy, and —, of —, the secretary of the above-named coy, solemnly and sincerely declare that the particulars contained in the memorandum of satisfaction annexed hereto, and dated — 19—, are true to the best of our knowledge, information, and belief. And we make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

Declared, at, &c.

Memorandum of Satisfaction of Mortgage or Charge.

The — Limtd, hereby gives notice that the (a), dated the — day of — 19— (b), and created by the coy for securing the sum of £—, was satisfied to the extent of £— on the — day of — 19—.

In witness whereof the common seal of the coy was herewith affixed the — day of — one thousand nine hundred and — in the presence of

— } Directors. [Seal of coy.]

—, Secretary.

(a) Insert here "mortgage" or "charge," "debentures" or "debenture stock," as the case may be.

(b) If a number of charges or debentures of different dates are included, insert the several dates.

The Companies (Consolidation) Act, 1908

Form 245.

COPY OF REGISTER OF DIRECTORS OR MANAGERS OF
THE — COMPANY — pursuant to sect. 75.

Copy of
register of
directors or
managers

[Tabular statement in columns headed:—(1) Names, (2) addresses, (3) occupations, (4) changes.]

Signature —

Officer —

Dated the — day of —, 19—

See as to this return, *infra*, Appendix.

Form 246.

Annual
summary.

The Companies (Consolidation) Act, 1908.

A 5s. 6d. registration fee stamp
must be impressed here

SUMMARY OF SHARE CAPITAL AND SHARES OF THE —, LIMITED,
made up to the — day of —, 19— (being the fourteenth
day after the date of the first ordinary general meeting in
19—).

Nominal share capital, £ — } — shares of £* } — each,
divided into*

Total number of shares taken up* to the — day of —, 19— (which number must agree with the total shown in the list, as held by existing members) { —

Number of shares issued subject to payment wholly in cash

Number of shares issued as fully pd up otherwise than in cash

Number of shares issued as partly pd up to the extent of — per share otherwise than in cash

† There has been called up on each of — shares £

There has been called up on each of — shares £

There has been called up on each of — shares £

‡ Total amount of calls received, including payments on application and allotment £

Total amount (if any) agreed to be considered as pd on — shares which have been issued as fully pd up otherwise than in cash £

Total amount (if any) agreed to be considered as pd on — shares which have been issued as partly paid up to the extent of — per share £

Total amount of calls unpaid £

Total amount (if any) of sums pd by way of commission in respect of shares or debentures or allowed by way of discount since the date of last summary £

Total amount (if any) pd on § — shares forfeited £

Total amount of shares and stock for which share { Shares £
warrants are outstanding } Stock £

* Where there are shares of different kinds or amounts (e.g., preference and ordinary, or 10s. and 5s.) state the numbers and nominal values separately.

† Where various amounts have been called, or there are shares of different kinds, state them separately.

‡ Include what has been received on forfeited, as well as on existing, shares.

§ State the aggregate number of shares forfeited (if any).

Total amount of share warrants issued and surrendered respy since date of last summary	Issued	£	Form 240.
	Surrendered	£	
Number of shares or amount of stock comprised in each share warrant	Number of shares		
	Amount of stock ..	£ -	
Total amount of debt due from the coy in respect of all mortgages and charges which are required (or, in the case of a coy registered in Scotland, which, if the coy had been registered in England, would be required) to be registered with the registrar of cos, or which would require registration if created on and after the first day of July, 1908			
		£	

NOTE.—Banking companies must add a list of all their places of business.

The return must be signed, at the end, by the manager or secretary of the company.

[Tabular form containing statement in form of balance sheet made up to the — of —.

Names and addresses of directors.]

List of persons holding shares in the — Company, Limited, on the — day of —, 19—, and of persons who have held shares therein at any time since the date of the last return, showing their Names and Addresses, and an Account of the Shares so held.

Names, Addresses, and Occupations.

Account of Shares.

Folio in Register to which containing particulars.	Surname.	Christian Name.	Address.	Occupation.	Number of Shares held by existing Members at date of Return.*	Particulars of Shares transferred since the date of the last Return, or in the case of the first Return of the Incorporation of the Company, by Persons who are still Members.	Particulars of Shares transferred since the date of the last Return, or in the case of the first Return of the Incorporation of the Company, by Persons who have ceased to be Members.	Remarks.
						Number.*	Date of Registration of Transfer.	

The aggregate number of shares held, and not the distinctive numbers, must be stated, and the column must be added up throughout so as to make one total to agree with that stated in the summary to have been taken up.

* When the shares are of different classes these columns may be subdivided so that the number of each class held or transferred may be shown separately.

† The date of registration of each transfer should be given as well as the number of shares transferred on each date. The particulars should be placed opposite the name of the transferor and not opposite that of the transferee, but the name of the transferee may be inserted in the "Remarks" column immediately opposite the particulars of each transfer.



ANNUAL SUMMARY OF CAPITAL AND LIST OF MEMBERS.

The obligation on the part of a company to file the above is imposed by sect. 26 of the Act of 1908, reproducing sect. 26 of the Act of 1862 as amended by sect. 19 of the Companies Act, 1900. "Calendar year" in the section means the year commencing 1st of January and ending 31st of December. *Gibson v. Barton*, L. R. 10 Q. B. 329. Not making a return at the proper time is *prima facie* evidence against each director of an offence. *Gibson v. Barton*, *supra*; *Edmonds v. Foster*, 45 L. J. M. C. 41; *Park v. Lawton*, (1911) 1 K. B. 599. A director cannot excuse himself for non-compliance with the section by showing that owing to his own default the meeting was not in fact called. See *Park v. Lawton*, *supra*. The return should be made even where no meeting is held. (See the above cases.) The return should be signed by the manager or secretary of the company. Sect. 26 (4). If the company is a "private company," as defined by sect. 121 of the Act, the return need not contain the statement in the form of a balance sheet required by sub-sect. (3), and a company does not cease to be a private company simply because it is proved that the company has disregarded some of the provisions of its articles, referred to in sect. 121 of the Act. *Park v. Royalties Syndicate*, (1912) 1 K. B. 320. Neglect to comply with sect. 26 is a criminal offence (*Reg. v. Tyler*, (1891) 2 Q. B. 599) involving a penalty of 5*l.* a day so long as the default continues (sub-sect. (5)). Proceedings to enforce the penalty are taken before a magistrate under the Summary Jurisdiction Acts (11 & 12 Vict. c. 43, 42 & 43 Vict. c. 49, and 47 & 48 Vict. c. 43). The magistrate may enquire into the sufficiency or accuracy of the return. *Briton Medical Co.*, 37 W. R. 32. The complaint must be brought within six months. *Edmonds v. Foster*, *supra*. As to what are fixed assets and how value to be ascertained, see *Galloway v. Schill, Seerbohm & Co., Limited*, W. N. (1912) 131.

Form 247.

Resolution
for registra-
tion of
existing
company.

Of Existing Companies.

As to the registration of existing companies, see Part VII. of the Act of 1908.

That the coy be registered under the Cos (Consolidation) Act, 1908, [as a coy limtd by shares, and that the coy's name be changed to The — Coy, Limtd].

The words in brackets should be omitted where the company is going to register as an unlimited company, and even where it is to register as a limited company they would seem unnecessary, though commonly used. See sect. 263 of the Act of 1908.

Form 248.

Application
for registra-
tion with
limited
liability.

The Companies (Consolidation) Act, 1908

Limited Company.

Applicon by the — Coy for a certificate of incorporation as a limtd coy under the Cos (Consolidation) Act, 1908.

The — Coy, constituted by —, dated the —, desires to register itself as a coy limtd by — under the Cos (Consolidation) Act, 1908, by the name of — Coy, Limtd, and for that purpose presents the under-mentd documents for registration under the sd Act.

Dated the — day of —, 19 —.

Documents presented for registration with the foregoing application:— **Form 248.**

1. Copy of the — constituting the coy.
2. List of the members of the coy made up to the — day of —.
3. Statement showing the nominal capital of the coy, &c.
4. Copy resolution of the coy assenting to its registration as a limtd coy, and adding the word "limtd" to its name.
5. Declaration by — of the coy, verifying the particulars set forth in the documents above mentd.

Where the company is already registered, *e.g.*, under 7 & 8 Vict. c. 110, the words "constituted by deed of settlement" in the above form will be altered to "completely registered under the Act 7 & 8 Vict. c. 110" [*or, as the case may be*]; and item 1 of the documents will be omitted.

The application is to be signed by a director, secretary, or other authorized officer of the company.

The Companies (Consolidation) Act, 1908.

Unlimited Company.

Form 249.

Application
to register
unlimited
company.

Applicon by the — Coy for a certificate of incorporation under the Cos (Consolidation) Act, 1908.

The — Coy, constituted by —, dated the —, desires to register itself under the Cos (Consolidation) Act, 1908, and for that purpose presents the under-mentd documents for registration under the sd Act.

Dated the — day of —.

Documents presented for registration with the foregoing application:

1. Copy of the — constituting the coy.
2. List of the members of the coy made up to the — day of —.
3. Statement of the registered office of the coy.
4. Copy resolution of the coy assenting to its registration.
5. Declaration by — of the coy verifying the particulars set forth in the documents above mentd.

Where the company is already registered, items 1 and 4 will be omitted.

The Companies (Consolidation) Act, 1908.

Form 250.

[A 5s. cos registration fee stamp
must be *impressed* here.]

List of —
members.

List of members of the — Coy made up to the — day of —,
19—.

Dated — day of —, 19—.

Form 250. [Tabulated form in columns headed:—(1) Name of member, (2) address of member, (3) occupation of member, (4) number of shares or amount of stock held, (5) distinctive numbers of the shares (if any).]

Form 250a.**The Companies (Consolidation) Act, 1908.**

Statement of
capital, &c.

Limited Company.

Statement of the nominal share capital of The — Coy, its division into shares, and the shares taken and amount pd thereon, or the amount of stock of which it consists, on the — day of —; also of the name and registered office of the coy.

Amount of nominal capital.

Number of shares into which it is divided, and amount of each share.

Number of shares taken up to the — day of —.

Amount pd on each share.

Amount of stock of which it consists.

Name of the coy.

Registered office.

Dated — day of —.

This statement to be signed by a director, secretary, or other authorized officer of the company.

The above is to be registered with the application for incorporation as a limited company. See sect. 183. It should be signed in the same manner as Form 246.

Form 250b.**The Companies (Consolidation) Act, 1908.**

Statutory
declaration to
be filed.

**DECLARATION *verifying* DOCUMENTS *presented for* REGISTRATION
by THE — COMPANY *with its application for incorporation.*
(Sect. 254.)**

We — of — and — of — being two of the — do solemnly and sincerely declare that the parlars set forth in the several documents accompanying this declaration, and marked respby with the letters — are true; and we make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

Declared at — this — day of — 19—, before me —.

Signatures of two directors or } —
other principal officers. } —

As to the above form, see sect. 254 of the Act of 1908. The declaration should be made by two of the directors or other principal officers of the company.

Under the Act, any company registered before or after the passing of the Act as an unlimited company may register under the Act as a limited company. The chief object of this enactment was to enable banking companies already registered as unlimited to re-register as limited companies, and most of these companies have already availed themselves of this useful power.

On the registration of a company which has already been registered, the Registrar is to close the former registration, and may [and usually does] dispense with the delivery of copies of any documents with copies of which he was furnished on the original registration; but, save as aforesaid, the registration is to take place in the same manner and have the same effect as if it were the first registration of the company. Sect. 259. Accordingly, the above forms can, with slight modifications, be adopted.

A simple resolution for registration under Part VII. will follow the terms of Form 247, *supra*, p. 624.

But usually the powers conferred by sect. 58 of the Act of 1908 are exercised. See *infra*.

Form 250b.

The following is an example of a resolution for registration and increase of capital, pursuant to sects. 57—8:—

Form 250c.

Resolution for
registration
with previous
increase of
capital.

That this coy, now registered as an unlimtd coy, be registered under the Cos (Consolidation) Act, 1908, as a coy limtd by shares: And that for the purposes of such registration the nominal amount of the capital be increased from 2,000,000*l.* to 3,000,000*l.*, by increasing the nominal amount of each share from 50*l.* to 75*l.*: And that no part of such increased capital shall be capable of being called up except in the event of and for the purposes of the coy being wound up, and that the name of the coy be changed to The — Coy, Limtd.

For resolution where capital is not increased, see *supra*, Form 247.

It is conceived that sect. 252 of the Act (replacing sect. 188 of the Companies Act, 1862), applies where a banking company re-registers under sect. 58 of the Act of 1908, or did so under the Act of 1879.

The Companies (Consolidation) Act, 1908.

Form 250d.

Limited Company.

Resolutions
for filing.

Copy resolutions passed at a general meeting of the — assenting to its being registered with limited liability.

[Set them out.]

ARTICLES OF ASSOCIATION.

CHAPTER IX.

INTRODUCTORY NOTES.

Summary of Statutory Provisions.

SECTS. 10, 11, 12, and 15 of the Act of 1908 provide as follows:—

Articles of
association.

10.—(1) There may in the case of a company limited by shares and there shall in the case of a company limited by guarantee or unlimited be registered with the memorandum, articles of association signed by the subscribers to the memorandum and prescribing regulations for the company.

(2) Articles of association may adopt all or any of the regulations contained in Table A. in the first schedule to this Act.

(3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, must state the amount of share capital with which the company proposes to be registered.

(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles must state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration.

11. In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A. in the first schedule to this Act, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

Application
of Table A.

12. Articles must—

- (a) be printed;
- (b) be divided into paragraphs numbered consecutively;
- (c) bear the same stamp as if they were contained in a deed; and
- (d) be signed by each subscriber of the memorandum of association in the presence of at least one witness who must attest the signature, and that attestation shall be sufficient in Scotland as well as in England and Ireland.

Form,
stamp, and
signature of
articles.

15. The memorandum and the articles (if any) shall be delivered to the registrar of companies for that part of the United Kingdom in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them.

Registration
of memoran-
dum and
articles.

The great majority of companies formed under the Act are registered as companies limited by shares. In the case of such companies.

as appears from sects. 10 and 11, above mentioned, articles of association may be registered with the memorandum: if not so registered then Table A. will apply.

In some cases
no articles
registered.

In a considerable number of cases no articles are registered, and Table A. accordingly applies *en bloc*. Grave inconvenience has often resulted from the adoption of this course, as several of the provisions of Table A. are inconsistent with particular sections of the Act, and therefore unreliable and misleading.

It is impossible, too, that Table A., from its very generality, should properly meet the special requirements of each company. More often Table A. is not adopted in its entirety, but promoters exercise the power contained in sect. 10 (2) by registering articles which adopt Table A., with some modifications. See *infra*, Form 252, for an example.

This course, too, is attended with inconvenience, because instead of a complete and consistent set of regulations, it involves piecing together clauses from Table A., with variations and additions from the new clauses engrafted upon it, and constant cross-reference and comparison. The object in both cases is to save expense; but experience goes to show that the trifling additional expense incurred in preparing and registering a full set of articles is amply compensated by the possession of a complete code of regulations.

Whichever mode is adopted, the regulations (unlike the company's memorandum of association) can always be altered or added to from time to time, and so inherent a characteristic is this alterability of articles, that a company cannot by any stipulation divest itself of the power of alteration or exempt any clause from alteration. *Walker v. London Tramways Co.*, 12 Ch. D. 705; *Malleon v. National Insurance Co.*, (1894) 1 Ch. 200. And this principle applies not only as between the company and its shareholders, but as between the companies and an outsider. *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656; *Punt v. Symons & Co.*, (1903) 2 Ch. 306. Thus sect. 13 provides that:—

Alteration of
articles by
special reso-
lution.

13.—(1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles; and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution.

(2) The power of altering articles under this section shall, in the case of an unlimited company formed and registered under the Joint Stock Companies Acts, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum.

The term "articles" used in the above sections is defined by sect. 285 of the Act as follows:—"Articles" means the articles of association of a company as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in Table B. in the Schedule annexed to the Joint Stock Companies Act, 1856, or in

Table A. in the First Schedule annexed to the Companies Act, 1862, or in that Table as altered in pursuance of section seventy-one of that Act, or in Table A. in the First Schedule to this Act."

By means of this definition the Act gets rid of what has been for many years past a troublesome ambiguity—the use sometimes of "articles," sometimes of "regulations," and of the clumsy circumlocution so often appearing in the text of the former Acts, *e.g.*, in sect. 12 of the Act of 1862, "if authorized so to do by its regulations as originally framed or as altered by special resolution," and substitutes the simple expression "if authorized by its articles." See, *e.g.*, sect. 41 (1908).

As to interpretation of the articles, see *supra*, p. 591 *et seq.*

The articles of a company are subordinate to and controlled by the memorandum of association. The memorandum contains the conditions which alone the company is granted incorporation—conditions which are fundamental. The articles are the internal regulations of the company, and over these the members have full control, and may alter them from time to time as they think fit by putting the course pointed out in sects. 13 and 69 of the Act; subject only to this, that they keep within the limits marked out by the conditions of the memorandum of association and the general law, and that they cannot, by altering the articles, justify the breach of an independent contract unless it was made subject to alteration. *Baily v. British Equitable Assurance Co.* (1906) A. C. 35.

Interpretation.

The memorandum the dominant instrument.

"The memorandum is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit." Per Lord Cairns, L. C., *Ashbury Rail. Co. v. Riche*, L. R. 7 H. L. 653, 671.

Hence, any articles that go beyond the company's limited sphere of activity or what the law allows will be inoperative, and anything done under the authority of such articles void and incapable of ratification.

If, for instance, the articles purport to confer on the company a power to buy its own shares (*Trevor v. Whitworth*, 12 App. Cas. 409), or to pay dividends out of capital (*Guinness v. Land Corporation of Ireland*, 22 C. D. 349), or to extend the objects by special resolution (*Ashbury v. Riche*, *supra*), or to issue shares at a discount (*Welton v. Saffery*, (1897) A. C. 299), or to apply the profits in a manner which is inconsistent with some provision in the memorandum of association (*Ashbury v. Watson*, 30 C. D. 376), or deprive a member of the right to present a winding-up petition (*Peveril Gold Mines*, (1898) 1 Ch. 122), or to exclude dissenting shareholders from their rights under sect. 161 of the Companies Act, 1862 (now sect. 192 of the Act of 1908) (*Baring-Gould v. Sharpington, &c. Syndicate*, (1899) 2 Ch. 80; *Payne v. Cork Co.* (1900) 1 Ch. 308), they are to that extent invalid and ineffectual.

Ultra vires provision.

But though the articles cannot alter or control the memorandum, yet, if there is an ambiguity in the memorandum, it has been said that the articles registered at the same time may be used to explain it *Southern Brazilian Rio Grande do Sul Railway*, (1905) 2 Ch. 78. See, however, as to this, *supra*, p. 592.

**Binding
operations.**

Sect. 14 of the Act is as follows:-

14.—(1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company, and in England and Ireland be of the nature of a specialty debt.

Thus, whatever the articles may be (so far as they are not *ultra vires*), they are binding in the manner, and to the extent, mentioned in sect. 14, which, it is to be noted, does not make them absolutely binding on the company and the members thereof, but binding *as if* each member had covenanted to conform to such regulations.

**Members'
implied cov-
enant with
company.**

The section (sect. 14) does not say with whom the implied covenant by the members is to be taken to be made, but it is sufficiently obvious that it is with the company, and, therefore, that the members are all bound to the company. See *Bradford Bank v. Briggs*, 12 App. Cas. 29. In that case the articles gave the company a lien on the shares of a member, and it was held that Briggs, a member of the company and the plaintiff in the action, was to be treated as having covenanted with the company to give it such lien. Lord Blackburn said (p. 33): "His property in the shares was, by virtue of sect. 16 of the Act [of 1862, now replaced by sect. 14 of the Act of 1908], bound to the company as much as if he had executed a covenant to the company in the same terms as Article 103." So, again, in *Welton v. Saffery*, (1897) A. C. 315, Lord Herschell said: "It is quite true that the articles constitute a contract between each member and the company." And in *Imperial Hydropathic, &c. Co. v. Hampson*, 23 C. D. 1, Bowen, L. J., said: "We are discussing the rights of directors of a statutory corporation created by the Act of 1862, and in such a case we must consider what are the rights of the directors and shareholders, for the articles of association, by sect. 16, are to bind all the company and all the shareholders as surely as if they had put their seals to them." That this is the true construction follows from the many decisions in which it has been held that the company is entitled to sue for the enforcement, and to restrain the breach of its regulations, and to insist on the irregularity of that which is done in contravention thereof. *Macdougall v. Gardiner*, 1 C. D. 13.

Pender v. Lushington, 6 C. D. 70; *Imperial Hydropathic Co. v. Hampson*, 23 C. D. 1; *Harben v. Phillips*, *ibid.* 15.

In *Eley v. Positive, &c. Co.*, 1 Ex. Div. 88, where the articles provided that the plaintiff should be a solicitor to the company, Lord Cairns said: "They (the articles) are an agreement *inter socios*, and in that view, when the introductory words are applied to Article 118, it becomes a covenant between the parties that they will employ the plaintiff." See also *Browne v. La Trinidad*, 37 C. D. 1. So in *Imperial Hydropathic Co. v. Hampson*, 23 C. D. 1, Cotton, L. J., said that the articles "under the Act are a contract between the shareholders to comply with the regulations in them." And Stirling, J., in *Wood v. Odessa Waterworks Co.*, 42 C. D. 636, said: "The articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other." See also *Pulbrook v. Richmond, &c. Co.*, 9 C. D. 610; *Bainbridge v. Smith*, 41 C. D. 475, in which it was held that a director being a member was entitled to an injunction against his co-directors restraining them from improperly excluding him from board meetings. Nevertheless there is some reason to doubt whether these judicial *dicta* quite define the effect of the articles, and Lord Herschell in *Wellton v. Saffery*, (1897) A. C., at p. 315, said: "It is quite true that the articles constitute a contract between each member and the company, and that there is *no contract* in terms *between the individual members* of the company; but the articles do none the less, in my opinion, regulate their rights *inter se*." And this accords with the well-established principle that it is for the company, save in exceptional cases, to sue for a breach of the regulations. *Macdougall v. Gardiner*, 1 C. D. 13; *Foss v. Harbottle*, 2 Hare, 461; *Burland v. Earle*, (1902) A. C. 83.

To analyse the matter a little more closely: first, in relation to an outsider, do the regulations bind the company? The answer clearly is, No. A provision in the articles in favour of an outsider, *e.g.*, of a promoter, that the preliminary expenses shall be paid by the company, gives to the promoter no right of action against the company. *Rotherham Chemical Co.*, 25 C. D. 103; *Melhado v. Porto Alegre Co.*, L. R. 9 C. P. 503. In this respect the articles of a company differ from an Act of Parliament. Such a provision in an Act of Parliament imposes on the company a statutory duty towards the promoter, and confers on the promoter a corresponding right of action. *Tilson v. Warwick Gas Co.*, 4 B. & C. 962. In the case of a company formed under the Act of 1862, or under the Companies (Consolidation) Act, 1908, it operates as a direction to the directors to pay such preliminary expenses, but nothing more.

Secondly, in relation to members. Here the answer is, Yes. The articles do bind the company. The section says so: "the . . . articles shall bind the company and the members thereof as if," &c., and those words must have effect given to them. It may

How far binding between members.

Whether company bound as regards outsiders.

Whether company bound in favour of members.

possibly be urged that they are qualified, and that the company is only bound "as if the members had covenanted," not as if the members *and the company* had covenanted, and therefore that the company is not bound. But such a construction stultifies the section, and, in effect, strikes out of it the words, "that the articles shall bind the company," and in corroboration of this view there are numerous decisions showing that the company is bound. Thus, in *Johnson v. Lytle's Iron Agency* (1877), 5 C. D. 687, an irregular forfeiture of shares was impeached by a member, and set aside by the Court of Appeal on the ground, as James, L. J., said, that the notice prior to forfeiture "did not comply strictly with the provisions of the contract between the company and the shareholders which is contained in the regulations." So in *Crum v. Oakbank Co.*, 8 A. C. 65, it was held that the plaintiff, a member, was entitled, as against the company, to insist on the observance of the regulations so long as they stood unaltered. Again, in *Wood v. Odessa Waterworks Co.*, 42 C. D. 636, Stirling, J., granted an injunction to restrain the defendant company from contravening the articles; and in *Imperial Hydropathic Co. v. Hampson*, 23 C. D. 1, it was held that the company was bound by the regulations as they stood, and could not validly act in contravention thereof.

Furthermore, in *Brett v. Standard Exploration Co.* (1906), 16 T. L. R. 112 Cozens-Hardy, J., held that a member was entitled to enforce compliance by the company with a clause in the articles giving him a right to a share certificate. These decisions, however, all deal with cases in which members claimed and sought to enforce or protect rights given them *as members of the company*. Where rights are by the articles given to members not as such, but in some other capacity (*e.g.*, as directors, policy-holders, or otherwise), a member claiming to enforce the same cannot, it seems, sue on the articles—treating them as a contract by the company with him—he must make out a contract outside the articles.

Cases where
company
not bound
by articles.

Thus, in *Eley v. Positive &c. Co.*, 1 Ex. D. 88, the articles contained a clause providing that A. should be employed for life as solicitor for the company, and should not be removed except for misconduct; he took office and was so employed for some time, and, whilst so employed, he became a shareholder; later on the company discontinued his employment; he, still being a shareholder, sued for breach of contract, and it was held that no action lay. The matter was disposed of rather summarily in the Court of Appeal. Lord Cairns, L. C., delivered the judgment of the Court, and refused the plaintiff relief principally upon the ground that the articles "are an agreement *inter socios*, and, in that view, if the introductory words are applied to Article 118, it becomes a covenant between the parties to it that they will employ the plaintiff. Now, so far as the plaintiff is concerned, this is *res inter alios acta*; the plaintiff (*i.e.*, *quâ* solicitor) is no party to it [although he was a

member'. This article is either a stipulation which is binding on the members, or else a mandate to the directors; in either case it is a matter between the directors and shareholders, and not between them and the plaintiff."

This case was followed in *Brown v. La Trinidad*, 37 C. D. 1, where the articles contained a provision that a contract with the plaintiff, made before incorporation, should be adopted by the company; and that it was thereby confirmed, and that the provisions thereof, so far as applicable to the company, should be construed as part of the regulations. Yet it was held that the plaintiff, though a member of the company, had no cause of action against the company on this clause. Lindley, L. J., said: "That, having regard to the construction put upon sect. 16 in *Eley v. Positive, &c.* and subsequent cases *none to be found*, it must be taken as settled that the contract upon which he (the plaintiff) relies, is not a contract upon which he can maintain any action, either on the common law side or the equity side"; adding, "there might have been some difficulty in arriving at that conclusion if it had not been for the authorities, because it happens that this gentleman has had shares allotted to him and is therefore a member."

It is not easy to reconcile the rule laid down in these decisions with sect. 14 of the Act, which expressly provides that the articles "shall bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by such members, and contained covenants on the part of each member . . . to observe the provisions of the articles subject to the provisions of the Act"; but apparently they must be taken to have settled the law in this respect. The theory on which they are based seems to be that the implied covenant is not a covenant by the company but by the members *inter se*, and that the company is only bound in the sense that the regulations as such are binding, although sect. 14 alone purports to make them binding. *Supra*, p. 73. Finding a difficulty in applying consistently with justice the rule above referred to, the Courts have in some cases acted on the footing that a clause in the articles, not dealing with the rights of a member as such, but apparently intended to operate as a contract with him, is to be regarded as the basis of a contract, *i.e.*, as indicating the terms on which the company proposes to contract with him, and that if the parties enter into the relations contemplated by the clause, they are to be treated as having made a contract in the terms of the clause and are bound accordingly. This is illustrated by *Swabey v. Port Darwin Gold Co.* (1889), 1 Meg. 385. In that case the articles provided for the payment to each director by way of remuneration of a specified sum per annum. By a special resolution, in July, the company reduced this as from the end of the preceding year. The plaintiff thereupon resigned, and sued the company for three months' remuneration for services prior to the date of his resignation; and

Difficulty of decision.

the Court held that he was entitled to recover on the footing of an implied contract in the terms of the clause. "The articles," said Lord Esher, "do not themselves form the contract, but from them you get the terms upon which the director is serving." And this proposition was adopted by Stirling, J., in *Re International Cable Co.*, 66 L. T. 254; and by Wright, J., in *Ex parte Beckwith*, (1898) 1 Ch. 324. Moreover, the principle involved is not confined to members, it extends also to outsiders, e.g., to persons who take office as directors. *Isaac's case*, (1902) 2 Ch. 158; *Salisbury Jones' case*, (1904) 3 Ch. 356. And see *Pritchard's case*, 8 Ch. 956. The question whether an implied contract so entered into is capable of being varied by the company against the will of the other party has not been finally decided. According to *Swabey v. Port Darwin Gold Co.*, *supra*, it would seem that the contract, at any rate where it relates to service, can be varied by the company by altering its articles as to the future, and this accords with the views expressed in *Doman's case*, 3 C. D. 21; *Hott's case*, 1 C. D. 307; and in *Argus Life Assurance Co.*, 39 C. D. 371.

The decision of the Court of Appeal in *Baily v. British Equitable*, (1904) 1 Ch. 374, pointed to a different conclusion. That case was commented on in the last edition of this work, and was subsequently reversed by the House of Lords. *Baily v. British Equitable Co.*, (1906) A. C. 35. See *supra*, p. 631, and *infra*, p. 640.

Alteration.

Sect. 13 of the Act gives to a company under the Act power by special resolution, but "subject to the provisions of this Act and to the conditions contained in its memorandum," to alter or add to its articles, and it expressly provides that "any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution." Nothing could be wider than the terms of this section. It does not say that the articles for the management or administration of the business may be altered, or that the articles other than those which are to be regarded as constitutional, may be altered; there is no limitation, except that the power is to be subject to the provisions of the Act and the conditions contained in the memorandum. All or any of the articles may therefore be altered, and this statutory incident of articles is inalienable. And as appears above, a company cannot by a clause in its articles exempt any article from liability to alteration under the section. *Walker v. London Tramways Co.*, 12 C. D. 705; *Malleson v. National Insurance Co.*, (1894) 1 Ch. 200.

And this principle applies not only as between the company itself and its shareholders (*Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656), but as between the company and an outsider. A company cannot contract not to alter its articles. *Punt v. Symons*, (1903) 2 Ch. 506.

At an earlier period, however, in the history of the Act of 1862 a construction was placed by that very eminent judge, Kindersley,

V.-C., on the corresponding section in the Companies Act, 1856, which had for many years had the effect of fettering to a large extent the freedom of companies under the Act of 1862. The case was *Hutton v. Scarborough Cliff, &c. Co.*, 2 Dr. & Sm. 521 (No. 2). This company was desirous of issuing some of the shares in the original capital as preference shares, but there being no power in its memorandum or articles to do so, the Court held (4 De G. J. & S. 672) that it could not be done, and Lord Westbury, L. C., expressed a doubt whether it could be done by altering the articles. It was then proposed to alter the articles of association so as to enable *new* shares to be created and issued with a preference attached to them; but Kindersley, V.-C., held that this again could not be done, as it amounted to an alteration of the constitution of the company, and was, therefore, *ultra vires* and invalid. The learned judge said:

Does the power to modify the articles of association enable the directors of a joint stock company in general language to do anything without limit as they may think fit? By the very form of the power clearly there must be a limit, because, if not, it would enable the directors and a majority of the shareholders to alter not merely such regulations as related to the management and administration of the company, but to alter *in toto* the whole constitution and frame of the company. It is quite clear that was never intended. . . . The question really is this, adopting the plain principle which I think ought to be adopted. Is, or is not, that which is proposed to be done an alteration of the *constitution* of the company? It appears to me clearly it is. No doubt, as the defendant contended, a party must be bound according to the fair legitimate interpretation of the construction of the contract."

What the learned judge in effect therefore decided was that the different articles were to be discriminated, and that there must be exempted from alterability such portions of them as in the opinion of the Court were constitutional, and that it was only such articles as related to the management and administration of the company which could be altered. Obviously this was a complete departure from the words of the section; nevertheless there was no appeal, and the decision, though it did not escape criticism (see *Harrison v. Mexican Rail. Co.*, 19 Eq. 358), was recognized as more or less authoritative for many years.

But in *British, &c. Corporation v. Couper*, (1894) A. C. 399, Lord Macnaghten had occasion in the House of Lords to refer to *Hutton v. Scarborough Cliff Co.*, *supra*, and said in reference thereto: "It seems to me that the decision was not founded upon a sound view of the Companies Act, 1862, and I respectfully dissent from it."

The way was thus prepared for the final demolition of the doctrine by the Court of Appeal in *Andrews v. Gas Meter Co.*, (1897) 1 Ch. (C. A.) 361. In that case the original articles contained no power to issue preference shares, but the company, by special resolution, had

*Hutton v.
Scarborough
Cliff Hotel*

Principle of
decision.

Dissent from
the decision.

*Andrews v.
Gas Meter Co.*

Hutton v. Scarborough Co. (No. 2) overruled.

Results.

Retrospective alterations allowable.

altered its articles so as to take power, and had issued preference shares accordingly. The Court overruled *Hutton v. Scarborough Cliff Hotel Co. (No. 2)*, *ubi supra*, and held the shares validly created. The principle on which the case was decided was that although by sect. 8 of the Act a company's memorandum is to state the amount of the original capital and the number of shares into which it is to be divided, yet that this does not extend to the rights of the shareholders in respect of their shares, and the terms on which additional capital may be raised. These are matters which may be regulated by the articles of association—indeed, are more properly so regulated than by the memorandum, and are therefore matters which, unless dealt with in the memorandum, as in *Ashbury v. Watson* (30 C. D. 376), may be determined by the company from time to time by special resolution pursuant to sect. 50 of the Act (now sect. 13 of the Act of 1908). "We are of opinion," said Lindley, L. J., delivering the judgment of the Court, "that the second decision in *Hutton v. Scarborough Cliff Hotel Co.*, [*supra*] was wrong and ought not to be followed, and that the decision appealed from must be reversed, and the resolution thereby declared to be *ultra vires* must be declared *intra vires* and valid. If, by declining to follow the second decision in the case referred to, we were disturbing titles or embarrassing trade or commerce, we should treat it as one of those decisions which, though wrong, it would be mischievous to overrule. But such is not the case, and it is desirable from all points of view to remove from companies a fetter which ought never to have been imposed upon them."

This decision has been very welcome, not merely because it removes a fetter on the issue of preference shares, but also because it disposes of the notion that the power to alter the articles given by sect. 13, replacing sect. 50 of the Act of 1862, is not to have full effect.

In a subsequent case it was argued that the power to alter the regulations conferred by sect. 50 of the Act of 1862 did not justify a retrospective alteration, *e.g.*, the insertion of a lien clause (*infra*, p. 662) intended to give the company a lien on the shares of members for debts incurred before as well as after the insertion of the clause. The argument if successful would have created the utmost confusion, and would to a great extent have deprived the members of that absolute control over the articles with which the section was intended to invest them. But it did not prevail, the Court of Appeal holding that the power of altering the regulations was not thus to be limited, and that the introduction of a lien clause was valid and effective, though in some cases it operated retrospectively.

"The power," said Lindley, M. R., in that case, "thus conferred on corporations to alter the regulations is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. It must be exercised for the benefit of the company as a whole, and it must not be exceeded. These con-

ditions are always implied and are seldom if ever expressed. But if they are complied with, I can discover no ground for judicially putting any other restrictions on the power conferred by the section than those contained in it." *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656.

The foregoing decisions are in accordance with the principles of construction applied by Chitty, J., in *Pepe v. City and Suburban Permanent Building Society*, (1893) 2 Ch. 311. In that case, the plaintiff, a holder of fully paid-up shares, had, under the rules, given notice of withdrawal; afterwards and before repayment the society altered the rules by giving the directors power to pay off in priority members holding less than 50% in the society. It was held that the alteration was valid, though in some senses it took away the vested right of the plaintiff.

"It was," said Chitty, J., in that case, "part of the plaintiff's contract with the society that the rules might be altered, and the power of altering them was wisely framed so as to require not a bare majority but three-fourths of the members to bring about the alteration. . . . The plaintiff's counsel says rightly that when the plaintiff gave notice of withdrawal he had a vested right to be paid according to the then existing rule, but this does not settle the question, because there existed also against him the power of altering the rule, so that the question assumes this form, that he had a vested right liable to be divested by any later rule they passed. It may be wondered that the society should have such a power, but it may be greatly to the benefit of all concerned to make alterations. And I say also that members place reliance on the sense of justice of the three-fourths majority required to effect the alteration."

See also *British Equitable Assurance Co. v. Baily*, (1906) A. C. 35; *Rosenberg v. Northumberland Building Society*, 22 Q. B. 373; *Barrow Haematite Co.*, 29 C. D. 582; *Doman's case*, 3 C. D. 21; *Argus Co.*, 39 C. D. 571. In the case last mentioned it was considered that a power in the deed of settlement of a company (not under the Act of 1862) to alter such deed of settlement was to have full effect, and included even power to insert, by alteration, a clause providing for the sale of the whole undertaking. *James Colmer, Ltd.*, (1897) 1 Ch. 524, shows the far-reaching operation of the decision in *Andrews v. Gas Meter Co.*, *supra*. In *Continental Union Gas Co.* (1893), 7 T. L. R. 496 it had been held in effect that voting rights were constitutional and could not be altered; but in *James Colmer, Ltd.*, Romer, J., held that, *Hutton v. Scarborough Cliff Hotel Co.*, *ubi supra*, having been overruled, there was no objection to an alteration of voting rights.

Nevertheless, it is apprehended that some limit must be placed on the general words contained in sect. 13, and the limit would seem to be this—that the section cannot be used to violate any statutory provision or principle of law; *e.g.*, to take away a shareholder's right

Limit to
alteration.

to present a winding-up petition. *Peveril Gold Mines*, (1898) 1 Ch. 192. So, too, a majority will not be permitted by the Court, under colour of the section, to commit a fraud, for instance, on the minority (*Menier v. Hooper's Telegraph Co.*, L. R. 9 Ch. 350), or to use extra voting power, not created *bonâ fide*. And see *Gray v. Lewis*, L. R. 8 Ch. 1051; *Atwool v. Merryweather*, 5 Eq. 464 n.; *Mason v. Harris*, 11 Ch. D. 97; *Macdougall v. Gardiner*, 1 Ch. D. 13; and *Burland v. Earle*, (1902) A. C. 83. Nor will directors be allowed to use a majority which they have obtained by a trick. (*Punt v. Symons & Co.*, (1903) 2 Ch. 507.) But short of some fraud or oppression or want of good faith of this kind, or contravention of the statutes on the part of the majority, there is no limit to the statutory power of alteration.

Baily v. British Equitable Assurance Co., (1904) 1 Ch. 374, must not be regarded as a decision that the Court will, at the instance of an outsider or otherwise, restrain a company from altering its articles. In that case certain life policies had been issued conferring the right to payment of a fixed sum plus any sum added by way of bonus, according to the company's "practice for the time being." Under alterable bye-laws made shortly after the company's formation, provision was made for periodical divisions of profit by way of bonus on the policies. Later on a question arose as to the company's power to alter the scheme of profit division thus established, and Kekewich, J., and the Court of Appeal held that as the policies were effected on the footing of a prospectus which referred to and set out the scheme of division embodied in the bye-laws, the company was precluded from applying its profits otherwise than in accordance with the scheme. This conclusion was entirely at variance with the views expressed by Lord Cairns, L. C., in *Doman's case*, 3 C. D. 21, and in *Herts' case*, 1 C. D. 307, and with *Argus Life Assurance Co.*, 39 C. D. 371, and *Pepe v. City and Suburban Permanent Building Soc.*, (1893) 2 Ch. 311, *supra*, p. 639, and it was unanimously reversed by the House of Lords (1906, A. C. 35), partly on the ground that the policy was taken subject to the risk of the scheme of distribution being altered and partly on the ground that the prospectus did not form part of the contract, and could not be referred to in the construction of the policies.

Principal
matters in
articles.

The principal matters dealt with in the articles of association of a company limited by shares are the following:

- (1) The exclusion, or partial exclusion, of Table A., *supra*, p. 630, and *infra*, p. 789.
- (2) The adoption of preliminary agreements, *supra*, pp. 223 *et seq.*, and *infra*, p. 643 *et seq.*
- (3) The allotment of shares, *infra*, p. 646.
- (4) The payment of commission for underwriting shares. See *supra*, p. 275, and *infra*, p. 648.

- (5) Calls, lien on, and forfeiture, *infra*, pp. 654, 658 *et seq.*
- (6) Transfer and transmission of shares, *infra*, p. 665.
- (7) Increase of capital, *infra*, p. 683.
- (8) Reduction of capital, *infra*, p. 684.
- (9) Borrowing, *infra*, p. 685.
- (10) General meetings, *infra*, p. 689.
- (11) Directors, *infra*, p. 709.
- (12) Dividends, *infra*, p. 763.
- (13) Accounts and audit, *infra*, pp. 770, 773.
- (14) Notices, *infra*, p. 778.
- (15) Special provisions for winding-up, *infra*, p. 783.
- (16) Special provisions in the case of private companies, Chap. X.

As to each member being entitled to a copy of the memorandum and articles, see *supra*, p. 33.

Where articles of association have been registered, a copy of every special resolution for the time being in force is to be embodied in or annexed to every copy of the articles of association that may be issued after the confirmation of the resolution. Sect. 70 (2) of the Act.

Members
entitled to
copy of
articles.
Copies of
special
resolutions.

Where articles have not been registered, a copy of every special resolution is to be forwarded, in print, to any member at his request, on payment of one shilling, or such less sum as the company may direct. Sect. 70 (3).

If a company makes default in printing or forwarding a copy of a special or extraordinary resolution to the registrar, it is to be liable to a fine not exceeding two pounds for every day during which the default continues. Sect. 70 (4).

Penalty.

If a company makes default in embodying or annexing to a copy of its articles or in forwarding in print to a member when required by this section a copy of a special resolution, it is to be liable to a fine not exceeding one pound for each copy in respect of which default is made. Sect. 70 (5).

Every director and manager of a company who knowingly and wilfully authorizes or permits any default by the company in complying with the requirements of this section is to be liable to the like penalty as is imposed on the company for the default. Sect. 70 (6).

Before registration, the articles must be stamped with a 10s. deed stamp and with a 5s. companies registration stamp. See *supra*, p. 485.

Stamps.

A blunder in articles can only be corrected by altering them under sect. 13, and cannot be effected under the general jurisdiction to rectify documents. *Evans v. Chapman*, 86 L. T. 381; 18 T. L. R. 506.

PRECEDENTS.

Form 251.

THE COMPANIES (CONSOLIDATION) ACT, 1908.

Articles of Association of the — Company, Limited.

Articles of a
company
limited by
shares.

This form of articles, with suitable modifications, has been used in thousands of cases. It includes most of the clauses usually inserted, and it will be found that it can with little difficulty be so altered as to suit the circumstances of the great majority of the companies from time to time in course of formation. Various special clauses will be found, *infra*, Forms 259 *et seq.*, some of which may be occasionally required.

PRELIMINARY.

Some persons insert the words "It is agreed as follows" at the beginning of the articles, but the words are superfluous. By sect. 14 of the Act of 1908 (*supra*, p. 32), each member is bound by an implied covenant to conform to the regulations.

Interpreta-
tion.

1. [The marginal notes hto shall not affect the construction hof.]
In these presents, unless there be something in the subject or context inconsistent therewith—

"Special resolution" and "extraordinary resolution" have the meanings assigned hto resply by the Cos (Consolidation) Act, 1908 (sect. 69).

"The directors" means the directors for the time being.

"The office" means the registered office for the time being of the coy.

"The register" means the register of members to be kept pursuant to sect. 25 of the Cos (Consolidation) Act, 1908.

"Dividend" includes bonus.

"Month" means calendar month.*

"In writing" and "written" include printing, lithography, and other modes of representing or reproducing words in a visible form.

Words importing the singular number only include the plural number and *vice versa*.

Words importing the masculine gender only include the feminine gender.

Words importing persons include corporations.

* In legal documents the primary meaning of "month" is lunar month, and there is no general exception making it mean calendar month in commercial documents. *Bruner v. Moore*, (1904) 1 Ch. 1904.

Some persons insert a long list of words and expressions in the interpretation clause, but the practice is not to be commended. Probably several of the above might be omitted, e.g., "special" and "extraordinary" resolutions, but they are retained because directors and members are not always familiar with the Act, and it may therefore be convenient to give some of the more important definitions in it. But it seems mere pedantry to say that "the directors" means the "directors for the time being," that "member" means "member of the company," and so forth.

Occasionally, however, additional definitions may be convenient, e.g., where there is to be reserve capital, under sect. 59 of the Act. Thus "reserve capital" means that portion of the capital which is not capable of being called up except in the event and for the purposes of the company being wound up."

Form 251.

2. The regulations contained in Table A. [in the first schedule to the Cos (Consolidation) Act, 1908] shall not apply to the *coy.* Table A. not to apply.

See *supra*, p. 629, sect. 11 of the Act. And *Fisher v. Black and White Publishing Co.*, (1901) 1 Ch. 174, as to the importance of excluding provisions of Table A. by clearly expressed language.

3. The *coy* shall forthwith enter into an agreement with — in the terms of the draft, a copy whereof has, for the purpose of identification, been subscribed by A. B., a solor of the Supreme Court, and the directors shall carry the sd agreemt into effect, with full power, nevertheless, from time to time to agree to any modification of the terms of such agreemt, either before or after the execution thof.

Seal to be affixed to agreement.

The above form will be used when Plan III., *supra*, p. 327, is adopted, and the agreement is *not* mentioned in the memorandum of association. When it is so mentioned, the clause will run thus:—"The directors shall forthwith affix the seal to the agreement mentioned in paragraph — of clause 3 of the company's memorandum of association, and shall carry, &c."

Where the agreement is made (Plan I., *supra*, p. 325) with a trustee or agent for the company before its incorporation, the clause will run:—

"The company shall [or may] forthwith adopt an agreement dated the — day of —, and made between — of the one part, and — on behalf of this company of the other part, and the directors shall [or may] carry the same into effect, with full power, nevertheless, at any time, and from time to time, either before or after the adoption thereof, to agree to any modification thereof." Or, if preferred, clause 3 in the text can be used in Plan I., but in such case the draft referred to will be the draft adoption contract.

Sometimes the words, "a copy whereof is set forth in the schedule hereto," are introduced: but it is not generally advisable to set out the agreement in the schedule. The object of setting out the agreement in a schedule is to give the members the fullest notice of its contents, for every member is taken to know the articles of association; *supra*, p. 77.

It used formerly to be the custom to insert in the articles a clause declaring that "the company hereby ratifies and adopts the agreement, &c." But such a clause is now rarely inserted, for it is misleading, since it does not really operate to effect a ratification, and yet leads the parties to suppose that it does so operate. It probably does no more than authorize the directors to carry out the agreement. *Eley v. Positive Gov. Co.*, 1 Ex. Div. 88, *supra*, p. 634. It does not relieve the directors from the obligation of exercising a discretion

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as to whether the contract is a proper one to adopt. *Brazilian Rubber Plantations* (No. 1), (1911) 1 Ch. 425. It certainly does not operate as a ratification of the agreement, "Because," as Jessel, M. R., said in *Empress Engineering Co.*, 16 Ch. D. 125, "it has been decided, and, as it appears to me, well decided, that there cannot in law be an effective ratification of a contract which could not have been binding on the ratifier at the time it was made, because the ratifier was not then in existence. It does not follow from that that acts may not be done by the company after its formation which make a new contract to the same effect as the old one, but that stands on a different principle"; and see *supra*, p. 322. It is obviously undesirable to leave matters on such a footing; for it is difficult to say at what stage a company becomes bound by acting on the agreement. Thus, in *Northumberland Avenue Hotel Co.*, 33 C. Div. 16, it was held that the company was not bound, although it had taken possession and expended large sums on the premises agreed to be leased. There the agreement was with a trustee for the company, and was adopted by the articles.

Accordingly an adoption contract is desirable. See Forms 40 and 41.

But no separate adoption contract is necessary where the preliminary contract made with an agent for the company is signed after the incorporation of the company: such a contract is capable of ratification. See *supra*, p. 327. Plan III. It has, indeed, been held that it may be ratified even after the other party has purported to repudiate it. *Bolton Partners v. Lambert*, 41 C. Div. 295. But referring to this case, Lord Lindley said: "The decision referred to presents difficulties; and their lordships reserve their liberty to reconsider it if on some future occasion it should become necessary to do so." *Fleming v. Bank of New Zealand*, (1900) A. C. 577, 587 (P. C.).

The following provisions of sect. 87 of the Companies (Consolidation) Act, 1908, must be borne in mind:—

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(6) Nothing in this section shall apply to a private company or to a company registered before the first day of January, nineteen hundred and one, or to a company registered before the first day of July, nineteen hundred and eight, which does not issue a prospectus inviting the public to subscribe for its shares.

As to when a company is entitled to commence business, see sect. 87, sub-sect. 1, *supra*, p. 20. By sect. 83 of the Act, "a company shall not previously to the statutory meeting vary the terms of a contract referred to in the prospectus, or statement in lieu of prospectus, except subject to the approval of the statutory meeting." As shown by sect. 65, the statutory meeting is only required in the case of a "company limited by shares and registered on or after" Jan. 1st, 1901. Where such a meeting is held the directors must, in the report referred to in sect. 65, sub-sect. 2, state "the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification."

Where the directors are not independent of the vendors, *e.g.*, where the vendors are themselves the directors or some of the directors, or where the directors or some of them are interested as promoters, or where it is intended that the directors shall be excused from taking the usual precautions, and the company is not a purely private company, it is sometimes deemed expedient to add additional words to the above clause 3, as below in italics. The precise operation and effect of such provisions has not yet been ascertained by decision. It may be that the vendors could not claim by way of contract (*supra*, p. 322) the benefit of such provisions, but at any rate they go far to fix the company

and its members with notice of the position of affairs, and to deprive those who join the company or deal with it of cause for complaint (*Postage Stamp Co.*, (1892) 3 Ch. 566; *Seligman v. Prince & Co.*, (1895) 2 Ch. 617; *British Seamless Paper Box Co.*, 17 Ch. D. 487); *Volenti non fit injuria*; and, further, they would seem to go far to bind by laches those who object to the agreement, and yet abstain from promptly taking steps to repudiate it or get it set aside. *Erlanger v. New Sombrero Co.*, 3 App. Cas. 1218.

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In a recent case (*Brazilian Rubber Plantations* (No. 1), (1911) 1 Ch. 425), an article provided that "No director shall be liable . . . for any loss, damage, or misfortune whatever which shall happen in the execution of the duties of his office, or in relation thereto, unless the same happens through his own dishonesty." And the Court held that an action by the company against its directors for negligence, no dishonesty being alleged, could not, in view of the article, succeed. On the other hand, such provisions to be effective must meet the very case, otherwise they are futile. Thus, in *Blund's case*, *Westmoreland Green Co.*, (1893) 2 Ch. 612, where there was a provision on the lines of clause A., below, it was held, that it did not protect a director who had played the part of an ostensible co-vendor, not having any real interest in the property (and see *Gluckstein v. Barnes*, (1900) A. C. 240). The most eminent counsel, now in high judicial office, have advised that such special provisions are in some cases expedient.

As to the provision that every member is to be deemed to have notice, &c., this is by no means a new provision. *Sahlgreen and Carrall's case*, 3 Ch. 323. As to purely private companies not being within the Erlanger rule, see *British Seamless Paper Box Co.*, 17 Ch. D. 467; *Salomon v. Salomon & Co.*, (1897) A. C. 22, and *supra*, p. 135.

The following words, with more or less modification adapted to the special circumstances, are sometimes added to clause 3:

A. -The basis on which the company is established is, that the company shall acquire the property comprised in the said agreement on the terms therein set forth, subject to any such modifications (if any) as aforesaid, and that the vendors therein named are to be the first directors of the company, and accordingly it shall be no objection to the said agreement that the vendors as promoters and directors stand in a fiduciary position towards the company, that they do not in the circumstances constitute an independent board, and every member of the company present and future is to be deemed to join the company on this basis.

It is advisable in some cases to insert a similar statement in any prospectus inviting application for shares.

The following words furnish another example:

B.- And it is hereby declared that the purchase consideration thereby agreed to be given by the company has been fixed by the vendors as the amount they are willing to take, having regard to the fact that the value of the mining claims and properties thereby respectively agreed to be sold has not yet been ascertained; and inasmuch as the said claims and properties are situate in British South Africa, and the value thereof is speculative and uncertain, and can only be ascertained by local operations, which would be expensive and involve delay, and, if successful, would enhance the price asked, it is expressly declared that the directors are not, before executing such agreements on behalf of the company, to take any steps to ascertain the value of the said claims and

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properties, whether by local operations, independent inquiry, or by any other means, and are hereby absolved from all further responsibility in regard thereto, and every member of the company, present and future, hereby signifies his assent to this provision, and it shall be no objection to the said agreement that the vendors therein named, or some or one of them, or some nominee of such vendors, are or is directors or a director of the company, provided that before the execution of such agreement he shall have disclosed his interest to the other directors.

Company's
shares not to
be purchased.

4. None of the funds of the coy shall be employed in the purchase of, or lent on, shares of the coy.

This prohibition is one which the law already implies so far as regards a purchase: but where a company desires to obtain the quotation of its shares in the official list, such a clause as above should be inserted in order to comply with the rules. See *supra*, p. 267, for extracts from rules.

When busi-
ness may be
commenced.
Private
companies.

4a. The business of the coy may be commenced as soon after the incorporation of the coy as the directors shall think fit, and notwithstanding that not only of the shares may have been allotted.

Before the passing of sect. 6 of the Companies Act, 1900 (now replaced by sect. 87 of the Companies Act, 1908), this clause was often inserted, but was not necessary, for a company might unquestionably commence business and the directors might make calls before the whole capital had been issued. *Melmer v. Jersey Imperial Hotel Co.*, 2 H. & M. 528; *Ornamental Woodwork Co. v. Brown*, 2 H. & C. 63. But the directors were bound to exercise their discretion *bona fide* (*Madrid Bank, Ex parte Williams*, 2 Eq. 216), otherwise they might be held guilty of misfeasance. *Liverpool Household Stores*, 62 L. T. 876. The above clause has, however, been generally retained to prevent misunderstanding, and it may for the same reason be still retained in the case of private companies, for sect. 87 of the Act of 1908 does not apply to a private company. See sub-sect. (6).

Public
companies.

In the case of public companies, even before the Act of 1900, the terms of the prospectus might give a member an equity to restrain the company from commencing business with a totally insufficient capital. *Elder v. New Zealand Land Co.*, W. N. (1874) 85; 30 L. T. 285; *Sharpley v. Louth and Leic. Co. Rail. Co.*, 2 C. Div. 663. But see *Scottish Petroleum Co.*, 23 C. Div. 413.

As to the restrictions which the Act of 1908 imposes on the commencement of business, see *supra*, p. 20.

Allotment of
shares.

5. Subject as aforesaid, the shares shall be under the control of the directors who may allot or otherwise dispose of the same to such persons, on such terms and conditions, and at such times, as the directors think fit [subject, nevertheless, to the stipulations contained in the said agreement with reference to the shares to be allotted in pursuance thereof], and with full power to give to any person the call of any shares either at par or at a premium, and for such time, and for such reason as the directors think fit.

The words in brackets will be omitted if no agreement is referred to in the articles.

Seets. 85 and 86 of the Act, as to the conditions on which directors may proceed to allotment, must be borne in mind, see p. 64, *supra*; also sect. 88 of the Act as to a return of allotments. See *supra*, pp. 64, 65 *et seq.* As to shares issued at a discount, see *supra*, pp. 60, 277; as to bonus shares, *supra*, p. 60. Sometimes the words "and either at a premium or otherwise" are inserted; but no special authority is required to issue shares at a premium. The concluding words are, it would seem, superfluous.

Sometimes the words "with the sanction of a general meeting, shares in the initial capital may be issued with any preferential rights attached thereto" are added.

The duty of the directors as to allotment is clear: they are bound to act in good faith in the best interests of the company, for their power and discretion is fiduciary; but except where it is affirmatively shown that they have not acted in good faith, the Court will not overrule the exercise of their discretion. *Ex parte Penney*, 8 Ch. 452, *infra*, p. 671. *Prima facie*, there is no objection to the directors making an allotment to themselves and their friends in preference to or to the exclusion of other persons; or there may be customers of the business whom it may be desirable to propitiate and secure by an advantageous allotment; but if it is shown that they have not acted in good faith, *e.g.*, have made the allotment not because the company wanted further funds, but in order to enable the directors themselves to obtain extra vote, and so carry or negative some contemplated resolution, they will commit a breach of trust. *Pont v. Simon & Co.*, (1903) 2 Ch. 507; *Ex parte Penney*, *supra*; *Percival v. Wright*, (1902) 2 Ch. 421; *Re Coalport China Co.*, (1895) 2 Ch. 404.

So, also, as regards the price of issue, this clause gives them a wide discretion: they can offer the original issue at par, however promising the prospects are, and upon a subsequent issue they may, in fixing the price, freely exercise their discretion if they act in good faith—that is, with an eye to the company's interests, and not to their private advantage, and accordingly are not bound to offer the shares at a premium equal to that at which the outstanding shares nominally stand in the market, for it is not *ultra vires* of the company to issue shares at par where it would be possible to sell at a premium. *Hilder v. Dexter*, (1902) A. C. 474.

And this being so, the directors are free to exercise their discretion in the matter, and they may consider it best in the interests of the company to issue at par or at a less premium than the market price indicates, *e.g.*, to existing shareholders. Where, however, directors allot shares otherwise than in good faith, they may be held responsible for breach of trust. *Shaw v. Holland*, (1900) 2 Ch. 305, and compare this with *London and Colonial Finance Co.*, 77 L. T. 176 (C. A.); *Percival v. Wright*, (1902) 2 Ch. 421.

Cases often arise in which it becomes desirable to give to allottees of shares as part of the consideration for subscriptions the call at par or a premium of further shares, and to make the call exercisable at any time within a year or other limited period. This was held by the House of Lords, in *Hilder v. Dexter*, (1902) A. C. 474, to be legal, and not to contravene sect. 8 of the Companies Act, 1900 (now replaced by sect. 89 of the Act of 1908), even when the call was at par and at the time it was exercised the shares were at a premium. See *supra*, p. 281.

It may be that the clause without the above addition, "and with full power to give to any person the call on any shares, &c.," sufficiently covers the ground, especially if read in conjunction with clause 113, *infra*, p. 746; but some persons prefer to provide this expressly.

6. As regards all allotments from time to time made, the directors shall duly comply with sect. 88 of the Cos (Consolidation) Act, 1908.

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Return of
allotments.

Form 251. The section referred to provides for returns to the Registrar of Companies of allotments and for filing contracts as to paid-up shares. Penalty for default 50*l.* per day. For the section in full, with notes, see *supra*, p. 64.

Restrictions on allotments. 7. If the coy shall offer any of its shares to the public for subscription:

- (a) The directors shall not make any allotment thereof unless and until at least — p.c. of the shares so offered shall have been subscribed, and the sums payable on application shall have been pd to and received by the coy; but this provision is no longer to apply after the first allotment of shares offered to the public for subscription has been made.
- (b) The amount payable on application on each share so offered shall not be less than 5 p.c. of the nominal amount of the share.

And if the company shall propose to commence business on the footing of a statement in lieu of prospectus, the directors shall not make any allotment of shares unless 7 at least shall have been subscribed for on a cash footing.

The above clause embodies the leading provisions of sect. 85 of the Companies (Consolidation) Act, 1908. See *supra*, p. 9.

It may be useful as a reminder. The application money must be actually paid in cash before allotment; if cheques are received, they must be cleared before allotment. *Mears v. Western Canada Pulp and Paper Co.*, (1905) 2 Ch. 353; *National Motor, &c. Co.*, (1908) 2 Ch. 228; *Burton v. Bevan*, (1908) 2 Ch. 240.

The last paragraph is intended to operate under sub-sect. (7) of sect. 85.

Commissions for placing shares.

8. The coy may at any time pay a commission to any person for subscribing or agreeing to subscribe (whether absolutely or conditionally) for any shares in the coy, or procuring or agreeing to procure subscriptions (whether absolute or conditional) for any shares in the coy, but so that if the commission shall be pd or payable out of capital the statutory conditions and requirements shall be observed and complied with, and the commission shall not exceed [10 p.c.] on the shares in each case subscribed or to be subscribed.

See, as to these provisions, sect. 89, *supra*, p. 279, and the notes to Form 13, *supra*.

The rate fixed is very commonly 10 per cent.; but there is no limit, and in order to preclude difficulty, especially in mining companies, 100 per cent. has in not a few cases been specified. There is less difficulty in fixing a high maximum, as the rate so fixed will not have to be specified in the prospectus: in that only the amount of rate actually "paid or agreed to be paid" has to be specified.

If the clause authorizes only a "rate," a lump sum cannot be paid, for it is not a rate. *Booth v. New Africander, &c. Co.*, (1903) 1 Ch. 295.

Sometimes the clause is prefaced with more specific authority; thus:

"As regards the 100,000 shares which are forthwith to be offered to the public for subscription, the directors may pay to subscribers a sum not exceeding — per share for subscribing the same, and may pay a sum of not exceeding £ [—, not exceeding — per share] to persons for underwriting the same; and whenever subsequently the company offers any of its shares to the public for subscription, the directors may," &c.

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9. The coy may make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be pd and the time of payment of such calls.

Shares may be issued subject to different conditions as to calls, &c.

This power is given a company by sect. 39 of the Act (replacing sect. 24 of the Act of 1867), if the company is authorized by its articles to do so. It seems, therefore, expedient to take the power.

As to the duties of directors under this article, see notes to clause 5.

10. If, by the conditions of allotment of any share, the whole or pt of the amount or issue price thereof shall be payable by instalments, every such instalment shall, when due, be pd to the coy by the person who for the time being shall be the registered holder of the share.

Instalments on shares to be duly paid.

It is very common now to issue shares on terms that fixed sums shall be paid on application and allotment, and the balance, or a considerable part thereof, by instalments at short intervals (in lieu of calls). It is therefore expedient to insert such a clause as above. By the joint effect of the above clause, and of sect. 14 of the Act of 1908, each instalment will be a debt due to the company. *Supra*, p. 632. In England and Ireland it will be a specialty, and therefore recoverable within twenty years. See sect. 3 of the Civil Procedure Act, 1833 (3 & 4 Will. IV. c. 42), and compare *Cork & Brandon Rail. Co.*, 13 C. B. 836. See *supra*, p. 221. Sect. 70 of the Act of 1862 (as to the form of an action for calls) is not re-enacted by the Act of 1908. See *infra*, notes to Form 695. Unless such a clause is inserted, the instalments do not constitute a statutory debt, and if a transfer is passed whilst an instalment is due, a serious question arises as to whether the transferee is liable to pay such instalment. *Hoylake Rail. Co.*, 9 Ch. 257. But if the transfer is in the usual form, the company can sue the transferee for the arrears. *Herbert Gold Co. v. Haycraft*, C. A., *Times*, 27th March, 1901. The transferor remains liable, but it may be that a fresh call could be made on the transferee. Care should be taken that the forfeiture clauses extend to unpaid instalments. See clause 21, *infra*.

Where shares are payable by instalments, and the company is ordered to be wound up before the final instalments are due, the liquidator can call up the full amount without waiting till the instalments fall due—they are converted into a statutory debt. *Corlova Union Gold Co.*, (1891) 2 C. D. 580; conf. *Fowler v. Broad's Night Light Co.*, (1893) 1 Ch. 724.

As to the words "or issue price thereof," these are to provide for shares issued at a premium, and thus to render the forfeiture clauses applicable in the event of non-payment of premium.

"For the time being," points to the holder at the time the instalment becomes payable. *London & Brighton Ry. v. Fairclough*, 2 M. & G. 674.

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Liability of
joint holders
of share.

11. The joint holders of a share shall be severally as well as jointly liable for the payment of all instalments and calls due in respect of such share.

This clause is not uncommon. It appears to be very reasonable, and affords an additional security to the company. It extends only to instalments payable and calls made during the joint lives, for on the death of one his liability ceases. In the absence of such a clause the liability is joint only. *Hill's case*, 20 Eq. 585.

A corporation and a natural person may now hold shares or stock as joint tenants (Bodies Corporate Joint Tenancy Act, 1899 (62 & 63 Vict. c. 20)), but a company is not bound to enter the name of a partnership firm on the register of members. *Faulkner Anthracite Collieries*, 103 L. T. 211. But see *supra*, p. 70.

Trusts not
recognized.

12. Save as herein otherwise provided, the coo shall be entitl to treat the registered holder of any share as the absolute owner thof, and accordingly shall not, except as ordered by a Court of competent jurisdiction, or as by statute required, be bound to recognize any equitable or other claim to or interest in such share on the part of any other person.

The obvious intention and purpose of the above clause is to enable the company to look to the registered holder and deal with him exclusively as the owner of the shares without being embarrassed by any notice that may be given to the company of any equitable or other claims on the part of outsiders, unless those claims are claims recognized by the articles, as in the case of executors or administrators, or in the case of transferees entitled to registration, or unless the Court intervenes.

The clause goes further than sect. 27 of the Act. That section provides that "no notice of any trust, expressed, implied, or constructive, shall be entered on the register or be receivable by the Registrar in the case of companies registered in England or Ireland."

On the construction of these words (in sect. 30 of the Companies Act, 1862) it was held in *Bradford Banking Co. v. Briggs* (1887), 12 App. Cas. 29, that in case of a company subject to the Act, but not having an exemption clause as above in its articles, the section, though it relieves the company from taking notice of trusts, does not relieve the company from the obligation to take notice of an equitable mortgage made by the shareholder. The exemption clause, however, framed as above, appears to relieve the company from this obligation also—thus, in *Société Générale v. Walker* (1886), 11 App. Cas. 20, 30, where there was an exemption clause in the articles, Lord Selborne said that he thought that, "upon the true and proper construction of the Companies Act, 1862, and of the article of this company, there was no obligation upon this company to accept or to preserve any record of notices of equitable interests or trusts if actually given or tendered to them, and that any such notice, if given, would be absolutely inoperative." It is true that this passage was thought by the learned lords who took part in the decision in *Bradford Co. v. Briggs*, *supra*, to go too far; but apparently attention was not called to the fact that in the case last mentioned there was no exemption clause, whereas in the case Lord Selborne was dealing with there was a very full exemption clause.

But even the presence of an exemption clause, it was settled long since, does not prevent a person equitably interested in shares from procuring the inter-

vention of the Court to protect his rights. *Binney v. Ince Hall Coal Co.*, 35 L. J. Ch. 363; *Taylor v. Midland Rail. Co.*, 8 W. R. 401. And now it is not uncommon, as in the above clause, to insert words showing that the clause is not to interfere with the jurisdiction of the Court. This removes a difficulty in construction referred to by Lord Halsbury in *Bradford Banking Co. v. Briggs*, *supra*.

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The following are additional cases in which the exemption clause was present, and the company was held entitled to disregard notice of equities: *New London and Brazilian Bank v. Brocklebank* (1882), 21 C. D. 302; *Miles v. New Zealand, &c. Co.* (1886), 32 C. D. 266; *Re Perkins*, 24 Q. B. D. 613. In the case last mentioned, Lord Coleridge, sitting in the Court of Appeal, pointed out very forcibly the importance of relieving companies from the obligation to recognize equities. "It seems to me," said his Lordship, "extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relations between trustees and their *cestuis que trust* in respect of the shares of the company. If a trustee is on the company's register as a holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company has nothing whatever to do; it could only look to the man whose name is upon the register. It seems to me that if we were to throw any doubt upon that rule we should make the carrying on of the business of joint stock companies extremely difficult, and might involve those companies in very serious questions, and the ultimate result would be anything but beneficial to the holders of shares in such companies themselves."

These decisions are based on the principle that a shareholder cannot both approbate and reprobate, and that persons claiming through him can stand in no better position. *Qui sentit commodum sentire debet et onus*. *Macdonald v. Law Union, &c. Co.* (1873), L. R. 9 Q. B. 328; *Barland's Trustee v. Steel Bros. & Co.*, (1901) 1 Ch. 279.

It is, and has for long been, a general practice with companies—at any rate, those having an exemption clause in their articles—to decline to receive notice of equities, and to inform a person who gives notice that the company does not recognize equities, and that if the party who is giving the notice desires, he must take steps to obtain an injunction, and this is all that a company can in reason be expected to do. Take the case, for instance, of a company with a thousand shareholders—a not uncommon number; it would be intolerable if the company was obliged to take notice of all the various claims that might be sent in to it by outsiders who claim to be interested in shares and yet abstain from taking the requisite legal proceedings, either in an action or under 1 & 2 Vict. c. 110, s. 14; 3 & 4 Vict. c. 82, s. 1; or R. S. C., Ord. XLV. (1), r. 1. See *infra*, pp. 662 *et seq.*

Shares are "choses in action" within sect. 44 of the Bankruptcy Act, 1883, and therefore exempt from the order and disposition provisions of that section. *Colonial Bank v. Whinney*, 11 App. Cas. 436. But the doctrine of *Dearle v. Hall*, 3 Russ. 1, does not apply to shares, and accordingly an equitable assignee of a share who does not give notice thereof to the company will not be postponed to a subsequent equitable assignee who does give notice. *Société Gén. v. Walker*, 11 App. Cas. 30. Hence, where the holder executes a transfer of shares to A., and subsequently another transfer of the same shares to B., the maxim *qui prior est tempore potior est jure* applies, and A. is entitled to registration to the exclusion of B. But if B. is a purchaser for value without notice of the prior transfer to A., and gets on to the register before A., he thereby gains priority over A. And he may, perhaps, gain priority without actual registration if he becomes unconditionally entitled to registration. *Roots v. Williamson*, 38 Ch. D. 485.

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It must be borne in mind that where a transfer by deed is required a blank transfer filled up after delivery does not pass the legal title, and is, therefore, ineffective as against a prior equity. *Hibblewhite v. McMorine*, 6 M. & W. 200; *Powell v. Prov. Bank of England*, (1893) 2 Ch. 555; *France v. Clark*, 26 Ch. D. 257.

Where a regular transfer is presented, but the company has received notice not to register it, it should, unless it is prepared to run the risk, inform the person who gave the notice that, unless he within (say) three days obtain an injunction, the transfer will be registered, and notice should also be given to the transferee. See *Tahiti Cotton Co., Ex parte Sargent*, 17 Eq. 280; *Cadogan and Hans Place Estate Co., W. N.* (1876) 91. But where the company has notice of an equitable title it is not bound to register a transfer which would be a fraud on the owner of such equitable title. *Roots v. Williamson*, 38 C. D. 485; *Moore v. North-Western Bank*, (1891) 2 Ch. 599; *Ireland v. Hart*, (1902) 2 Ch. 527; *Peat v. Clayton*, (1906) 1 Ch. 559; *Ottos Kopje Diamond Mines*, (1893) 1 Ch. 618.

The company need not register a person as a member under a transfer of shares of which they have any doubt, but can leave the transferee to come to the Court and make out his title. Per Mellor, J., *Bahia and San Francisco Rail.*, L. R. 3 Q. B. 597. And although a mortgage of shares contains an express or implied receipt clause, the company is not bound to act on it, but may require an account of what is due to the mortgagee. *Hockey v. Western*, (1898) 1 Ch. 350.

A person claiming under a forged transfer, who sends in and procures registration of such transfer, and the issue of a fresh certificate, is bound, though acting in good faith, to indemnify the company. *Sheffield Corp. v. Barclay*, (1905) A. C. 392.

Under sect. 27 of the Act, a trustee who is the registered holder of shares is personally liable. *Chapman and Barker's case*, 3 Eq. 361; *Hemming v. Maddick*, 7 Ch. 395. The *cestui que trust* cannot be made liable, either as shareholder or contributory. *Bagg's case*, 2 Dr. & Sm. 459; *Somervail v. Cree*, 4 App. Cas. 648. And the same rule applies to Scotch companies even where the trustees are registered "as trustees." *Muir v. City of Glasgow Bank*, 4 App. Cas. 337. But a trustee is entitled to be indemnified by his *cestui que trust*. *Hemming v. Maddick*, *ubi supra*. And if the *cestui que trust* is *an juris* and cannot disclaim the shares, it is immaterial whether he created the trust or accepted a transfer of the beneficial ownership with knowledge of the trust. *Hardoon v. Belilos*, (1901) A. C. 118.

A company is by statute bound to attend to a distingus notice. See notes to Form 580, *infra*.

PREFERENCE SHARES.

Preference
shares.

13. Of the shares in the initial capital [10,000] shall be preference shares, &c. (See Forms 261 *et seq.*, *infra*.)

Where the initial capital is divided into classes it is convenient here to set forth the particulars, unless the matter is fully dealt with in the memorandum of association. See Forms 210 *et seq.*, and *supra*, p. 375.

Form 251.

CERTIFICATES.

14. The certificates of title to shares shall be issued under the seal of the coy. and signed by two directors, and countersigned by the secretary or some other person appointed by the directors. Certificates:

As to the serious responsibility incurred by a company in issuing certificates, see *infra*, Chap. XIV., where also will be found forms of certificates.

As to the obligation to issue promptly, see sect. 92 of the Act. Regarding being had to that section, it seems doubtful whether a fee can be exacted.

15. Every member shall be entitled to one certificate for all the shares registered in his name, or to several certificates, each for one more of such shares. Every certificate of shares shall specify the number and denoting numbers of the shares in respect of which it is issued and the amount paid up thereon. members' right to.

Under an article in the above form it was held that a shareholder was entitled in an action to compel the company to issue a certificate to him, and that although after the word "entitled" the words "within a reasonable time" must be implied, the Court in considering what time was reasonable was not bound to take into account the fact that the company's prospectus referred to certain contracts under which certificates for some of the shares in the company could not be issued until a certain period had elapsed. *Burdett v. Standard Exploration Co.*, 16 T. L. R. 112.

16. If any certificate be worn out or defaced, then, upon production thereof to the directors, they may order the same to be cancelled, and may issue a new certificate in lieu thereof; and if any certificate be lost or destroyed, then, upon proof thereof to the satisfaction of the directors, and on such indemnity as the directors deem adequate being given, a new certificate in lieu thereof shall be given to the party entitled to such lost or destroyed certificate. As to issue of new certificate in place of one defaced, lost, or destroyed

The company, under the doctrine of estoppel (see *infra*, p. 1140 *et seq.*), incurs a serious responsibility by issuing a new certificate, unless the old one is cancelled; and it ought not to be done except on very satisfactory proof of loss or destruction, or on a satisfactory indemnity being given. See further, *infra*, Chap. XIV.

17. For every certificate issued under the last preceding clause there shall be paid to the coy the sum of 1s., or such smaller sum as the directors may determine. Fee.

The Stock Exchange Committee will not allow a fee to be charged for the first certificate, such certificate being the shareholder's proper evidence of title to his shares.

Form 251.

To which of
joint holders
certificate to
be issued.

18. The certificate of shares registered in the names of two or more persons shall, unless otherwise directed by them, be delivered to the person first named on the register.

Calls.

In the absence of a special provision in the memorandum or articles, or any special agreement as to payment, a subscriber to the memorandum of association, like an ordinary shareholder, is not liable to pay anything in respect of the shares subscribed for by him until calls are duly made on him. *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56. The same case shows that if the directors subscribe the memorandum for shares it is their duty not to favour themselves, but to make calls on their own shares *pari passu* with the other shares of the class.

Calls.

19. The directors may, from time to time, make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them resp'y, and not by the conditions of allotment thof made payable at fixed times, and each member shall pay the amount of every call so made on him to the persons and at the times and places appointed by the directors. A call may be made payable by instalments.

Sect. 14 of the Act of 1908 provides that "all money payable by any member to the company under the memorandum or articles, shall be a debt due from him to the company, and in England and Ireland be of the nature of a specialty debt." Hence an action lies for the amount.

As to an action against a member for calls or other money, see *infra*, note to clause 22a.

A call made by persons not duly appointed directors is *prima facie* void. *Hovbrack Coal Co. v. Teague*, 5 H. & N. 151. And it is a corollary from the same principle that if the directors who purported to make the call were not duly qualified that is *prima facie* a good defence to an action for the call. *Iron Ship, &c. Co. v. Blunt*, L. R. 3 C. P. 484. See also *Sharp v. Dawes*, 2 Q. B. Div. 26. Care must also be taken that the meeting of the directors making the call is duly convened (*Garden Gully United Quartz Mining Co. v. McLister*, 1 App. Cas. 46; *Faure Electric Accumulator Co. v. Phillipart*, 58 L. T. 525), and that a proper quorum is present. *Austin's case* (1871), 24 L. T. 932.

But sects. 71 (3), 74, of the Act, and a clause like 111, *infra*, may make an act of directors done before discovery of undue appointment or disqualification valid.

In making a call care should be taken to make it payable at a time sufficiently distant to allow the requisite notice to be given. Under clause 109 the power to make a call may be delegated to a committee, but the power cannot be delegated without some such authority. *Howard's case*, 1 Ch. 561; see p. 742, *infra*.

The power to make calls is in the nature of a trust to be exercised for the general benefit of the company. *Gilbert's case*, 5 Ch. 559; *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56. If it is being exercised *malâ fide*, e.g., for the directors' private ends or for some indirect purpose, it may be restrained by injunction, but the Court is not very willing to interfere.

Norman v. Mitchell, 19 Beav. 278; 5 De G. M. & G. 648; *Logan v. Courtown*, 13 Beav. 22; *Bailey v. Birkenhead Co.*, 12 Beav. 433; *Fraser v. Whalley*, 2 H. & M. 10; *Punt v. Symons*, (1903) 2 Ch. 506; *Abbotsford Hotel v. Kingham*, 102 L. T. 118. The onus of proving *mala fides* is on the party alleging it. *Odessa Trams. Co. v. Mendel*, 8 C. Div. 246. It may be proper to make a call in order to prevent threatened transfers. *Gilbert's case*, *ubi supra*.

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A minute of the resolution making a call ought to be made, for there is some question whether the call can otherwise be proved. *Cornwall Mining Co. v. Bennett*, 5 H. & N. 423; 29 L. J. Ex. 157. And the resolution should specify the amount of the call, and when, where, and to whom the call is to be paid. *Re Cawley & Co.*, 42 C. Div. 209. Compare *Johnson v. Lyttle's Iron Agency*, 5 C. Div. 687. It would seem that even without express authority a call may certainly be made payable by instalments. *Ambergate Rail. Co. v. Norcliffe*, 6 Ex. 628; *Lawrence v. Wynn*, 5 M. & W. 355.

Although calls are to be made on the members (as in Table A., clause 12), a deceased member, whilst his name remains on the register, must, it would seem, be treated as a continuing member so far as may be necessary to render his estate liable. *New Zealand, &c. Co. v. Peacock*, (1894) 1 Q. B. 622. If desired, the words "In this clause member includes the legal personal representatives of a member" may be inserted. Conf. sect. 21 of the Companies (Clauses Consolidation) Act, 1845. Proof may be made in an administration action for the estimated liability in respect of all future calls. *Re McMahon, Fuller v. Same*, (1900) 1 Ch. 173. And the same rule applies in bankruptcy. *Re Rowe*, (1904) 2 K. B. 489. The receipt by the company of a dividend of less than 20s. in the pound does not make the share fully paid (*Rowe's Trustee's Claim*, (1905) 1 Ch. 597 (affirmed on appeal, (1906) 1 Ch. 1)), so as to entitle the shareholder to participate in surplus assets on a winding-up.

In an administration action executors need no protection against future calls by means of funds being retained in Court. *Mellor v. South Australian Land*, (1907) 1 Ch. 72.

Directors may make calls after voluntary liquidation has commenced with the sanction of the general meeting or of the liquidators. *Fairbairn Engineering Co.*, (1893) 3 Ch. 450.

20. A call shall be deemed to have been made at the time when the resolution of the directors authorizing such call was passed.

When call deemed to have been made.

This clause, which appears in Table A., is inserted in order to get rid of any doubt as to what all is "made" when the resolution is passed, or when notice of it is given to the members. *Shaw v. Rowley*, 16 M. & W. 810. See clauses 24 and 25, in connection with which the question is sometimes material.

20a. No call shall exceed one-fourth of the nominal amount of a share, or be made payable within two months after the last preceding call was payable.]

Restrictions on power to make calls.

The above clause is sometimes used, but, except where quotation is required, it is generally considered better to leave the directors free to exercise their discretion. The prospectus not uncommonly states that it is not intended to make calls beyond a certain amount, but such a statement of intention is not a pledge binding on the company; and it was held in one case that an action would lie, though the shares were applied for on the faith of a prospectus which stated

Form 251. that "No further calls are contemplated." *Accidental Insurance Co. v. Davis* (1866), 15 L. T. 182. *Prima facie* a payment to be made on the allotment of a share is not a call. *Croskey v. Bank of Wales*, 4 Giff. 314; *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56. The Stock Exchange Committee generally require a clause as above, and will now allow the word "fifth" to be substituted for "fourth." An "instalment" under clause 10 is not a "call" within this clause.

Notice of call. 21. Fourteen days' notice of any call shall be given specifying the time and place of payment, and to whom such call shall be paid.

It is always expedient to allow a reasonable time for payment of a call. If money is urgently required, the directors should raise it temporarily on debentures or mortgage or otherwise, so as to allow sufficient time for the members to pay up. Where so many "clear days' notice" or so many "days' notice at least" is to be given, the day of giving the notice and the day on which the call is to be paid should not be counted. *Watson v. Eales*, 23 Beav. 294; *Railway Sleepers Co.* (1885), 29 C. D. 204. If a call is made payable by instalments, the notice ought, it would seem, to be given the prescribed number of days before the time fixed for the payment of the first instalment. Notice must be given in accordance with the articles of the company. *Watson v. Eales*, *supra*. And see clause 22, *infra*.

When interest on call, or instalment, payable. 22. If the sum payable in respect of any call or instalment be not paid on or before the day appointed for payment thereof, the holder for the time being of the share in respect of which the call shall have been made, or the instalment shall be due, shall pay interest for the same at the rate of 5l. p.c.p.a. from the day appointed for the payment thereof to the time of the actual payment, or at such other rate as the directors may determine.

What the rate of interest should be is a matter for consideration. Sometimes 10 per cent. is specified. See *Storken's case*, 3 Ch. 412.

Such a clause does not apply to calls made by the liquidators of a company (*Welsh Flannel and Tweed Co.*, 20 Eq. 367); but interest may be made payable by the liquidator giving notice of his intention to charge it. See Part II., p. 554. As to liability to pay interest on calls after forfeiture of the shares, see *Storken's case*, L. R. 3 Ch. 412, and *Faure Electric Accumulator Co. v. Phillipart*, 56 L. T. 525.

It is now common to sue for a call on a writ specially indorsed under Ord. III. r. 6, of the Rules of the Supreme Court. After judgment has been obtained against the defaulting shareholder, the company can proceed against him in bankruptcy by serving him with a bankruptcy notice. *Re Winterbottom*, 18 Q. B. D. 446. So long as the company is a going concern the shareholder can plead a set-off, but not after a winding-up, whether voluntary or by the Court.

The duty of the directors, when a call is made, is to compel every shareholder to pay to the company the amount due from him in respect of that call; and they are guilty of a breach of their duty if they do not take all reasonable means for enforcing that payment. *Spackman v. Evans*, L. R. 3 H. L. 186. Directors must not favour themselves in this respect. *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 53.

[22a On the trial or hearing of any action for the recovery of any money due for any call, it shall be sufficient to prove that the name of the member sued is entered in the register as the holder, or one of the holders, of the shares in respect of which such debt accrued; that the resolution making the call is duly recorded in the minute book; and that notice of such call was duly given to the member sued, in pursuance of these presents; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matters whatsoever, but the proof of the matters aforesaid shall be conclusive evidence of the debt.] **Form 251.**

Evidence in
action for call.

This clause is sometimes inserted; it is not contained in Table A. The provisions of the general law are generally considered sufficient. Sect. 70 of the Act of 1862 is repealed, and not re-enacted.

Notwithstanding the terms of the above clause, the defendant would still be entitled to show that he was not a member. It would, however, seem that as against a member the clause would render the duly recorded resolution of a call conclusive. See and consider *Cornwall, &c. Co. v. Bennett*, 5 H. & N. 423; and *Roney's case*, 4 D. J. & S. 426.

23. The directors may, if they think fit, receive from any member willing to advance the same, and either in money or money's worth, all or any part of the capital due upon the shares held by him beyond the sums actually called for; and upon the amount so paid or satisfied in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the member paying such sum in advance and the directors agree upon. **Payment of calls in advance.**

The power to receive payment of calls in advance is in the nature of a trust for the benefit of the company. Directors should only receive money in advance when in their judgment it can be advantageously used for the purposes of the company. *Poole, Jackson and White's case* (1878), 9 Ch. D. 322; *Re Pyle Works*, 44 Ch. D. 586. Hence, where directors paid up in advance their own shares, and on the same day appropriated the amount in payment of their fees, for which there were, at the time, as they knew, no other available assets, it was held that, the transaction not being *bona fide*, the directors remained liable on their shares. *Sykes' case*, 13 Eq. 255. See also *Gilbert's case*, 5 Ch. 559; *Wincham Shipbuilding Co.*, 9 C. Div. 322; *Re A. M. Wood's Ship and Moor-dale Protection Co.*, 2 Meg. C. R. 164; *Washington Diamond Co.*, (1893) 3 Ch. 350; *Liverpool Guarantee Co.*, 30 W. R. 378; *Kent's case*, 39 C. Div. 266; *Anglo-Continental, &c. Corporation*, (1898) 1 Ch. 327, 335; and *Driffeld Gas Light Co.*, (1898) 1 Ch. 451.

It has now been settled, by the House of Lords, that such a clause justifies the payment of the agreed interest upon the capital paid up in advance, not merely out of profits, but, if needs be, out of capital, provided that the power to receive in advance has been exercised *bona fide*. *Lock v. Queensland Investment Co.*, (1896) A. C. 461. See further, *infra*, pp. 764, 765. Of course, it may be arranged that the interest is only to be paid out of profits, and that payment up in advance is not to give any preference, in winding-up, as to capital.

Form 251. In a winding-up, capital paid up in advance of calls *prima facie* ranks for payment next after outside debts, and the costs of winding-up (see *Maule's case*, 6 Ch. 51, and the cases following), and arrears of interest thereon, rank in like manner. *Exchange Drapery*, 38 C. D. 174; *Wakefield, &c. Co.*, (1892) 3 Ch. 165.

FORFEITURE AND LIEN.

If call or instalment not paid, notice may be given.

24. If any member fail to pay any call or instalment on or before the day appointed for the payment of the same, the directors may at any time thereafter, during such time as the call or instalment remains unpaid, serve a notice on such member requiring him to pay the same, together with any interest that may have accrued, and all expenses that may have been incurred by the co. by reason of such non-payment.

The power of forfeiture is a most valuable one for enforcing the payment of calls and instalments. It is not inherent in a company, but must be taken. *Clarke v. Hart*, 6 H. L. C. 633. If the procedure has been regular, the Court will not give relief against the forfeiture. *Sparks v. Liverpool Waterworks*, 13 Ves. 428. But like all provisions for forfeiture, it is to be treated as *strictissimi juris*, and accordingly any irregularity in the procedure will invalidate the forfeiture. *Clarke v. Hart*, *supra*; *Garden Gully, &c. Co. v. McLister*, 1 App. Cas. 39; *Johnson v. Lytle's Iron Agency*, 5 C. Div. 687; *Goulton v. London Architectural Co.*, W. N. (1877) 141; *Stubbs v. Lister*, 1 Y. & C. C. C. 81. Even where a shareholder is seeking to rescind his contract the Court can restrain a forfeiture. *Lamb v. Sambas Rubber*, (1908) 1 Ch. 415; *Jones v. Pacaya Rubber Co.*, (1911) 1 K. B. 455, overruling *Ripley v. Paper Bottle Co.*, 57 L. J. Ch. 327.

Where the shareholder is bankrupt, the notice may still be given to him (*Graham v. Van Dieman's Land Co.*, 1 H. & N. 541; 28 L. J. Ex. 73), but it is well to give notice to the trustee also.

If the shareholder is dead the notice may be sent to his registered address. *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656.

It has been decided that the power of forfeiture may be exercised by the directors with the sanction mentioned in sect. 133 (5) of the Act of 1862 (now replaced by sect. 185 (iii) of the Act of 1908), even after the commencement of a voluntary winding-up. *Fairbairn Engineering Co.*, (1893) 3 Ch. 450.

A power to forfeit may, it would seem, be introduced into the articles by special resolution. *Dawkins v. Antrobus*, 17 C. Div. 634; and see *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656; *Re Rowe*, (1904) 2 K. B. 489.

The power creates a trust to be exercised for the benefit of the company, and, if it is used for the purpose of enabling members to escape from their liabilities, the transaction cannot stand. *Esparto Trading Co.*, 12 C. D. 191; *Harris v. North Devon Rail. Co.*, 20 Beav. 384; *Spackman v. Evans*, L. R. 3 H. L. 186; *Lord Wallcourt's case*, W. N. (1899) 258.

Sometimes it is considered desirable to make the power of forfeiture exercisable for non-payment of debts generally, and not merely calls and instalments. *Dunlop v. Dunlop*, 21 C. D. 583.

Directors do not lose the power of forfeiture because the company charges all its uncalled capital in favour of trustees for debenture holders. *Re Agency Land and Finance Co. of Australia*, 20 T. L. R. 41.

A clause in a company's articles forfeiting the shares of any shareholder who should commence or threaten an action against the company or the directors

in payment to the shareholder of the full market value of his shares is invalid as an infringement of a shareholder's legal rights. *Hope v. International Financial Soc.* (1876), 4 Ch. D. 327.

Form 251.

The members whose shares have been wrongly forfeited are entitled to bring in action to set the forfeiture aside (*Sweeney v. Smith* (1861), 7 Eq. 324), and to prove in the winding-up of the company in competition with other creditors. *New Chile Co.*, 45 C. D. 598.

A shareholder who is a director, and present at and party to proceedings by which his shares were declared to be forfeited for non-payment of calls, cannot after the lapse of several years dispute the validity of the forfeiture on the ground of any irregularity. *Jones v. North Vancouver Land Co.*, (1910) A. C. 317.

25. The notice shall name a day (not being less than fourteen days from the date of the notice), and a place or places, on and at which such call or instalment and such interest and expenses as aforesaid are to be paid. The notice shall also state that in the event of non-payment at or before the time and at the place appointed, the shares in respect of which the call was made or instalment is payable will be liable to be forfeited.

Form of notice.

Sometimes the above clause is omitted, and the preceding clause (24) altered by inserting the words "within 21 days from the date thereof" before the word "together," and by adding at the end of the clause the words, "Such notice shall contain a copy of the next following clause."

Whatever the precise formalities prescribed by the clause, they must be strictly pursued. *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687.

26. If the requisitions of any such notice as aforesaid are not complied with, any shares in respect of which such notice has been given may, at any time thereafter, before payment of all calls or instalments, interest and expenses, due in respect thereof, be forfeited by a resolution of the directors to that effect. Such forfeiture shall include all dividends declared in respect of the forfeited shares, and not actually paid before the forfeiture.

If notice not complied with, shares may be forfeited.

The forfeiture may be held valid although this clause has not been strictly observed. *Woolaston's case*, 4 De G. & J. 437; *Knight's case*, 2 Ch. 321.

Of course the directors are not bound to exercise the power of forfeiture (*Bigg's case*, 1 Eq. 309), and will not do so if it is not to the interest of the company.

26a. When any share shall have been so forfeited, notice of the resolution shall be given to the member in whose name it stood immediately prior to the forfeiture, and an entry of the forfeiture, with the date thereof, shall forthwith be made in the register.]

Notice after forfeiture.

This clause is sometimes inserted, and it seems reasonable in order that the member may have an opportunity of getting the forfeiture annulled under clause 28. It does not follow that the failure to give the notice invalidates the

Form 251. forfeiture. *Webster's case*, 32 L. J. Ch. 135; 7 L. T. 618. For the ex-holder of the forfeited shares being no longer a member, has no *locus standi* to exact compliance with the articles.

Forfeited
share to
become pro-
perty of
company.

27. Any share so forfeited shall be deemed to be the ppty of the coy, and the directors may sell, re-allot, and otherwise dispose of the same in such manner as they think fit.

This clause is almost always inserted.

The articles generally give power to the directors to sell forfeited shares as above. They can sell at a discount, that is for less than the amount paid up prior to the forfeiture, and they are not bound to treat the shares as if nothing had been paid on them. *Morrison v. Trustees' Executors Co.* (1899), 68 L. J. Ch. 11; 79 L. T. 605 (C. A.). But the transferee will be a holder of shares in respect of which money is due, and may therefore by a clause in the regulations be debarred from voting under an article disentitling a shareholder in default to vote. *Randt Gold Mining Co. v. Wainwright*, (1901) 1 Ch. 184. And he is liable notwithstanding the issue to him of a certificate that his shares are discharged from all calls prior to date. *New Balkis Eersteling v. Randt Co.*, (1904) A. C. 165. He should, however, unless otherwise agreed, be credited with subsequent payments by the proper owner. *Randt Gold Mining Co.* (1904) 2 Ch. 468.

And see *infra*, note to clause 29.

Where a forfeiture is duly and *bona fide* effected, equity will not relieve against it. *Sparks v. Liverpool Waterworks Co.*, 13 Ves. 428. A shareholder who desires to challenge a forfeiture as invalid may bring an action to set it aside (*Sweeny v. Smith* (1867), 7 Eq. 324; and see *Johnson v. Lytle's &c. Co.*, *supra*, and *Re New Chile Co.*, 45 Ch. D. 598); and mere laches will not disentitle a legal owner of shares to relief against an invalid forfeiture. *Garden Gully, &c. Co. v. McLister*, 1 App. Cas. 39. But his having been a party to the forfeiture as director will disentitle him to relief. *Jones v. North Vancouver Land Co.*, (1910) A. C. 317.

A shareholder whose shares have been irregularly forfeited (*e.g.*, without proper notice) can sue the company or, in a winding-up, prove for damages against the company. *In re New Chile, &c. Co.*, 45 C. D. 598.

A director who takes part in a forfeiture resolution of shares in which he is interested may be estopped from questioning the appointment of the directors who concurred therein. *Jones v. North Vancouver Land Co.*, *supra*.

A clause in a company's articles forfeiting the shares of any shareholder who should commence or threaten an action against the company or the directors on payment to the shareholder of the full market value of his shares is invalid. *Hopps v. International Financial Society* (1876), 4 C. D. 327. It is a violation of the shareholder's common law right of action.

Power to
annul
forfeiture.

28. The directors may, at any time before any share so forfeited shall have been sold, re-allotted, or otherwise disposed of, annul the forfeiture thof upon such conditions as they think fit.

The regulations very commonly give power to the directors so long as they have not sold to annul a forfeiture on such terms as they think proper, but this power can not be exercised without the consent of the late holder. *Exchange Trust, Limited, Larkworthy's case*, (1903) 1 Ch. 711.

29. Any member whose shares have been forfeited shall, notwithstanding, be liable to pay, and shall forthwith pay to the coy, all calls, instalments, interest, and expenses, owing upon or in respect of such shares at the time of the forfeiture, together with interest thereon, from the time of forfeiture until payment, at [5] p.c.p.a., and the directors may enforce the payment thereof if they think fit.

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Arrears to be paid notwithstanding forfeiture.

Forfeiture of shares *prima facie* prevents any action by the company for past calls (*Stocken's case*, 3 Ch. 415), and when a person has been induced by misrepresentation to become a member, forfeiture places him in a position, if sued by the company, to set up the misrepresentation by way of defence, even in a winding-up. *Aaron's Reef v. Twiss*, (1890) A. C. 273. But the articles commonly provide that where a share has been forfeited the member shall still be liable for payment of the call with interest, and this creates a new obligation which can be enforced. *Stocken's case*, *supra*; *Ladies' Dress Association v. Fulbrook*, (1900) 2 Q. B. 376.

A call may be "owing" within the meaning of such a clause, though it has not become payable when the forfeiture takes place. *Faure v. Phillipart*, 38 L. T. 525.

Nor does the forfeiture of a share relieve the ex-holder from all liability in respect thereof, for if the company should be wound up within a year after the forfeiture, he will still be liable as a past member to the extent specified in sect. 123 (1) (i) of the Act. *Creyke's case*, L. R. 5 Ch. 63. So a shareholder who has transferred his shares within a year of a winding-up is liable as a past member, though the shares have been forfeited in the hands of a transferee. *Bridger's and Neill's cases* (1869), L. R. 4 Ch. 266.

A liquidator has no power to cancel a forfeiture of shares duly made by the directors before the commencement of the winding-up. *Dawe's case*, 6 Eq. 232.

When shares forfeited for non-payment of calls are sold, the purchaser is liable to a fresh call in respect of the capital comprised in such prior calls (*New Balkis Everetling v. Randt Gold Mining Co.*, (1904) A. C. 163), for the company cannot sell free from that liability. But subsequent payments by the ex-holder, on account of the prior calls, should be credited to the purchaser in due course. *Randt Gold Mining Co.*, (1904) 2 Ch. 468.

If a company proves in the bankruptcy of a shareholder for future calls, and receives less than the full amount, this does not make the shares paid-up so as to entitle a shareholder to participate in surplus assets. *West Coast Gold Fields*, (1905) 1 Ch. 597.

[29a. The forfeiture of a share shall involve the extinction of all interest in, and also of all claims and demands against the coy in respect of the share, and all other rights incident to the share, except only such of those rights as by these articles are expressly saved.]

Effect of forfeiture.

Although the above clause is sometimes inserted, it appears to be of little or no value. In substance it merely provides for that which is otherwise provided for, namely, that a forfeited share shall be deemed to be the property of the company. If strictly construed, it would deprive a future holder of the share of the right of voting and of receiving dividends, &c. See *Stocken's case*, 3 Ch. 412.

In *Creyke's case*, 5 Ch. 63, it was contended that the forfeiture of shares in

Form 251. a company whose articles contained such a clause freed the forfeiting member from liability even as a past member; but it was held that this was not so.

As to proving for damages where a forfeiture is irregular, see *New Child. Co.*, 15 C. D. 598.

Company's
Lien on shares.

[29b. The coy shall have a first and paramount lien upon all the shares [other than fully pd-up shares; omit these words if quotation not required, registered in the name of each member (whether solely or jointly with others), and upon the proceeds of sale thereof, for his debts, liabilities, and engagements, solely or jointly with any other person, to or with the coy, whether the period for the payment, fulfilment, or discharge thof shall have actually arrived or not, and no equitable interest in any share shall be created except upon the footing and condition that clause 12 hof is to have full effect. And such lien shall extend to all dividends from time to time declared in respect of such shares. Unless otherwise agreed, the registration of a transfer of shares shall operate as a waiver of the coy's lien, in any, on such shares.]

It has been usual to give a company a lien in express words as above. The suggestion has been made that a lien might be implied though not expressly given. *Lindley on Companies*, 6th ed. 635; but this possibility is not relied on in practice. See *Pinkett v. Wright*, 2 Ha. 120; 12 Cl. & Fin. 761. Probably a lien on the shares gives a lien on the dividends without express mention. *Hague v. Danderson*, 2 Ex. 741. The Stock Exchange Committee require the insertion of the words "other than fully paid-up shares" in the above clause, the object being that there shall in the case of a fully paid-up share be absolute freedom of transfer.

A clause as above, excepting fully paid-up shares from the lien, may be altered by special resolution so as to be made to apply to fully-paid shares, and if the alteration is made in good faith it will be effective against the holder of shares already fully-paid, although he is the only holder of fully-paid shares in the company. *Allen v. Gold Reels of West Africa*, (1900) 1 Ch. 656; *Re Rowe*, (1904) 2 K. B. 489.

It is well settled that the lien thus created takes effect as an equitable charge on the shares. *Bradford Bank v. Briggs* (1887), 12 App. Cas. 29; *New London & Co. v. Brodiebank* (1882), 21 Ch. D. 302; *Ex parte Lewis* (1871), L. R. 6 Ch. 818; *National Bank of Wales*, (1899) 2 Ch. 629, 633, 675. And the case last cited and *General Exchange Bank*, L. R. 6 Ch. 818, 821, further show that this clause, with the power of sale under clause 29c, constitute a "security" within the meaning of a power to directors to advance funds of the company upon securities, and that the lien and power of sale are not defeated by the board omitting to obtain the certificates of the shares. (1899) 2 Ch. 676.

The clause gives the company a lien for director's remuneration overpaid under a mistake of fact. *Bodega Co.*, (1904) 1 Ch. 276.

And if shares are standing in the names of trustees, and the articles exclude the recognition of equities (clause 12, *supra*), the company, by virtue of the lien clause, has, as was laid down in *New London & Brazilian Bank v. Bank of Brazil*, 21 C. Div. 302, a charge which prevails over the title of the *cestui que trust*; and the company's rights are unaffected, even though it have notice of the equitable interest. See also *Re Perkins*, 24 Q. B. Div. 613; and *supra*, p. 651.

Difficult questions, however, sometimes arise as to the company's position after notice of a subsequent mortgage. **Form 251.**

In *Bradford Banking Co. v. Briggs* (1887), 12 App. Cas. 29, it was decided by the House of Lords that the principle of *Hopkinson v. Rolt*, 9 H. L. C. 514, applies to a lien clause in articles of association; and, accordingly, that when the company has notice of an equitable mortgage made by a shareholder it cannot, by virtue of the lien clause, obtain priority for any advance made by it to or for any sums becoming due to it from the shareholder after notice of such subsequent mortgage.

In that case the lien clause was that—"The company shall have a first and permanent lien and charge available upon every share of every person who is the holder, or one of several joint holders, thereof, for all debts due from him either alone or jointly with any other person, whether a shareholder or not in the company."

The articles (as the writer knows from inspection) contained no exemption clause. *Supra*, p. 650.

The company's principal contentions in this case were: (1) that on the true construction of the lien clause (103) in its articles the shareholder had agreed that the company should have a lien ranking in priority to all other charges with or without notice, and that the second mortgagee with notice of this bargain could not establish any claim in violation of it; and (2) that the company was, under sect. 30 of the Act of 1862 (now sect. 27 of the Act of 1908), entitled to disregard the notice as notice of a trust, and, on that ground, entitled to priority.

As to the first of these contentions, the House of Lords held that this was not the meaning of the clause. "I cannot agree," said Lord Blackburn, "that this is the true construction of Art. 103." And Lord Fitzgerald said that the principle of *Hopkinson v. Rolt* governs the present case *unless* there is something in Art. 103 which prevents its application. The articles provide for the transfer of shares; . . . but there is no limit to the right of the shareholder to pledge, or raise money on his shares unless it is to be found in Art. 103," and he considered that "full effect may be given to its terms, and yet the lien conferred by it be limited as to liabilities of the shareholder contracted up to the time at which the company shall have had notice that he has ceased to be the beneficial owner of the shares."

As to the second contention, the Lords held that this went too far, and that notice of the mortgage was not notice of a trust within the meaning of sect. 30 of the Act of 1862 (sect. 27 of Act of 1908).

That section provides that "No notice of any trust, expressed, implied, or constructive, shall be entered on the register or be receivable by the registrar in the case of companies under this Act and registered in England or Ireland"; and the importance of thus relieving the company from an obligation to recognize equities is well pointed out by Lord Coleridge, C. J., sitting in the Court of Appeal in *Re Perkins*, 24 Q. B. D. 613. See extract set out, *supra*, p. 651. Lord Esher and Fry, L. J., concurred.

Object of sect. 30 of the Act.

Company looks to registered holder.

There are many cases, however, in which it is, in the best interests of a company and of its shareholders, desirable to secure to the company a paramount lien not only for advances made and liabilities to the company incurred before, but *after*, notice of a subsequent charge. Whether this security can be given has yet to be decided. No doubt (*Hopkinson v. Rolt* and *Bradford Banking Co. v. Briggs*, *supra*, show that) a first mortgagee cannot in an ordinary case, after notice of a second charge, insist on priority for subsequent advances, but there is no doubt that such priority can be obtained by the assent of the subsequent incumbrancer, and the question is whether anything short of this will suffice. The suggestion is that where the articles expressly provide

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for a paramount lien, and contain an exemption clause as above (p. 650), providing that the company "shall not be bound to recognize any equitable or other claim to, or interest in, the share on the part of any other person;" and the lien clause expressly provides that "no equitable interest in any share shall be created except on the footing and condition that [the exemption clause] shall have full effect," that is sufficient to secure the priority. Anyone who claims to have a charge on, or equitable interest in, a share must reasonably be supposed to have read the articles of association, and to take the shares subject to the provisions thereof (see *Bradford Banking Co. v. Briggs*, *supra*, pp. 632, 663, where Lord Blackburn recognized that this was so), and being thus fixed with notice of the provisions of the articles, it seems difficult to see how the chargees can repudiate those provisions and deny to the company the benefit of the clauses.

That case (*Bradford Banking Co. v. Briggs*) did not decide that there was any inflexible rule of equity making it impossible by the articles to exclude the rule in *Hopkinson v. Rolt*, *supra*: on the contrary, the provisions of the articles were carefully considered and it was held that they did not show any intention to exclude the rule, for they in no way attempted to relieve the company from noticing equities. Under these circumstances, the principle of *Tulk v. Moxhay* (1848), 2 Ph. 772; *De Matton v. Gibson* (1858), 4 De G. & J. 276; *Macdonald v. Law Union, &c. Co.* (1873), L. R. 9 Q. B. 328, that a person taking property with notice of an equity attaching thereto is bound thereby, appears applicable.

What sufficient to override the case.

Occasionally the lien clause contains express words to the effect that the lien is to be for all debts and liabilities, "whether incurred before or after notice of any equitable interest in any person other than the registered holder," and these words certainly go far to make the intention manifest; but more commonly the clause is framed as above in order to introduce a negative which some of the cases in equity, *supra*, pp. 650, 651, treat as material.

When the holder of shares, subject to a lien on the part of the company, sells some of them, the purchaser is entitled to marshal as against an execution creditor of the vendor, and to throw the lien in the first instance upon the shares remaining unsold. *Gray v. Stone & Funnell*, 69 L. T. 282; W. N. (1893) 133.

As to the rights of a purchaser of shares against the vendor where the company exercises its rights of lien subsequent to the purchase, see *Macmurdo, Penfield v. Macmurdo*, W. N. (1892) 73.

The right of lien may be discharged by an arrangement between the shareholder and the company, but to effect this the terms must be incompatible with the retention of the lien, or the arrangement must indicate the intention of the parties that the right shall no longer be enforced. *Bank of Africa v. Salisbury Gold Mining Co.*, (1892) A. C. 281.

A lien under a clause of this description is a charge upon the shares within the meaning of sect. 2, sub-sect. vi. of the Conveyancing Act, 1881, and consequently sect. 15 applies and entitles the shareholder to require the company, on payment of the sum due, to assign the debt and their lien on the shares to his nominee. *Everitt v. Automatic Weighing Machine Co.*, (1892) 3 Ch. 506.

As to effect of reconstruction, see *Re Lewis*, 6 Ch. 818.

As to enforcing lien by sale.

[29c. For the purpose of enforcing such lien, the directors may sell the shares subject thereto in such manner as they think fit; but no sale shall be made until such period as aforesaid shall have arrived, and until notice in writing of the intention to sell shall have been served on such member, his exors or admors, and default shall have been made by him or them in the payment, fulfilment, or discharge of such debts, liabilities, or engagements for seven days after such notice.]

The lien is of much greater value if it can be enforced in a summary manner by sale of the share subject to it. Table A (clause 10) now confers on the company such a power of sale. The restriction as to default contained in the latter part of the above clause is not in universal use, but it seems only fair and equitable. See observations of Jessel, M. R., in *Stockton Malleable Iron Co.*, 2 C. D. 101. "Default" means "non-payment." *Williams v. Stern*, 5 Q. B. D. 109. Where there is a lien, but no power of sale, it was considered necessary to bring an action to enforce a sale. *New London & Brazilian Bank v. Brocklebank*, 21 C. Div. 302; 30 W. R. 422, 737. But as the Conveyancing Act applies (see *Everitt v. Automatic, &c. Co.*, *supra*), it may be that under sect. 19 of that Act a sale might be made by the company as mortgagee. No doubt the charge is not given "by deed," only by articles, but articles by virtue of sect. 14 of the Act operate as if the shareholder had thereby covenanted.

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[29d. The net proceeds of any such sale shall be applied in or towards satisfaction of the said debts, liabilities, or engagements, and the residue (if any) paid to such member, his execs., admors., or assigns.]

Application of proceeds of sale.

30. Upon any sale after forfeiture or for enforcing a lien in purported exercise of the powers hitherto given, the directors may cause the purchaser's name to be entered in the register in respect of the shares sold, and the purchaser shall not be bound to see to the regularity of the proceedings, or to the application of the purchase money, and after his name has been entered in the register in respect of such shares, the validity of the sale shall not be impeached by any person, and the remedy of any person aggrieved by the sale shall be in damages only and against the company exclusively.

Validity of sales under clauses 27 and 29c.

Compare this and the preceding clause with clause 11 of Table A, 1908.

Where there are calls in arrear, the purchaser is not liable thereon, but he is liable to have a fresh call made on him for the like amount. *Balkis Eersteling v. Randt Gold Mining Co.*, (1904) A. C. 165. See *supra*, note to clause 29.

Where the company threatens to sell without justification, the existence of this clause renders it expedient for the shareholder to apply for an injunction before the sale is effected; for after sale it will be difficult, if not impossible, to recover the shares.

As to the rights of a member whose shares have been wrongfully forfeited to damages in the winding-up of the company, see *New Chile Co.*, 45 C. D. 598.

Transfer and Transmission.

By sect. 22 of the Act of 1908, shares are to be "transferable in manner provided by the articles of the company." Hence, it is necessary to provide for transfers. It is well settled that, save so far as restricted by the articles, the right of transfer is absolute. It would not be within the province of this work to enter into a consideration of the numerous cases relating to transfer, but the following may be mentioned: *Weston's case*, 4 Ch. 20; *Gilbert's case*, 5 Ch. 559. According to the principles laid down in these cases, the articles are not to be looked at to see whether they give a right to transfer, for the statute gives that, but whether they restrict the right and what form they require. A transfer even to a pauper to escape liability, if out-and-out, is valid (*De Pass's case*, 4 De G. & J. 544; *Cawley & Co.*, 42 C. Div. 209; *Discoveries Finance*

Weston's case.

Form 251. *Corp., Lindlar's case*, (1910) 1 Ch. 312 (C. A.), overruling case of same name reported in 1908, 1 Ch. 141), and it makes no difference that the transferee was paid to take the transfer (*Slater's case*, 35 Beav. 391). Moreover, if the articles restrict the right in a specified case, then the maxim "*Expressio unius est exclusio alterius*" applies. *Weston's case*, *ubi supra*. So where there was power to decline to register a transfer made by a member indebted to the company, or, in case of shares not fully paid up, to a transferee of whom the directors did not approve, it was held that a holder of fully paid-up shares, not indebted to the company, might distribute his shares among a number of nominees, although his object was to secure to himself the maximum of voting power at a pending meeting of the company, contrary to the spirit of the company's articles. *Stranton Steel and Iron Co.*, 16 Eq. 559; and *Pender v. Lushington*, 6 C. D. 70. See also *Cannon v. Trask*, 20 Eq. 669, 675; and see *Abbotsford Hotel v. Kingham*, 102 L. T. 118 (C. A.). And in *Stockton Malleable Iron Co.*, 2 C. Div. 101, there was power to decline to register any transfer of shares whilst the member making the transfer was indebted to the company on any account whatever. The company was indorsee of a bill accepted by a member, but not yet payable. On the construction of the articles, it was held that indebted meant indebted in respect of a debt due and payable, and consequently that the member had a right to transfer, notwithstanding that the company held his acceptance. See also *Moffat v. Farquhar*, 7 C. D. 591; and *Cawley & Co.*, 42 C. Div. 209.

A director who is a shareholder has as free a right of transfer as a member who is not a director. *Cawley & Co.*, 42 C. Div. 209. And it is submitted that he is not even bound to keep his qualification shares. But his office is vacated if "he ceases at any time to hold his qualification . . . and [he is] incapable of being re-appointed director . . . until he has obtained his qualification." Sect. 73 (2), Companies Act, 1908. The decision in *South London Fish Mar. Co.*, 39 C. Div. 324, on this point, was based on the terms of the special Act, and there appears to be no foundation for the doubt expressed in *Gilbert's case*, *ubi supra*.

Where a company is threatened with insolvency, it may be the duty of the executive to refuse to register transfers. *Alex. Mitchell's case*, 4 App. Cas. 567; *Nelson Mitchell v. City of Glasgow Bank*, 4 App. Cas. 624. But see *contra*, *Taurine Co.*, 25 C. Div. 118; and *Violet Consolidated, &c. Co.*, W. N. (1899) 66; 68 L. J. Ch. 535; 80 L. T. 684.

An agreement for the sale of a share does not bind the seller to procure the registration of the transfer. His duty is performed when he hands over to the transferee a duly executed transfer. *Skinner v. City of London, &c. Co.*, 14 Q. B. Div. 882; *London Foundry Assoc. v. Clarke*, 20 Q. B. Div. 576; *Casey v. Bentley*, (1902) 1 I. R. 376. But until registration of the transfer the transferor is a trustee of the shares for the transferee. *Loring v. Davis*, 32 Ch. D. 625; *Hardoon v. Belilion*, (1901) A. C. 118; *Stevenson v. Wilson*, (1907) P. C. 445. If the buyer wishes to protect himself, he must buy with "registration guaranteed."

The complete legal title is not obtained by the transferee until the transfer is registered. *Soc. Gen. v. Walker*, 11 App. Cas. 20; *Shropshire Union Co. v. The Queen*, L. R. 7 H. L. 496; *Roots v. Williamson*, 38 C. D. 485; *Powell v. London and Provincial Bank*, (1893) 1 Ch. 610; *Ireland v. Hart*, (1902) 2 Ch. 527. Before that he cannot be sued for calls. *Ural Gold Fields v. Pappa*, 15 T. L. R. 330. Hence the importance of securing registration. If the company improperly refuses registration, it will be liable to an action for damages. *Skinner v. City of London, &c. Co.*, *ubi supra*; *Otton Kopje Diamond Mines*, (1893) 1 Ch. 618. Moreover, proceedings can be taken by the transferor or transferee for rectification of the register and damages under sect. 32 of the

Act; but unless an order is made for rectification of the register the Court would appear to have no jurisdiction under this section, except by consent, to direct a company to pay damages. **Form 251.**

A company is not bound to register at once. It may inquire, *e.g.*, as to the authenticity of the transfer. *Sec. Gén. v. Walker*, 11 App. Cas. 41; *Ottos Kopje Diamond Mines, ubi supra*; *Ireland v. Hart*, (1902) 1 Ch. 522. A transfer must be duly stamped, and the directors may properly refuse registration where the face consideration in the transfer is not the real consideration. *Maynard v. Consolidated Kent Collieries Corp.*, (1903) 2 K. B. 121.

Where there is power to reject a transfer, and the transferor is indebted to the company in respect of calls or otherwise at the date when the matter came before the directors, the company must register the transfer, unless the indebtedness existed when the transfer was left for registration. *Cawley & Co.*, 12 C. Div. 209.

A company cannot refuse to register a transfer of shares to a bankrupt director on the ground that if registered the shares will pass to the trustee in bankruptcy. *Sutton v. English and Colonial Produce Co.*, (1902) 2 Ch. 502.

The secretary of a company has no authority to pass transfers (*Chida Mines, Ltd. v. Anderson*, 22 T. L. J. 100) nor has a manager. *Whitchurch (George), Ltd. v. Cavanagh*, 85 L. T.

Great care should be taken by directors in regard to transfers, for if they pass a forged transfer, or a transfer executed under a forged power of attorney, the company may incur serious loss, for in the absence of special provision, registration of a forged transfer cannot defeat the title of the true owner of the shares or stock, and if his name has been removed from the register the company may be compelled to reinstate it. *Davis v. Bank of England; Bart v. L. & N. W. Rail. Co.*, 38 Ch. D. 149.

A person who presents a forged transfer to a company for registration, and procures such registration, is liable, though acting in good faith, to indemnify the company. *Sheffield Corp. v. Barclay*, (1905) A. C. 392. See *infra*, Chap. XIV.

Where there are joint registered holders, a transfer, to be effective, must be executed by all, and if the signature of any one be forged the transfer will be void. *Barton v. L. & N. W. Rail. Co.*, 24 Q. B. D. 77.

Where shares are allotted to A. and before he is registered as a member he transfers to B., the company may register B. without registering A. *Nicol's case*, 29 C. D. 434. And so, too, where A. being the registered holder transfers to B., and he to C., the company may register C.

As to lunatics.—Shares held by a lunatic member, or by joint holders, one of whom is a lunatic, can only be transferred pursuant to an order in lunacy and by the person named in the order. See Lunacy Act, 1890, ss. 133, 136—139.

A Master in Lunacy cannot make a vesting order as to shares in trustees, one of whom is a lunatic, on appointment of new trustees. *Re Longdale*, (1901) 1 Ch. 3.

As to charging orders on a lunatic's property, see *Re Hunt*, (1900) 2 Ch. 54, n.

As to transferring shares in name of unfound lunatic residing abroad, see *Indisheim v. London & Westminster Bank*, (1900) 2 Ch. 15.

As to infants.—Transfers can only be made in pursuance of an order of some Court of competent jurisdiction, *e.g.*, the Chancery Division, and by the person named in the order.

As to powers of attorney.—A member can transfer his shares by attorney, but the power of attorney must be left with the transfer, and should either be retained by the company or should be filed pursuant to the Conveyancing Act, 1881, s. 48 (*infra*, Chap. XV.). It should be duly authenticated, and, unless it is irrevocable under sect. 8 or 9 of the Conveyancing Act, 1882 (*infra*,

Form 251. Chap. XV.), evidence should be adduced that at the time the transfer was signed the appointor was alive.

As to married women.—A married woman can transfer without the concurrence of her husband. Married Women's Property Act, 1882, s. 9.

As to voting orders, see the Trustee Act, 1893. *New Zealand, &c. Co.*, (1893) 1 Ch. 403; *Re Gregson*, (1893) 3 Ch. 233; *Re Dypaunin*, (1910) 1 Ch. 223.

In a voluntary winding-up a transfer may be made with the consent of the liquidator under sect. 131 of the Act of 1862. See *National Bank of Wales*, (1897) 1 Ch. 298.

Execution of
transfer, &c.

31. The instrument of transfer of any share shall be signed both by the transferor and transferee, and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the register in respect thereof.

See Table A (clause 18). The object of requiring the transferee to execute the transfer is to fix him with an agreement to take the shares, and thereby secure him as a member; for by sect. 24 of the Act, an agreement to become a member followed by entry on the register, constitutes membership. See *Langer's case*, 37 L. J. Ch. 292; *W. N.* (1868) 8; and *Burnes v. Pennell*, 2 H. L. Cas. 497; *Re Taurine Co.*, 25 C. D. 118.

The instrument of transfer is not complete until it is signed by both parties (*Marino's case*, 2 Ch. 596), and accordingly registration cannot be enforced as against the company until it is so signed, but the company may waive the transferee's signature. See the above case.

Where A. transfers to himself and others, A. need only execute once.

A transfer may be good as against the transferor, even though not executed by the transferee. *Re Dodds, Ex parte Brown and Coates*, 64 L. T. 476.

The main object of the latter part of the clause is to give effect to the provisions as to calls, so that a member upon whom a call has been made shall not be able to avoid forfeiture by a transfer.

As between transferor and transferee, there is an implied contract by the latter to indemnify the former against all liability in respect of the shares during the time that the transferee holds them. *Kellock v. Enthoven*, L. R. 9 Q. B. 241; *Loring v. Davis*, 32 C. D. 625; *Leri v. Ayres*, 3 App. Cas. 852; *Hardoon v. Belilios*, (1901) A. C. 118; *Seton*, 6th ed. 2362.

Stamp.

A transfer on sale, whether by deed or otherwise, must be stamped with the proper *ad valorem* duty, in accordance with the Stamp Act, 1891; and see now 9 Edw. 7, c. 43, ss. 7, 12 (2); and under sect. 17 of the said Act of 1891 any person whose office it is to register a transfer is liable to a penalty of 10% if he registers a transfer not duly stamped.

True state-
ment of
consideration.

But where a transfer appears, having regard to its contents, to be duly stamped, it is not the duty of the secretary to cross-examine the depositor in order to ascertain whether the consideration is truly stated; *omnia præsumuntur rite esse acta*. Thus, if the consideration expressed is 5s., and the stamp 10s., there is no need to go further. But if directors become aware that the consideration stated on the face of the transfer is not the true consideration, they may go behind it and require the proper stamp for the true consideration to be affixed. *Maynard v. Consolidated Kent Collieries*, (1903) 2 K. B. 121.

Where the regulations merely require the transfer to be in writing, it will not be the less effective because it is under seal. *Ortigosa v. Brown*, 38 L. T. 845. But where a deed is necessary, it must be duly signed, sealed and delivered. *Powell v. Lond. & Prov. Bank*, (1893) 2 Ch. 555. And a printed

circle, with the words "Place of seal," is not equivalent to a seal. *Balkis Co.*, **Form 251**.
36 W. R. 392.

As to composition for stamp duties on transfer, see Stamp Act, 1891, s. 114.

As to giving the numbers of shares on a transfer of shares in bank, see Leeman's Act, 30 Vict. c. 29. A custom of the Stock Exchange to disregard this Act is unreasonable and void. *Perry v. Barnett*, 15 Q. B. D. 388; see, however, *Neymour v. Bridge*, 14 Q. B. D. 460.

A registered transfer is presumed, *prima facie*, to be accepted by the transferee even where he has not executed it. *Standing v. Bowring*, 31 C. D. 282.

32. The instrument of transfer of any share shall be in writing in the [usual common form or in the] following form, or as near thereto as circumstances will admit: - Form of transfer.

The Stock Exchange Committee require the words in brackets, so that the ordinary form of transfer sold by stationers and others may suffice.

I, A. B., of —, in conson of the sum of — pounds paid to me by C. D., of —, hmftr called the sd transferee, do hby transfer to the sd transferee — share [or shares], numbered —, in the undertaking called the — Coy, Limtd, to hold unto the sd transferee, his executors, administrators and assigns, subject to the several conditions on which [I] held the same immediately before the execution hof; and I the sd transferee do hby agree to take the sd share [or shares] subject to the conditions afcd. As witness our hands, the — day of —.

Witness to the signature of, &c.

The directors may refuse to register if the prescribed form is not *substantially* followed, but they may waive any irregularity, e.g., non-signature by the transferee. *Marino's case*, L. R. 2 Ch. 596. When the articles require the transfer to be "in the usual common form," registration cannot be refused because particulars found in a common form, but which in the circumstances are immaterial, are omitted. *Letheby and Christopher, Ltd.*, (1904) 1 Ch. 815.

It is generally expedient to use the above form. It differs slightly from the form given in Table A., clause 19; but it is in general use, and can be purchased at stationers and elsewhere. Sometimes the articles require a transfer to be by deed; but this requisition causes inconvenience and secures no benefit. Thus where the transfer may be by instrument in writing as above, the shareholder may sign a blank transfer, and hand it over to a purchaser or mortgagee, with authority to the holder of it for the time being to fill in the name of a transferee; and such a transfer when filled up can be sent in for registration, and no objection can be raised by the company to its validity. *Ex parte Sargent*, 17 Eq. 273; *Tees Bottle Co.*, 33 L. T. 834; *Kimberley Co.*, 58 L. T. 305. But where a deed is required, this convenient plan is not properly available; for a deed executed in blank is inoperative as a legal transfer. *Hibblewhite v. McMorine*, 6 M. & W. 209; *Powell v. Lond. & Prov. Bank*, (1893) 2 Ch. 555; *France v. Clark*, 26 Ch. D. 267; *Ex parte Sargent*, 17 Eq. 273; *Tees Bottle Co.*, 33 L. T. 834. Nevertheless, such are the exigencies of business, that even where a deed is required blank transfers are frequently resorted to, in the expectation that the company will not notice or take advan-

Form 251. tage of the irregularity. It seems, however, desirable to make the articles accord with the general practice.

When a deed is necessary, the directors have no power to dispense with it. *Murray v. Bush*, L. R. 6 H. L. 50.

If the articles expressly permit a transfer by instrument in writing, the practice of the company having always been to require a deed cannot make a deed obligatory. *Re Tahiti Cotton Co.*, 17 Eq. 273. It appears from the decision of the Court of Appeal, in *France v. Clark*, *supra*, that though the delivery to a mortgagee of a certificate of title and blank transfer may give him an implied right, where a deed is not required, to insert his own name, the right does not pass to his assigns.

In some cases the delivery of blank transfers may establish an estoppel as against the transferor. *Colonial Bank v. Williams*, 15 App. Cas. 267. But there is no presumption of re-delivery of a blank transfer. See *Powell v. London, &c. Bank*, *ubi supra*; and see Chap. XV., *infra*.

Where for valuable consideration, *e.g.*, an advance, the shareholder delivers blank transfers, he may be taken to bind himself not to interfere with registration. *Hooper v. Herts*, (1906) 1 Ch. 549 (C. A.).

"Subject to the several conditions on which I hold." Do these words in the transfer subject the transferee to a lien existing as against the transferor? It is generally assumed that they do not. They do not affect the transferee with notice of facts known to the transferor. *Westmoreland Green, &c. Co.*, (1893) 2 Ch. 612. But it has been held that they do bind the transferee to pay calls not paid prior to the registration of the transfer and enable the company to sue him. *Herbert Gold Co. v. Haycraft*, C. A., *Times*, 28 March, 1901; and see *Randt Gold Mining Co. v. Wainwright*, (1901) 1 Ch. 184.

As to the effect of executing a transfer with the words "in trust" added, see *London and Canadian Loan, &c. Co. v. Duggan*, (1893) A. C. 306 (P. C.).

It is misfeasance for directors who have accepted their qualification from the promoter to execute a blank transfer of such shares in trust for the promoter. *London and South Western Canal Co.*, (1911) 1 Ch. 346.

A transfer ought to state the consideration truly (sect. 5 of Stamp Act, 1891), but if the full duty is paid, the penalty will not be enforced. *Furness Rail. v. Commissioners*, 33 L. J. Ex. 173. And the non-statement does not affect the validity of the transfer. *Powell v. London and Provincial Bank*, (1893) 2 Ch. 555. But it may entitle the directors to refuse registration till the proper stamp is affixed. *Maynard v. Consolidated Kent Collieries*, (1903) 2 K. B. 121.

A transfer of a bankrupt's share may be as follows:—

"Whereas at the date of the order hereinafter mentioned A. B., of —, was registered in the books of The — Company, Limited (hereinafter called the company), as the proprietor of ten shares, numbered —, in the said company, of 10*l.* each. And whereas an order of adjudication of bankruptcy was on the 1st day of June, 1908, made against the said A. B., and on the — day of — I was duly appointed trustee of the property of the said A. B., and such appointment was certified by the Board of Trade on, &c.; [or, but no trustee has ever been appointed of the property of the said A. B., and I, as chief official receiver, am trustee thereof]. Now I, S., of —, in consideration, &c., do hereby, as trustee of the estate of the said A. B., transfer unto the said transferee the said shares, numbered —, in the undertaking called, &c. To be — into the said C. D., his executors, administrators, and assigns, subject to all the several conditions on which the said A. B. held the same at the date of the said order of adjudication. And I, the said transferee, do hereby agree to take the said shares, subject to the same conditions."

In considering the form of transfer the directors must not be too technical. Thus, where the articles required a transfer to be in the usual common form,

according to which the address of the transferor and the distinctive numbers should appear, and the transfer tendered omitted these particulars, but was accompanied by the transferor's share certificate giving the omitted particulars, it was held that the transfer should be registered. *Ethchy v. Christopher, Ltd., Jones's case*, (1904) 1 Ch. 815.

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33. The directors may decline to register any transfer of shares [or stock, to be omitted if quotation required] upon which the coy has a lien; and in the case of shares not fully pd up, may refuse to register a transfer to a transferee of whom they do not approve.

In what cases directors may decline to register transfer.

If desired, add the words, "And shall not be bound to give any reason for such refusal." But these words are implied, see *infra*.

From what has been said in the note preceding clause 31, it appears that if the right of transfer is to be restricted, express provisions must be inserted in the articles for the purpose.

It is not found in practice that a clause as above affects the market value of the shares; for it is always assumed that the transfer will be passed, and, of course, it generally is. If, however, the company has a lien, the clause enables it to preserve the same; and this is often a matter of importance. It is expedient, as above, to make the clause apply to *any* case where the company has a lien, and not merely, as is often done, to the case of a member who is "indebted" to the company. See *Stockton Malleable Iron Co.*, 2 C. Div. 101; and see also *supra*, note to clause 29a. As to clause 20 of Table A. (old), see *Ex parte Stringer*, 9 Q. B. D. 436. See now Table A. (new), clause 20.

It is generally thought sufficient, in addition to providing for the preservation of the lien, to give the directors power to decline to register a transfer of shares, not fully paid up, to a transferee of whom they do not approve. If the company gets into difficulties, this will enable the directors to prevent the introduction of insolvent members. Where such a discretion is given, the directors will not, if acting *bonâ fide*, be compelled to give their reasons for refusing to register a transfer, and no unfavourable inference can be drawn from their declining to give any reason, but if the directors choose to give their reasons the Court will then consider whether they are legitimate or not. *Bell Brothers*, 65 L. T. 245; 7 T. L. R. 689 (Chitty, J.).

If they exercise their power capriciously or wantonly, it must be alleged and proved; the Court will then interfere, but not otherwise. *Ex parte Penney*, 8 Ch. 452. "I cannot," said James, L. J., in that case, "conceive that any director would choose to accept office, or exercise the power entrusted to him, if he were liable to be called upon to say what the particular reasons were, or the particular motive was, which influenced him in coming to the conclusion that any person was not eligible as a shareholder. . . . I am of opinion that we cannot sit as a Court of Appeal from the conclusion which the directors have arrived at, if we are satisfied that the directors have done that which alone they could be compelled by mandamus to do, to take the matter into their consideration." See also *Coalport China Co.*, (1895) 2 Ch. 404; and *Hannan's King, &c. Co.*, 14 T. L. R. 314, to the like effect. In *Puckle's case*, Jessel, M. R., said that where the articles authorized the directors to refuse to register a transfer "if they were of opinion that the transferee was not a responsible person," there was no appeal from their decision. L. J. Notes of Cases, 1875, 19. But if the directors' reason is disclosed, and is a bad one, or if it is proved that they are acting otherwise than *bonâ fide* in the interests of the company, the Court will intervene, and order rectification of the register. *Bell Brothers*, 65 L. T. 245; 7 T. L. R. 689; *Ceylon Land and Produce Co.*, 7 T. L. R. 692; cf. *Sun Fire Office v. Hart*, 14 App. Cas. 98.

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If the directors refuse, they are not under any obligation to send notice of their refusal to the transferor. *Gustard's case*, 8 Eq. 438.

Directors may refuse to pass a transfer if they find that the stamp is on the face consideration, not the real consideration, and insufficient. *Maynard v. Consolidated Kent Collieries*, (1905) 2 K. B. 122.

Where the directors have a discretion and exercise it *bonâ fide* by passing the transfer, they are not liable for loss occurring to the company by reason of the transferee proving insolvent. *Faure Electric Accumulator Co.*, 40 C. D. 141; 37 W. R. 116. Restrictions on transfer are strictly construed. *Bentham Mills Spinning Co.*, 11 C. D. 900.

The discretion under this clause may, by virtue of clause 109, be delegated to a single director. *Taurine Co.*, 25 C. Div. 142. A director may take part in approving of a transfer to himself (*Bush's case*, 6 Ch. 262), and a share certificate being signed by a director who is also a partner will, none the less, protect the partnership by estoppel (*Coasters, Ltd.*, 103 L. T. 632).

Where directors suspect a breach of trust they should give notice that they will have to register unless an injunction is obtained. *Grundy v. Briggs*, (1910) 1 Ch. 444.

No transfer to
infant, &c.

[33a. No transfer shall be made to an infant or person of unsound mind.]

The above is sometimes inserted. Even apart from such a clause, a company cannot be compelled to accept an infant transferee; and, if shares be transferred to an infant, the company may, on discovering the infancy, decline to confirm the transfer, and upon motion under sect. 32 of the Act, can procure the rectification of the register by restoring the name of the transferor. *Symons' case*, 5 Ch. 301. The principle is that a man who executes a transfer remains liable, unless and until there is on the list a transferee who is legally liable to the company. But an infant allottee or transferee is clearly not liable in respect of shares standing in his name; for he cannot effectually contract to take shares; and by reason of sect. 2 of the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), no action can be brought to charge the infant on any ratification after full age. To charge him there must be a new promise. Acting as a member after full age may afford evidence of such a new promise. *Ditcham v. Worrall*, 5 C. P. Div. 410; *Curtis' case*, 6 Eq. 455; *Mann's case*, L. R. 3 Ch. 459, n.; *Capper's case*, L. R. 3 Ch. 458. If, however, the company has knowingly acquiesced in accepting an infant shareholder it will be bound. *Parson's case*, 8 Eq. 656. And so also if it has allowed the infant to transfer his shares. *Gooch's case*, 8 Ch. 266.

If shares are allotted to an infant, and repudiated when he comes of age, he may recover what he paid the company in respect thereof. *Hamilton v. Vaughan Sherrin Co.*, (1894) 3 Ch. 589.

A director allotting to an infant son constitutes misfeasance. *Creave, Wheel Mining Co.*, L. R. 8 Ch. 45. In the case of shares which are only in part paid up, the company may refuse to pass a transfer to a person residing abroad. And the seller of such shares on the London Stock Exchange may decline to transfer to a person so residing. *Goldschmidt v. Jones*, 22 L. T. 221.

Under the old law a company could not be compelled to register a transfer to a corporation and an ordinary individual jointly. *Law Guarantee, &c. Soc.*, 24 Q. B. D. 406.

But the law in this respect has been altered by the Bodies Corporate Joint Tenancy Act, 1899 (62 & 63 Vict. c. 20), sect. 1 of which enacts as follows:

(1) A body corporate shall be capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an

Power for
corporations
to hold pro-

individual; and where a body corporate and an individual, or two or more bodies corporate, become entitled to any such property under circumstances or by virtue of any instrument which would, if the body corporate had been an individual, have created a joint tenancy, they shall be entitled to the property as joint tenants. Provided that the acquisition and holding of property by a body corporate in joint tenancy shall be subject to the like conditions and restrictions as attach to the acquisition and holding of property by a body corporate in severalty.

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property as joint
tenants.

- (2) Where a body corporate is joint tenant of any property, then on its dissolution the property shall devolve on the other joint tenant.

As to married women, see the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and the Act of 1893 (56 & 57 Vict. c. 63), s. 1.

Married
women.

This Act places a married woman transferee in the same position as if she were a feme sole, and renders her liable on her contracts to the extent of her separate property. But, unless satisfactory evidence of separate estate is produced, the directors might properly (where they have a discretion) refuse to register a transfer to a married woman of shares involving any liability. See proviso at end of sect. 7 of the Act of 1882.

[33b. The company adopts the Forged Transfers Acts, 1891 and 1892, and the directors shall have full power to give effect thereto.]

Forged
Transfers
Acts.

A clause as above is occasionally inserted, but it is superfluous, for, notwithstanding its omission, the Acts will apply.

The Forged Transfers Act, 1891, as amended by the Forged Transfers Act, 1892, provides that where a company issue or have issued shares, stock, or securities transferable by instrument in writing, or by an entry in any books or register kept by or on behalf of the company, they shall have power to make compensation, by a cash payment out of their funds, for any loss arising from a transfer of any such share, stock, or securities in pursuance of a forged transfer or of a transfer under a forged power of attorney, whether such loss arises and whether the transfer or power of attorney was forged before or after the passing of this Act, and whether the person receiving such compensation, or any person through whom he claims, has or has not paid any fee, or otherwise contributed to any fund out of which the compensation is to be paid.

The Acts empower the company, by fees or otherwise, to provide a fund to meet claims for compensation, and to raise the amount by mortgages, and to impose such reasonable restrictions on the transfer of shares, stocks, or securities, or with respect to powers of attorney for the transfer thereof, as they may consider requisite for guarding against losses arising from forgery.

These Acts, it is to be observed, do not impose upon the company any obligation to pay. They only give power to make compensation, i.e., if the company chooses. Hence there is no objection to adopting the Acts by the articles or to passing (as many companies have) a resolution adopting the Acts, for in neither case is the company bound to pay any particular claim unless it thinks fit so to do.

The Acts were no doubt intended for the benefit of a purchaser who, having in good faith paid for and been registered as the holder of shares, stock, or securities, found himself subsequently deprived of what he had bought in consequence of its being proved that the transfer to him was forged or was executed under a forged power of attorney. The wording is not very clear, but it is submitted that it is capable of this construction, and the purport of the Acts. True, the loss in such a case is not one "arising from a transfer," for

Form 251. there is no valid transfer, and the loss arises from the fraud of the forger; but to make sense of the enactment it may be allowable to read in the words "the invalidity of" after the word "from."

Transfer to be
left at office,
and evidence
of title given.

34. Every instrument of transfer shall be left at the office for registration, accompanied by the certificate of the shares to be transferred, and such other evidence as the company may require to prove the title of the transferor, or his right to transfer the shares.

It is expedient to have a clause of this kind because of the liabilities which a company incurs if it issues a certificate of shares in pursuance of a forged transfer. Further, *infra*, Chap. XIV. It should use the utmost caution in regard to registration of transfers.

As against the real owner, a forged transfer is a mere nullity, and accordingly the real owner can compel the company, if it has removed his name from the register, to reinstate him as the holder of the shares, and to pay him all dividends which have been declared on the shares whilst his name was off the register. *Davis v. Bank of England*, 2 Bing. 393; *Barton v. North Staffordshire Rail. Co.*, 38 C. D. 459; *Barton v. L. & N. W. Rail. Co.*, 24 Q. B. Div. 83.

Moreover, if a company has issued to the transferee claiming under the forged transfer a certificate of title to the shares, the company will be liable to pay damages to any third person who acts on the faith of such certificate being regular, *e.g.*, by buying or lending money on the shares. *Bahia, &c. Co.*, L. R. 3 Q. B. 584; *Ottos Kopje Diamond Mines, Limited*, (1893) 1 Ch. 618. And the company is under the same liability even to the transferee, where he acts on the faith of the certificate, *e.g.*, by entering into a contract to sell the shares (*Tompkinson v. Balkis Co.*, (1893) A. C. 396; *Hart v. Frontino*, L. R. 5 Ex. 111; *Bloomenthal v. Ford*, (1897) App. Cas. 156), or by paying a call. Where, however, the certificate has been issued and sent by the company's secretary without the directors' authority and for his own purposes, the company is not estopped from disputing it. *Ruben v. Great Fingall Consolidated*, (1906) A. C. 439. As to the measure of damages, see *Ottos Kopje, &c. Limited*, *supra*.

But though the company incurs these liabilities, it has its redress against the transferee. Thus, if a person claiming under a forged transfer sends in to the company and procures the registration of such transfer and the issue of a fresh certificate, he is bound, though acting in good faith, to indemnify the company against consequent loss incurred by the company. *Corporation of Sheffield v. Barclay*, (1905) A. C. p. 392, reversing C. A., (1903) 2 K. B. 580. And see *Bank of England v. Cutler*, (1907) 1 K. B. 889.

Where a company pays dividends to a transferee under a forged transfer, it is not estopped from denying the transferee's title, and can recover the dividends. *Foster v. Pontons and Dry Dock Co.*, 9 T. L. R. 450. As to proving the forgery, see *Copiapu Mining Co.*, 9 T. L. R. 615.

Very commonly the certificate relating to the shares to be transferred contains words at the foot that "without the production of this certificate no transfer of the shares mentioned therein can be registered." It was held by Farwell, J., in *Rainford v. James Keith & Co.*, (1905) 1 Ch. 296, that these words operated merely as a warning to the shareholder to take care of the certificate, and did not operate as a representation to or contract with a third party, *e.g.*, with a depositary of the certificate who lends money thereon; that the company will not transfer without production of the certificate. On appeal.

the case was decided on another point, (1905) 2 Ch. 147. See also *Guy v. Waterlow Brothers*, 25 T. L. R. 515. For *dicta* to the contrary, see *Société Générale de Paris v. Walker*, 11 App. Cas. 29. **Form 251.**

It is the practice of companies, on having a transfer tendered to them for registration, to give notice to the shareholder before registering it, thus:—
 "Sir,—A transfer of — shares of £— each in the above company, purporting to be executed by you, has been lodged for registration, and unless I hear from you to the contrary within — days the same will be registered. For the company, —, Secretary." The company is under no obligation to give such a notice. *Simm v. Anglo-Amer. Co.*, 5 Q. B. Div. 205. And a shareholder who does not answer the letter is not thereby estopped from impeaching a forged transfer. *Barton v. L. & N. W. Rail. Co.*, 24 Q. B. Div. 77. Gross negligence on the part of a shareholder may, however, preclude relief in case of a forged transfer. *Coles v. Bank of England*, 10 Ad. & El. 437.

A clause is occasionally to be found in articles, providing, *inter alia*, that the directors shall not be bound to inquire into the authenticity of any transfer; but such a clause seems inexpedient; and where a quotation on the Stock Exchange is desired, the Committee of the London Stock Exchange always require the clause, if contained in the articles, to be struck out by a special resolution altering the articles.

Even without the words in clause 34 as to the certificate, the concluding words would justify the directors in calling for a deposit of the certificate for examination. *East Wheel, &c. Co.*, 33 Beav. 119.

Where the directors have a discretion as to registering a transfer from a member who is indebted to the company, the time when the instrument of transfer is left at the office, not the time when the directors consider the matter, is the critical period. *Cawley & Co.*, 42 C. Div. 209.

CERTIFICATION OF SHARES.

When the holder of shares executes a transfer of them, it is for the transferee, as the party mainly concerned, to get the transfer registered, and in order to do this he must be prepared to hand over, or to procure someone else to hand over, to the company the transferor's certificate of title to such shares. If the certificate comprises the shares transferred and no more, it can of course be handed over with the transfer to the transferee, and then can be delivered by him to the company; but very commonly the certificate includes other shares; for example, the certificate may certify that A. is the holder of 100 shares; if he transfers only 50 he retains 50, and therefore does not want to hand over his certificate to the buyer. And again, if, having 100 shares, he sells 50 to B. and 50 to C., he cannot hand over the certificate to both. In such cases the transferor usually lodges his certificate with the company, and then at his request, or at the request of his broker, the secretary "certifies" the transfers (before they are handed over to the transferees), by stamping in the margin the form of certification and signing the same. The following forms are used:—
 "Certificate lodged for the — Company, Limited, — Secretary," or "Certificate for — shares [has been lodged] at the company's office. Date. Secretary."

A certification of this kind is regarded as a representation by the secretary, on behalf of the company, that the transferor has produced such documents as on the face of them show a *prima facie* title in the transferor to make the transfer, e.g., a certificate of title that the transferor is the registered holder of the shares comprised in the transfer, or else a certificate that some other person is the registered holder, together with proper transfers from that person to the transferor. In giving such "certifications" the secretary is not supposed

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to do more than look at the documents produced; if they appear to be in order he certifies; if they are not he refuses to certify; but he is not bound to inquire whether the documents produced to him are genuine or not, or whether the various transfers are valid or invalid in point of law. "He does not warrant the title of the transferor, nor the validity, in point of law, of the various documents which together (purport to) establish his title." Per Lindley, L. J., *Bishop v. Balkis Consolidated Co.*, 25 Q. B. D. 512.

A transfer certified as above is, by the rules of the London Stock Exchange, accepted as good delivery of the shares to a buyer without delivery of the certificate. Irrespective of these rules, a transferee generally requires the certificate or a certified transfer, for the articles of the company usually provide for the production of the certificate before a transfer will be registered. A record of certifications should be kept.

Sometimes an official of the London Stock Exchange certifies.

It was held in one case (*Re Concessions Trust*, (1896) 2 Ch. 757), that where an instrument, purporting to transfer fully paid up shares, is certified by the secretary as above, the company is, by the certification, estopped from saying that they are not paid up. But it has now been decided by the House of Lords that though a secretary has authority to certify, there is no estoppel if the secretary certifies fraudulently for his own private ends. *George W. Church & Co.*, (1901) A. C. 117. Conf. *Ruben v. Great Fingall Consolidated*, (1906) A. C. 439.

Certification of transfers given to the secretary is an ordinary business transaction within the power of a trading company. *Bishop v. Balkis, &c. Co.*, 25 Q. B. D. 520.

If the company, after certifying, returns the certificate by mistake to the transferor, and the transferor pledges it in fraud of the transferee, this gives the pledgee no ground of action against the company. *Longman v. Bath Electric Tramways*, (1905) 1 Ch. 646.

Where the certificate is lodged with a view to the transfer of part only of the shares comprised therein, the company in due course issues to the transferor a fresh certificate for the balance; or, according to the practice of some companies, indorses on the deposited certificate particulars of the shares transferred, and then returns the certificate to the depositor. Sometimes on the deposit, and before the issue of a fresh certificate, the depositor is given a balance ticket.

When transfers to be retained.

[34a. All instruments of transfer which shall be registered shall be retained by the coy, but any instrument of transfer which the directors may decline to register shall be returned to the person depositing the same.]

The above is sometimes used.

Fee on transfer.

35. A fee not exceeding 2s. 6d. may be charged for each transfer, and shall, if required by the directors, be pd before the registration thof.

When transfer books and register may be closed.

36. The transfer books and register of members may be closed during such time as the directors think fit, not exceeding in the whole thirty days in each year.

Table A., in lieu of the above, provides (clause 20):—

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"The directors may suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year."

By sect. 31 of the Act of 1908, it is provided that a company may, by advertisement in some newspaper circulating in the district in which the registered office of the company is situated, close the register of members for any time or times not exceeding in the whole thirty days in each year.

37. The executors or administrators of a deceased member (not being one of several joint holders) shall be the only persons recognized by the company as having any title to the shares registered in the name of such member, and in case of the death of any one or more of the joint registered holders of any shares, the survivors shall be the only persons recognized by the company as having any title to or interest in such shares.

Transmission of registered shares.

As to survivorship.

The first part of this clause is generally inserted in order that the company may not be involved in questions of administration, but may look to the legal personal representatives only.

If desired, provision can be made to the effect that, on the death of a shareholder, the shares shall, if not disposed of specifically by will, pass to some specified person, or be dealt with in a specified manner to the exclusion of the legal personal representatives. As to the validity of such provisions, see *Iskby v. Contin*, 59 L. T. 224; *Davies v. Davies*, (1892) 3 Ch. 63.

A deceased member of a limited company remains a member for the purposes of the articles of association so long as his name remains on the register without notice to the company of his death. Per Davey, L. J., *New Zealand Gold Extraction Co. v. Peacock*, (1894) 1 Q. B. 622, 633 (C. A.). See *infra*, p. 781.

But when notice of a general meeting is to be given to "the members" it is not necessary to give it to the executors of a deceased member, unless they too are members, for these are not members. *Allen v. Gold Reef of West Africa*, (1900) 1 Ch. 556. See, however, clause 114 of Table A. as to giving notices of general meetings to executors or administrators.

As to survivorship, see *Hill's case*, 20 Eq. 595, in which it was held that even without express provision there is a right of survivorship as between joint holders.

To preclude disputes, words are sometimes added to the above clauses to the effect that "Before recognizing any executor or administrator, the directors may require him to take out probate or letters of administration in England." But see note to clause 38.

38. Any person becoming entitled to shares in consequence of the death or bankruptcy of any member, upon producing such evidence that he sustains the character in respect of which he proposes to act under this clause, or of his title, as the directors think sufficient, may, with the consent of the directors (which they shall not be under any obligation to give), be registered as a member in respect of such shares, or may, subject to the regulations as to transfers hereinbefore contained, transfer such shares. This clause is hereafter referred to as "the transmission clause."

As to transfer of shares of deceased or bankrupt members.
Transmission clause.

Form 251. This clause, with more or less variation, is a common one. It is generally expedient, if possible, to secure a member who is living and responsible in the place of a deceased member or one under disability. Of course, if any person, under this clause, becomes a member, he is personally liable to the company on the shares, but this does not affect the equities subsisting between him and the estate of the deceased shareholder, or the infant, lunatic, or other member in whose place he stands.

Even apart from this clause, the personal representatives of a deceased member can transfer; for sect. 29 of the Act of 1908 provides that "a transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer." Until transfer under this power, or until the personal representative personally accepts the shares, the estate of the deceased member is alone liable. See *Baird's case*, 5 Ch. 725.

The question sometimes arises whether a transfer by one of several executors is effective. According to the general law, each of several executors can sell and transfer the personalty of the testator, but the terms of the company's articles must be considered, and where they are framed as above, or as in Table A, clause 22, it would seem that a transfer must be signed by all.

One of two or more executors registered as shareholders cannot transfer: both or all concur in a transfer. *Barton v. North Staffordshire Rail.*, 38 C. Div. 458; *Barton v. L. & N. W. Rail. Co.*, 24 Q. B. Div. 77. See *supra*.

So long as the share of a deceased member remains standing in his name, his representatives do not become members of the company in respect thereof, but when the representatives are registered, they become personally liable, and the company has nothing more to do with the deceased member. Some companies have been in the habit, on production of probate or letters of administration, of registering the representatives as the holders of the shares, but this is not regular as regards companies under the Act, in the absence of a "distinct and intelligent request on the part of the executors." Per Lord Cairns, L. C., *Buchan's case*, 4 App. Cas. 588. When registered as members there should be a "clean" registration without any reference to that representative capacity. *Re Saunders & Co.*, (1908) 1 Ch. 415. On such registration the executors or administrators may choose the order in which their names are to stand. *Ibid*. See Forms 430 *et seq.*, *infra*.

Where a shareholder testator is domiciled abroad, the company, before recognizing his executor or administrator, must require probate or letters of administration to be obtained in England. This is the evidence on which alone the Court will act, and the company should not accept less conclusive evidence. *Fernandes's Exors.*, 5 Ch. 314; *Attorney-General v. New York Breweries Co.*, (1898) 1 Q. B. 205; affirmed *sub nom. New York Breweries Co. v. Attorney-General*, (1899) A. C. 62.

As to colonial probate, see Colonial Probates Act, 1892 (55 Vict. c. 6).

As to shares in a colonial register, see sects. 34 to 36 of the Companies (Consolidation) Act, 1908.

Occasionally a company which has foreign shareholders obtains a private Act, enabling it to recognize devolutions of title without production of probate. See *Ionian Bank (Limited) Act*, 1899 (62 & 63 Vict. c. xcix).

By apt words in the articles it would appear possible to provide for the direct devolution of shares to a specified person on the holder's death. *Davies v. Davies*, (1892) 3 Ch. 63.

Where shares upon which there is a liability form part of the estate of a deceased member, his executors or administrators should advertise in the usual way for claims in accordance with 22 & 23 Vict. c. 35. They will then be in a

position to distribute, having regard to the claims of which they have notice, just as if the estate was administered by the Court *Clegg v. Rowland*, 3 Eq. 318; *Re Frewen Co.*, L. T. 953: see, however, *Russell's Executors' case*, 15 Sol. J. 790. But they cannot safely ignore a claim not sent in, if they have notice of it. *Land Credit Co. v. Markwell*, 21 W. R. 35. They may, however, after due advertisement as aforesaid, distribute without making provision for liability in respect of uncalled capital. *Jervis v. Wolferstan*, 18 Eq. 18; *Hobbs v. Wayet*, 36 C. D. 256.

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If executors or administrators after distribution remain under liability (e.g., as holders of the legal title to partly paid shares), and they are subsequently compelled to pay calls, they are entitled to compel the residuary legatees to refund by way of indemnity (*Jervis v. Wolferstan*, *supra*; *Wittaker v. Kershaw*, 45 C. D. 320), and the company as creditor may, if need be, have the estate administered by the Court, and compel legatees to refund. *Gillespie v. Alexander*, 2 Russ. C. C. 136; *David v. Frowd*, 1 My. & K. 209; *Williams on Executors*, 10th ed., 1085; *Seton*, 6th ed., 1660.

Prima facie, in an administration action, the Court will not require a fund to be retained in Court to provide for future cases. *Mellor v. South Australian Land, &c.*, (1907) 1 Ch. 72.

Where a shareholder dies insolvent the company may prove for the value of future calls. *Fuller v. McMahon*, (1900) 1 Ch. 173; *Bankruptcy Act*, 1883, s. 37 (2); and see note to Clause 19.

In *Tuticorin Co.* (1894), 43 W. R. 190, it was held that where the estate of a shareholder was sequestrated in Scotland, and afterwards the shareholder died, the sequestrator was entitled to rank for dividend in the winding-up in the place of the deceased.

By sect. 50 (3) of the *Bankruptcy Act*, 1883 (46 & 47 Vict. c. 52), when any part of the property of the bankrupt consists of shares transferable in the books of any company, the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt. Accordingly the trustee's right of transfer cannot be fettered to a greater extent than that of the bankrupt. This is not always borne in mind. Provisions forfeiting the shares of a bankrupt member, or permitting the company to dispose of them compulsorily, cannot be relied on, as they defeat the rights of the creditors by withdrawing part of the estate from them. *Ex parte Jay*, *In re Harrison*, 14 C. Div. 19; *Collins v. Barker*, (1893) 1 Ch. 578.

But there is nothing obnoxious to the bankruptcy law in articles which provide that a shareholder shall in the event of his bankruptcy be bound to sell his shares at the price fixed for all transfers alike, and as part of a *bond fide* scheme for securing that shareholders shall be actively engaged in the business. *Borland's Trustee v. Steel Bros. & Co.*, (1901) 1 Ch. 279.

Clause 13 of Table A (old) was very different from the transmission clause above, being as follows:—"Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may from time to time be required by the company."

As to its operation, see *Bentham Mills Spinning Co.*, 11 C. Div. 900. In that case it was held that under the last-mentioned clause the trustee of a bankrupt could insist on being registered, although the bankrupt was indebted to the company, and the company had a lien for the indebtedness; not so under clause 28 of this Form. It is true that in *Ex parte Harrison*, 26 C. D. 522, Bacon, V.-C., considered that the trustee, when registered, would be subject to the company's equities; but that does not prevent the trustee being entitled, not only to registration of himself as member, but also to have (a) registration

Form 251. *simpliciter*, i.e., undefaced by any note or memorandum that the shares are subject to a lien, (b) a "clean certificate"—that is to say, a certificate in the ordinary form undefaced by any such note or memorandum. *Re W. Key & Son, Ltd.*, (1902) 1 Ch. 467.

Disclaimer of Shares.

The trustee in bankruptcy of a shareholder has a right to disclaim within twelve months shares on which there is a liability, see sect. 55 of the Bankruptcy Act, 1883, amended by sect. 13 of the Bankruptcy Act, 1890; *Budden v. Roberts*, 12 C. D. 288. Under sub-sect. (7) of same section, the company can prove for damages in case of such disclaimer. The twelve months run from the appointment of the trustee. *Re Cohen*, W. N. (1905) 138, C. A. As to the measure of damages on disclaimer, see *Re Hallett, Ex parte National Insurance Corp.*, 1 Manson, 380, and *Re Hooley*, 6 Manson, 404. As to vesting the title in a third party claiming an interest, see sub-sect. (6) and *Williams on Bankruptcy*.

Sometimes the "transmission" clause continues with the words "or any guardian of an infant member or committee of a lunatic member," but there is some doubt whether they are effective.

Transfers in the case of infants can only be made in pursuance of an order of some Court of competent jurisdiction, e.g., the Chancery Division, and by the person named in the order.

And shares held by a lunatic can only be transferred under an order in lunacy, and by the person named in the order. See Lunacy Act, 1890, ss. 133, 136—139. As to the form of order in such a case, see *Re Purvis*, (1904) 1 Ch. 373. See also Lunacy Act, 1891, and Lunacy Act, 1908, as to persons not so found.

As to a charging order against lunatics' shares, see *Llewellyn v. Brown*, (1900) 1 Ch. 489. As to transfer to a foreign tutor or guardian of a lunatic resident abroad, see *Thiery v. Chalmers, Guthrie & Co.*, (1900) 1 Ch. 80; and as to Court's discretion as to transfer to foreign curator, *Re Knight*, (1898) 1 Ch. 257; as to the want of jurisdiction to transfer securities where the lunatic is not so found and is out of the jurisdiction, see *Didisheim v. London and Westminster Bank*, (1900) 2 Ch. 15; and as to the jurisdiction of the Chancery Division to order payment of dividends to a foreign committee, see *New York Security and Trust Co. v. Keyser*, (1901) 1 Ch. 666, and *Farnham v. Milward*, (1895) 2 Ch. 735.

As to the right of the official assignee of the Stock Exchange to sell a defaulter's shares, see *Richardson v. Stormont, Todd & Co.*, (1900) 1 Q. B. 701.

See also clause 22 of Table A.

SHARE WARRANTS.

Power to
issue share
warrants.

39. The coo, with respect to fully pd-up shares, may issue warrants (hnftr called share warrants), stating that the bearer is entld to the shares therein specified, and may provide by coupons or otherwise for the payment of future dividends on the shares included in such warrants.

The Companies Act, 1867, sects. 37 *et seq.* (now replaced by sect. 37 of the Companies Act, 1908), empowered a company limited by shares, if authorized so to do by its articles as originally framed, or as altered by special resolution, to issue share warrants.

Share warrants must be under the seal of the company, and will entitle the bearer to the shares or stock therein specified; and such shares or stock will be transferable by delivery of the share warrant. By mercantile usage a share warrant is a negotiable instrument. *Webb, Hale & Co. v. Alexandria Water Co.*, 21 T. L. R. 572; 93 L. T. 339. See form of share warrant, *infra*, Form 553.

The Act (1908) provides in sect. 28 as to the particulars to be contained in the annual summary to be filed by a company, where share warrants have been issued.

Holding a share warrant will not qualify a director who is required to hold a share qualification. See sect. 37 (4).

40. The directors may determine, and from time to time vary, the conditions upon which share warrants shall be issued, and, in particular, upon which a new share warrant or coupon will be issued in the place of one worn out, defaced, lost, or destroyed; upon which the bearer of a share warrant shall be entitled to attend and vote at general meetings; and upon which a share warrant may be surrendered and the name of the holder entered in the register in respect of the shares therein specified. Subject to such conditions, and to these presents, the bearer of a share warrant shall be a member to the full extent. The holder of a share warrant shall be subject to the conditions for the time being in force, whether made before or after the issue of such warrant.

As to conditions on which share warrants shall be issued.

Times all the matters referred to in the above clause are expressly provided by the articles, but it is generally thought better not to incur the burden with such matters of detail, since, in the great majority of companies, share warrants are never issued.

Where the immediate issue of share warrants is in contemplation, it may be desirable to set the conditions out in detail. In such case add to the above clause the words "until otherwise determined, the conditions following shall have effect as if made by the directors under this clause," and then set out the conditions in such paragraphs; or omit the above clause and insert a new clause, thus:—"The following provisions shall have effect," and then set out the conditions, inserting before them the words of the above clause commencing with "Subject to such conditions."

For form of conditions, see *infra*, p. 1134 *et seq.*

The bearer of a share warrant may, if desired, be deprived of the right of voting, but this is seldom done. It is usual, however, to make the deposit, before the meeting, of the warrant, a condition of the right to vote, see *infra*, Form 553.

CONVERSION OF SHARES INTO STOCK, &c.

41. The company [in general meeting] may convert any paid-up shares into stock.

Conversion of shares into stock.

The power is not often exercised, and the clauses relating to it might, if

Form 251. brevity be desired, be omitted. They can at any time be supplied by special resolution. If the words in brackets are omitted, the directors will be able to carry out the conversion under their general powers, *infra*.

See further as to conversion of shares into stock, Chap. XIII., *infra*. If desired, the clause may run thus: "The company may by special resolution convert," &c.

**Transfer of
stock and
rights of
holders.**

42. When any shares have been converted into stock, the several holders of such stock may, thenceforth, transfer their respective interests therein, or any part of such interests, in the same manner and subject to the same regulations as and subject to which fully paid-up shares in the coy's capital may be transferred, or as near thereto as circumstances will admit. But the directors may from time to time, if they think fit, fix the minimum amount of stock transferable, and direct that fractions of a pound shall not be dealt with, but with power, nevertheless, at their discretion to waive such rules in any particular case.

**Rights of
stockholders.**

43. The stock shall confer on the holders thereof respectively the same privileges and advantages, as regards participation in profits and voting at meetings of the coy, and for other purposes, as would have been conferred by shares of equal amount in the capital of the coy. but so that none of such privileges or advantages, except the participation in profits of the coy, shall be conferred by any such aliquot part of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages. And, save as aforesaid, all the provisions herein contained shall, so far as circumstances will admit, apply to stock as well as to shares. No such conversion shall affect or prejudice any preference or other special privilege. The coy may at any time reconvert any stock into paid-up shares of any denomination.

The concluding words of sect. 41 (1) (c) reproduce sect. 29 of the Companies Act, 1900.

Sect. 41 is a useful addition. The section is not framed like sect. 9 of the Act of 1867 as to reduction of capital. It does not say that the company, if authorized by its articles, may by special resolution so far modify, but merely that a company may do it if authorized by its articles. Hence, if the articles contain the requisite power to reconvert stock into paid-up shares, that power can be exercised in the manner therein specified, *e.g.*, by the directors or by the company in general meeting, by ordinary or by special or extraordinary resolution. And if the articles do not contain the requisite power the reconversion can nevertheless be effected by a single special resolution (see *Campbell's case*, 9 Ch. 1), or the special resolution can insert the power in the articles and at the same time vest that power in the directors, so that they can, the moment the resolution is passed, effect the reconversion.

Notice of the reconversion must be given to the registrar. Sect. 42.

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INCREASE AND REDUCTION OF CAPITAL.

44. The coy [in general meeting] may, from time to time, increase the capital by the creation of new shares of such amount as may be deemed expedient. Power to increase capital.

A company limited by shares, if so authorized by its articles, may increase its share capital by the issue of new shares of such amount as it thinks expedient. Sect. 41 (1) (a). Under the above clause the increase can be effected by a simple resolution passed at an extraordinary meeting. Not uncommonly it is thought better to require the sanction of a special resolution to an increase. Thus: "44a. The company may, from time to time, by special resolution, increase," &c.; or, the words in brackets can be omitted, and in such case the directors will be able to increase the capital at their discretion. *Campbell's case*, 9 Ch. 1; *Moseley v. Koffyfontein Co.*, (1911) A. C. 409.

45. The new shares shall be issued upon such terms and conditions, and with such rights and privileges annexed thereto [as the general meeting, resolving upon the creation thereof, shall direct, and if no direction be given], as the directors shall determine; and in particular such shares may be issued with a preferential or qualified right to dividends, and in the distribution of assets of the coy, and with a special or without any right of voting. On what conditions new shares may be issued. As to preferences, &c.

As to the issue of preference and other special class of shares, see *supra*, pp. 480, 576, and *infra*, p. 811 *et seq.*

If clause 44a is used, then omit the words within brackets in the above clause and substitute these: "as by the special resolution creating the same shall be directed, and if no direction be given," &c.

See further, as to increase of capital, *infra*, where forms of resolutions, notices, &c., will be found.

46. The coy [in general meeting] may, before the issue of any new shares, determine that the same, or any of them, shall be offered in the first instance, and either at par or at a premium, to all the then members or any class thereof, in proportion to the amount of the capital held by them, or make any other provisions as to the issue and allotment of the new shares: but, in default of any such determination, or so far as the same shall not extend, the new shares may be dealt with as if they formed part of the shares in the original ordinary capital. To be offered to existing members.

In lieu of the above clause, which is very commonly used, the following, which is similar to the clause 42 in Table A, may, if preferred, be substituted: "Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be

Form 251. deemed to be declined; and after the expiration of such time, or on receipt of an intimation from the member to whom such notice is given, that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company." Where a member is deceased, but his name is still on the register, his executors or administrators are, for the purpose of such a clause, entitled to stand in his place. *James v. Buena Ventura, &c. Co.*, (1896) 1 Ch. 456.

How far new shares to rank with shares in original capital.

47. Except so far as otherwise provided by the conditions of issue, or by these presents, any capital raised by the creation of new shares shall be considered part of the original ordinary capital, and shall be subject to the provisions herein contained with reference to the payment of calls and instalments, transfer and transmission, forfeiture, lien, voting, and otherwise.

Reduction of capital, &c.

48. The coy may, from time to time, by special resolution, reduce its capital by paying off capital or cancelling capital which has been lost or is unrepresented by available assets, or reducing the liability on the shares, or otherwise, as may seem expedient, and capital may be paid off upon the footing that it may be called up again or otherwise; [and paid-up capital may be cancelled as aforesaid without reducing the nominal amount of the shares by the like amount to the intent that the unpaid and callable capital shall be increased by the like amount].

As to reduction of capital, see *infra*, Chap. XVII.

The words in brackets are sometimes inserted with a view to enabling a company in case of necessity to increase its callable capital without reconstruction. Whether the provision is effective has not yet been decided. According to *British, &c. Corporation v. Couper*, (1894) A. C. 399, the Court can sanction any kind of reduction. And the new Act so provides. Sect. 46.

SUB-DIVISION AND CONSOLIDATION OF SHARES.

49. [And] the coy may also, by special resolution, sub-divide or, by ordinary resolution, consolidate its shares or any of them.

As to sub-division of shares, see *infra*, Form 479, and Act of 1908, sect. 41 (1) (d).

As to consolidation, see the same s. on (b) and *infra*, Form 478.

Sub-division into preferred and ordinary.

[49a. The special resolution whereby any share is sub-divided may determine that, as between the holders of the shares resulting from such sub-division, one or more of such shares shall have some preference or special advantage as regards dividend, capital, voting, or otherwise over or as compared with the others or other.]

The above power is sometimes found useful. It has been doubted whether it could be taken by special resolution, and in several cases private Acts have been obtained to effect such a division. But the decision in *Andrews v. Gas Meter Co.*, *supra*, p. 637, appears to dispose of those doubts.

MODIFICATION OF RIGHTS.

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50. Whenever the capital, by reason of the issue of preference shares or otherwise, is divided into different classes of shares, all or any of the rights and privileges attached to each class may be modified, commuted, affected, abrogated, or dealt with by agreement between the coy and any person purporting to contract on behalf of that class, provided such agreement is ratified in writing by the holders of at least three-fourths in nominal value of the issued shares of the class, or is confirmed by an extraordinary resolution passed at a separate general meeting of the holders of shares of that class, and all the provisions hereinafter contained as to general meetings shall, *mutatis mutandis*, apply to every such meeting, but so that the quorum thereof shall be members holding, or representing by proxy [one-fifth] of the nominal amount of the issued shares of the class. This clause is not to derogate from any power the coy would have had if this clause were omitted.

Power to
modify rights.

Where there are different classes of shares, great inconvenience is sometimes caused by there being no power for the majority of the members of a class to bind the minority, and accordingly the insertion of a clause as above is desirable.

Where the rights attached to different classes of shares are defined by the memorandum of association, those rights cannot, it is conceived, be modified under the above clause, except where the memorandum contains power by reference to this clause or otherwise. See *supra*, p. 576. *Welsbach Co.*, (1904) 1 Ch. 87. But see now the power to reorganize capital with the sanction of the Court (Companies Act, 1908, s. 45), and the power to arrange in sect. 120.

The clause does not justify any payment out of the company's capital as a consideration for the modification.

Modification does not include abrogation (*Mercantile Investment Co. v. International Cos. of Mexico*, (1893) 1 Ch. 484), but the above clause goes further.

The clause was considered by the Court of Appeal in *Hemans v. Hotchkiss Ordnance Co.*, (1899) 1 Ch. 115, and it was held that the words as to the quorum clearly rendered the presence of the specified quorum at every meeting, whether original or adjourned, essential. It was contended that clause 67, *infra*, applied, but the Court held the contrary.

In *Will v. United Lankat Plantations*, L. J. Notes, 30 March, 1912, Joyce, J., in the absence of such a clause, held that a special resolution altering the rights of the preference shares was invalid.

Borrowing Powers.

51. The directors may, from time to time, at their discretion, raise or borrow, or secure the payment of, any sum or sums of money for the purposes of the coy [but so that the amount at any one time owing in respect of moneys so raised, borrowed, or secured, shall not, without the sanction of a general meeting, exceed the nominal amount of the capital. Nevertheless, no lender or other person dealing with the coy shall be concerned to see or inquire whether this limit is observed.

Power to
borrow.

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In exercising this power, sect. 87 (1) of the Companies Act, 1908, must be borne in mind, for if a company on its formation invites the public to subscribe for shares it may not borrow until after it has become entitled to commence business under that section. See *supra*, p. 20. See also "Non-prospectus Companies." *Ibid*.

An express or implied power to borrow must be given in the memorandum; but if the company have power to borrow, the Act imposes no limit on that power, except this—that money can only be borrowed for the purposes of the company. Nevertheless, the Stock Exchange Committee require some limitation, and it is not unusual to insert in the articles a limit as above, or to make the limit "the amount of the subscribed capital for the time being of the company," or "the amount of the paid-up capital," or a specified sum.

Where the company has power to borrow and mortgage (as to which, see *supra*, Form 110), there is no need expressly to delegate the power to the directors, provided that the articles contain a general delegation (clause 113) to them of the powers of the company, as *infra*. *Patent Fife Co.*, 6 Ch. 83; *Gibbs and West's case*, 10 Eq. 312; *Anglo-Danubian, &c. Co.*, 20 Eq. 339; and see *Australian Co. v. Mounsey*, 4 K. & J. 733; *Pyle Works* (No. 2), (1891) 1 Ch. 173; *Hampson v. Lios's Patent Candle Co.*, 45 L. J. Ch. 437.

Nevertheless, it is usual to give the directors express power. How far the directors' power should be fettered or limited is a matter of arrangement. It is by no means uncommon to vest the power in the directors absolutely. If this is to be done, omit from "but so that" to end of clause. In small companies it is not unusual to require the sanction of a special resolution.

As to the validity of securities given for money borrowed beyond the limit. see *Blackburn Bldg. Soc. v. Cunliffe Brooks*, 22 Ch. D. 61; 9 App. Cas. 857; *Baroness Wenlock v. River Dee* (No. 2), 19 Q. B. D. 155; *Re Wrexham Mold Rail. Co.*, (1899) 1 Ch. 440. If there is power to borrow, with the sanction of a general meeting, a lender may assume that the requisite sanction has been obtained. *Royal British Bank v. Turquand*, 6 E. & B. 327 (*supra*, p. 79); *Bryant v. La Banque du Peuple*, (1893) A. C. 170. See also *Hampshire Land Co.*, (1896) 2 Ch. 743, in which case the meeting which purported to give this sanction was irregular. But it would seem that the passing of a special resolution must not be assumed because such a resolution as requiring to be registered would appear on the file. *Irvine v. Union Bank of Australia*, 2 App. Cas. 379.

For other cases in which irregularities have been held not to invalidate the security, see *Biggerstaff v. Rowatt's Wharf*, (1896) 2 Ch. 93 (powers of managing director); *Davies v. R. Bolton & Co.*, (1894) 3 Ch. 678 (quorum); *Robinson v. Montgomeryshire Brewery Co.*, (1896) 2 Ch. 841 (authority of agent); *County of Gloucester Bank v. Rudry*, (1895) 1 Ch. 629 (quorum). *supra*, p. 80; *Mahoney v. East Holyford Co.*, L. R. 7 H. L. 69 (*de facto* directors).

Where three companies, each having power to borrow on debentures, issued jointly debentures charging all their properties, the Court of Appeal held that the debentures bound the property of each company to the extent of charging it with the portion of the money which reached the coffers of that company. *Johnston Foreign Patents Co.*, (1904) 2 Ch. 234. A lender is not bound to inquire how the company intends to apply the money—that is the company's business—and a misapplication of the money, therefore, will not, in the absence of notice, affect his security. *David Payne & Co.*, (1904) 2 Ch. 608.

Overdrawing a banking account is in effect a borrowing. *Blackburn Bldg. Soc. v. Cunliffe*, 9 App. Cas. 857; *Pyle Works* (No. 2), (1891) 1 Ch. 173. As to the claim a lender may in such cases have against the assets of the company, see *Baroness Wenlock v. River Dee*, 19 Q. B. D. 155, and cases there cited.

Even where directors have an unrestricted power to borrow, they not uncommonly seek the sanction of a general meeting before exercising the power.

Sometimes a clause is inserted to the effect that it is intended that the company shall forthwith create and issue a specified amount of first mortgage debentures, or debenture stock, secured in a specified manner, and that whilst the same remains outstanding, the company is not to be at liberty to create any mortgage or charge on its property or uncalled capital [or as the case may require], ranking, or which by any means may be made to rank, in priority to or *pari passu* with such first mortgage debentures or debenture stock. The object is to fortify the security by giving notice to all the world. *Supra*, pp. 77, 81.

Where the clause authorized the borrowing of any sum "not exceeding the amount of the preference share capital," and no preference capital was issued, the Court of Appeal held that no limit was imposed. *Johnston Foreign Patents Co.*, (1904) 2 Ch. 234.

There is not in general anything to prevent the directors from raising money by depositing debentures with the lender. *Strand Music Hall*, 3 De G. J. & S. 147; *Regent's Canal Ironworks*, 3 C. Div. 43; *Re Patent File Co.*, L. R. 6 C. P. 83.

As to loans to the company by directors, see *Campbell's case*, 4 C. D. 470; *Black v. Maltair*, 5 Jur. N. S. 1018. It would seem that they may lend to the company upon the same terms as the public are asked to lend; but when it is proposed to borrow from the directors exclusively, and at a high rate of interest and upon mortgage, the transaction must be carefully safeguarded, and the clauses as to directors' contracts should be considered [e.g., clause 92, p. 731], and a resolution of a general meeting may in some cases be desirable.

As to personal liability of directors to lenders on an implied warranty or authority, where the borrowing powers are exceeded, see *Collen v. Wright* (1857), 8 El. & Bl. 647; *Weeks v. Probert*, L. R. 8 C. P. 427; *Chapleo v. Brunswick Soc.*, 6 Q. B. D. 715; *Firbank's Executors v. Humphreys*, 18 Q. B. D. 54; approved in *Starkey v. Bank of England*, (1903) A. C. 114; *Oliver v. Bank of England*, (1901) 1 Ch. 610. And as to debentures generally, see Part III. of this work.

52. The directors may raise or secure the payment or repayment of such sum or sums in such manner and upon such terms and conditions in all respects as they think fit, and, in particular, by the issue of debentures or debenture stock of the coy charged upon all or any pt of the ppty of the coy (both present and future), including its uncalled capital for the time being.

Conditions on which money may be borrowed.

53. Debentures, debenture stock, and other securities may be made assignable free from any equities between the coy and the person to whom the same may be issued.

Securities may be assignable free from equities.

This clause is sometimes inserted. As to its object, see Part III. Where a company has power to issue negotiable instruments, the above clause is probably not necessary.

54. Any debentures, debenture stocks, bonds, or other securities, may be issued at a discount, premium or otherwise, and with any special privileges as to redemption, surrender, drawings, allotment of

Issue at discount, &c., or with special privileges.

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Form 251. shares, attending and voting at general meetings of the coy, appointment of directors, and otherwise.

This clause is sometimes inserted, but the power to "raise" money given by clause 51, and the general powers given *infra*, are probably sufficient. *Anglo-Danubian Steam, &c. Co.*, 20 Eq. 241; *Australian Co. v. Mounsey*, 4 K. & J. 733; *Pyle Works (No. 2)*, (1891) 1 Ch. 173; *Hampson v. Price's Patent Candle Co.*, 45 L. J. Ch. 437.

Register of mortgages to be kept.

55. The directors shall cause a proper register to be kept, in accordance with sect. 100 of the Cos (Consolidation) Act, 1908, of all mortgages and charges specifically affecting the ppty of the coy; and shall duly comply with the requirements of sect. 93 of the Cos Act, 1908, in regard to the registration of mortgages and charges therein specified and otherwise.

Considering the serious liabilities which directors and others may incur by not complying with the sections referred to, it seems desirable to insert a reminder of this kind.

Upon sect. 43 of the Act of 1862, replaced by sect. 100 of the Companies Act, 1908, it was held that non-registration exposed the directors to penalties, but did not avoid, as sect. 93 does, the mortgage or charge. *Wright v. Horton*, 12 App. Cas. 371.

The right of inspection given by the section includes by implication a right to make extracts and notes. *Mutter v. Eastern and Midlands F. Co.*, 33 C. D. 92; *Nelson v. Anglo-American, &c. Co.*, (1897) 1 Ch. 130; but the right to take extracts is impliedly negatived where the Act gives a right to have copies on payment. *Balaghat Mining Co.*, (1901) 2 K. B. 665, C. A., overruling *Boord v. African Consolidated Co.*, (1898) 1 Ch. 596; see *infra*, pp. 771, 772.

As to a *cestui que trust's* right to information, see *Tillott*, (1892) 1 Ch. 86. A director is entitled to inspect *virtute officii*.

A right of inspection given by the articles ceases on a voluntary winding-up. *Yorkshire Co.*, 9 Eq. 650; *Kent Coalfields Syndicate*, (1898) 1 Q. B. 754. But application for an order to allow inspection can be made in a voluntary winding-up under sects. 193, 221. See Forms 722, 723, of Part III. So, too, in a compulsory or supervision case. *Somerset v. Land Securities Co.*, W. N. (1897) 29. *Form 102 et seq.*, Part III.

The right to inspect under sect. 101 is only given to a "creditor or member" of the company gratis: to others for a fee. As to sect. 93 of the Companies Act, 1908 [registration under that section is only required in the case of a mortgage or charge (1) to secure any issue of debentures or debenture stock, or (2) on uncalled capital, or (3) by an instrument which if executed by an individual would require registration as a bill of sale, or (4) on land, (5) on book debts, (6) by way of floating charge]. See *supra*, pp. 616, 618, and Part III. of this work.

Mortgage of uncalled capital.

[55a. If any uncalled capital of the coy is included in or charged by any mortgage or other security, the directors may, by instrument under the coy's seal, authorize the person in whose favour such mortgage or security is executed, or any other person in trust for him, to make calls on the members in respect of such uncalled capital, and the provisions hnbefore contained in regard to calls shall, *mutatis*

mutandis, apply to calls made under such authority, and such authority may be made exercisable either conditionally or unconditionally, and either presently or contingently, and either to the exclusion of the directors' power or otherwise, and shall be assignable if expressed so to be.] **Form 251.**

The above is sometimes used. But the Stock Exchange Committee sometimes object to the clause.

Sometimes it is considered expedient to insert a clause as follows:—

"55b. Where any uncalled capital of the company is charged, all persons taking any subsequent charge thereon shall take the same subject to such prior charge, and shall not be entitled, by notice to the shareholders or otherwise, to obtain priority over such prior charge."

As to getting in calls for debenture holders after a winding-up order, see *Fowler v. Broad's, &c. Co.*, (1893) 1 Ch. 777; and Part II.

See further as to mortgages of uncalled capital, Part III.

MEETINGS.

56. The statutory meeting of the coy shall, as required by sect. 65 of the Cos (Consolidation) Act, 1908, be held at such time not being less than one month or more than three months from the date at which the coy shall be entld to commence business, and at such place as the directors may determine, and the directors shall comply with the other requirements of that section as to the report to be submitted and otherwise. **The statutory meeting.**

As to when a company is entitled to commence business, see *supra*, p. 20.

Sect. 39 of the Companies Act, 1867, required every company to hold a general meeting within four months after the registration of its memorandum of association, and an extraordinary meeting was a sufficient compliance with this provision. *Lord Claud Hamilton's case*, 8 Ch. 548. But that section was repealed by sect. 33 of the Companies Act, 1900; that again by the Act of 1908; and sect. 65 of that Act now provides that "every company limited by shares and registered on or after the 1st January, 1901, shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called the statutory meeting"; and in further sub-sections enacts how the meeting is to be convened, what report is to be submitted to it, what matters may be discussed thereat, and what may be done, &c.

In the case of a private company, though the company must hold the statutory meeting, no preliminary report need be sent to shareholders or filed. Sect. 65 (10).

57. Other general meetings shall be held once in the year — and in every subsequent year, at such time and place as may be prescribed by the coy in general meeting, and if no other time or place is prescribed [in the month of — in every such year] at such time and place as may be determined by the directors. **When subsequent general meetings to be held.**

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The Act of 1900 now provides (sect. 64, replacing sect. 49 of the Companies Act, 1862) that "A general meeting of every company shall be held once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting"; there are penalties for default; and the same section provides that when default has been made in holding a meeting of the company in accordance with the provisions of this section, the Court may on the application of any member, call or direct the calling of a general meeting of the company. "Calendar year" means the year commencing 1st January and ending 31st December. (*Hibson v. Barton*, L. R. 16 Q. B. 488.)

If the statutory meeting is held within the year it will satisfy sect. 64, but the statutory meeting is not an "ordinary" meeting; and, in order to comply with sect. 26, an ordinary meeting must be held each year, for a Return to the Registrar has, under that section, to be made each year within a short time after the expiration of fourteen days from the ordinary general meeting. If the articles permit, this meeting can be held on the same day as the statutory meeting.

It is no answer to proceedings for the penalty that the meeting was not in fact held. *Edmonds v. Forster*, 45 L. J. M. C. 41; 33 L. T. 890; *Park v. Lawton*, (1911) 1 K. B. 588. Evidence that a person is a director is *prima facie* evidence that he knowingly and wilfully authorized and permitted the company's default. *Edmonds v. Forster*, *supra*. An offence under this section is a criminal offence. *Reg. v. Tyler*, (1891) 2 Q. B. 588. Proceedings to enforce the penalty are taken before a magistrate, who may inquire into the sufficiency and accuracy of the return. *Briton Medical*, 37 W. R. 52. Sometimes provision is made for half-yearly meetings.

The company's penalty is 5*l.* for every day during which the default continues. See *Reg. v. Catholic, &c. Co.*, 48 L. T. 675; but it has been held that the default is not a continuing one where the meeting has not been held within the year. *Dorte v. South African Super-Aeration*, 28 T. L. R. 425. And see p. 763.

Distinction between ordinary and extraordinary meetings.

When extraordinary meeting to be called.

Requisition.

58. The general meetings referred to in the last preceding clause shall be called ordinary meetings; all other meetings of the company shall be called extraordinary meetings.

59. The directors may, whenever they think fit, and they shall on the requisition of the holders of not less than one-tenth of the paid-up capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company, and in the case of such requisition the following provisions shall have effect:—

- (1) The requisition must state the objects of the meeting and must be signed by the requisitionists and deposited at the office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.
- (2) If the directors of the company do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists or a majority of them in value may themselves convene the meeting, but a meeting so convened shall not be held after three months from the date of the deposit.

- (3) If at any such meeting a resolution requiring confirmation at another meeting is passed, the directors shall forthwith convene a further extraordinary general meeting for the purpose of considering the resolution, and if thought fit of confirming it as a special resolution; and if the directors do not convene the meeting within seven days from the date of the passing of the first resolution, the requisitionists or a majority of them in value may themselves convene the meeting.
- (4) Any meeting convened under this clause by the requisitionists shall be convened in the same manner as far as possible as that in which meetings are to be convened by directors.

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If brevity desired omit this sub-paragraph and substitute the words "The provisions of sect. 66 of the Companies (Consolidation) Act, 1908, shall apply" for the words "following provisions shall have effect."

"Whenever they think fit, in the above clause, means *prima facie* when at a board meeting they so determine. *Brown v. La Trinidad Co.*, 37 C. Div. 1. But as appears from that case, and from *Southern Counties, &c. v. Rider*, 73 L. T. 374; *British Asbestos Co. v. Bird*, (1903) 2 Ch. 439; and *Boschong Proprietary Co. v. Fife*, (1906) 1 Ch. 148, it does not follow that a meeting irregularly convened is in all cases incompetent.

See, however, *Aircraft Co. v. Navigation Co.*, (1900) 2 Ch. 230, in which a meeting convened by the secretary without the authority of the directors was held to be irregular; followed by *Wright J.*, in *State of Wyoming Syndicate*, 4013 2 Ch. 431, and *Hunter v. Kerr, Stuart & Co.*, 83 L. T. 729, in which it was held that a meeting thus irregularly convened was rendered valid by the directors' ratification before the time fixed.

The above clauses follow very closely the wording of sect. 66 of the Act of 1908. It seems desirable to adopt the statutory provision exclusively.

It is desired that convening of meetings on requisition can be rendered as valid as that which is convened by the directors. It is suggested that the tenth should be empowered to requisition. Indeed, the members could be empowered to requisition, or for that matter to convene a meeting without requisition. But it seems undesirable to put the power in the hands of one or two possibly troublesome members to set the machinery of a meeting in motion vexatiously.

The Court would not compel directors to convene a general meeting on requisition where the directors have enabled the requisitionists to call the meeting. *Dougall v. Gardiner*, 1 Ch. 606, and under the present Act the same rule will probably be adopted. But the Court might, perhaps, itself convene a meeting, if there were no directors, and no other mode of procedure. *Perkins, L. J.*, *S. C.* For an example, see *Trade Auxiliary Co.*, 21 R. 1, where, there being no proper board, a receiver was appointed, and a meeting could be held. Where there is a deadlock, sect. 67 of the Act may apply. *Brick and Stone Co.*, W. N. (1878) 140. *Vaughan Williams*, once held that a complete deadlock was a good ground for making a winding-up order. *Sailing Ship "Kentmere" Co.*, W. N. (1897) 58.

It is apprehended that the mere fact that some of the resolutions referred to in the requisition cannot be put to the meeting as being, e.g., *ultra vires*, does not relieve the directors from all obligation to call the meeting, or if they abstain from calling it, preclude the requisitionists from calling it and dealing with what can properly be put to the meeting. *Isle of Wight Rail. Co. v. Lachourdin*, 25 C. Div. 320.

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Notice of
meeting.

60. Seven clear days' notice to the members specifying the place, day, and hour of meeting, and, in case of special business, the general nature of such business, shall be given [either by advertisement or] by notice sent by post, or otherwise served as hinftr provided, and with the consent in writing of all the members, a meeting may be convened by a shorter notice, and in any manner they think fit.

Notice of a general meeting must, unless otherwise provided, be given to all the members, but sometimes the articles provide that members holding less than, say, [20%] of the capital, or that holders of shares of a particular class, *e.g.*, preference shares, or members not having an address in the United Kingdom, shall not be entitled to notice. In the absence of any such qualification notice should be given to all the members, and the omission to do so *prima facie* invalidates the meeting. *Smyth v. Darley*, 2 H. L. C. 789. But there is usually a clause in the articles relaxing this rule in the case of accidental omission to give notice or non-receipt. See Table A, clause 49; and as to members who are abroad, see *infra*, p. 779.

Unless the articles otherwise provide, the executors or administrators of a deceased member, until registered as members, are not entitled to notice, for the notice is to be given to the "members." It is enough if notice is sent to the deceased member's registered address. *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656.

And though, under sect. 32 of the Act of 1908 (sect. 35, Act of 1862), the register may be rectified by entering a person's name as a member as from a past day this may be done without invalidating notices given to other members. *Sussex Brick Co.*, (1904) 1 Ch. 698.

As to notice, see further, *infra*, and Chap. XII.

As appears from the above clause and clause 63, an ordinary meeting may deal with special business if the notice specifies it. And see *Graham v. Van Dieman's Land Co.*, 26 L. J. Ch. 73. As to what is "special business," see clause 63, *infra*, and Table A., clause 50.

An adjourned meeting is considered, for some purposes, a continuation of the original meeting. See *Scadding v. Lornet*, 3 H. L. Cas. 418. Hence, in the absence of special provision, notice of an adjourned meeting need not be sent to the members. *Wills v. Murray*, 4 Ex. 843.

A notice which is to state the general nature of the business or the object of the meeting must give members fair notice of the matters to be dealt with. *Bridport Brewery Co.*, 2 Ch. 191; *Wright's case*, 12 Eq. 345; *Lawes' case*, 1 De G. M. & G. 430; *Hampshire Co.*, (1896) 2 Ch. 743; *Hope v. Croydon Tramways*, (1898) 1 Ch. 358. But it is not enough in a notice of an extraordinary meeting merely to say "special business." *Wills v. Murray*, 4 Ex. 869. And any resolution beyond the notice is invalid. *Hampshire Land Co.*, *supra*. But notices are not to be construed with excessive strictness. Per Selwyn, L. J., *Wright's case*, 12 Eq. 345; *Henderson v. Bank of Australia*, 45 C. Div. 330; *Grant v. United Switchback*, 40 Ch. D. 137; *Re British Sugar Refining Co.*, 3 K. & J. 408. They are to be read and construed as an ordinary business man would read and construe them. *Alexander v. Simpson*, 43 C. D. 147; and see *Young v. South African, &c. Syndicate*, (1890) 2 Ch. 268.

Thus where a meeting is convened to remove "any" of the directors, it may remove "all." *Isle of Wight Rail. Co. v. Takourdin*, 25 C. Div. 332. It is, however, wiser to say "all or any."

In another case (*Betts & Co., Ltd. v. Macnaghten*, (1910) 1 Ch. 430) the articles provided that the notice of the general meeting should specify the

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general nature of the special business to be transacted. In pursuance of this article notice was given that a meeting was to be held for the purpose of considering and, if thought fit, passing certain specified resolutions "with such amendments and alterations as shall be determined on at such meeting." One of the resolutions specified in the notice was a resolution to appoint A., B. and C. to be ordinary directors of the company with 200*l.* per annum each as remuneration, and at the meeting a resolution was carried appointing A., B. and C. and also two additional persons to be directors each at 200*l.* per annum. This resolution the Court held to be effective, and looking to the very elastic terms of the notice of meeting the decision seems sound enough if based on the special terms of the notice, but the learned judge did not so base the same. The ground he took was that the notice sufficiently indicated the general nature of the business to be transacted. "Under the articles," said he, "all that was incumbent upon the conveners of the meeting to do was to specify the general nature of the special business for which the meeting was convened, and although on this occasion the conveners of the meeting went out of their way to indicate in the notices with particularity the mode in which the special business was to be submitted to the meeting, their having done so cannot, in my opinion, impose any greater restrictions on the meeting than would have been imposed upon it had the notice been in more general terms." According to the learned judge's view, where the articles require the notice in the case of special business to state the general nature of such business, the notice, however specific, cannot restrict the powers of the meeting to the specified business, but leaves the meeting free to deal with any business of a like nature. This would encourage a dangerous laxity in the framing of notices and the passing of wholly unexpected and onerous resolutions to the detriment of absent shareholders, put off their guard by an apparently innocent notice. Suppose, for instance, the notice is to appoint A. B. to be a director at 200*l.* per annum, according to the learned judge's view the resolution can be amended and may be passed so as to appoint half a dozen persons to be directors each at 200*l.* per annum or upwards; or suppose the notice is of a resolution to authorize the directors to borrow, say, 1,000*l.*, it can be amended and passed so as to authorize them to borrow 10,000*l.*; or suppose the notice is to grant to the directors an extra 100*l.*, the resolution might be to grant them an extra 1,000*l.*, for in each case it could be said that the notice sufficiently indicated the general nature of the business.

Such a view is at variance with the reasoning of the Court of Appeal in *Bethell v. Trench Tubeless Tyre Co.*, (1900) 1 Ch. 409, and with the view of Page-Wood, V.-C., in *Wright's case*, 12 Eq. 341, n. That learned judge was of opinion that although where a meeting was convened to consider and approve of an agreement, a shareholder could not object to a resolution approving the agreement with some modifications not making it more onerous on the company, he would, nevertheless, be entitled to object to a resolution approving of the agreement with modifications making it more onerous on the company, and that view has been generally acted on during the last forty years and upwards. The view, too, seems inconsistent with what Lord Justice Bowen said in *Alexander v. Simpson*, 43 C. D. 139, as to the extreme importance that these notices should be so framed that those who run may read, and that they should be construed in a sense in which business men to whom they are addressed would understand them. No business man would understand that a notice *simpliciter* of a meeting to appoint A., B. and C. to be directors at 200*l.* a year each could be treated as justifying the appointment of five persons as directors each at 200*l.* per annum.

In construing a notice it is to be borne in mind that all the shareholders of the company must have imputed to them "knowledge of the Act of Parliament.

Form 251. and also of their own memorandum and articles of association." Per Lord Selborne, *Campbell v. Case*, L. R. 9 Ch. 22.

A notice convening a meeting to consider and determine as to the appointment of a committee to inquire into the working and general management of the company would not justify a resolution requiring the directors to carry into effect the recommendations of the committee. Per Cotton, L. J., *Isle of Wight Rail. Co. v. Takourdin*, 25 C. D. 330.

An insufficient or misleading notice invalidates the resolution, even though no proxies are used, "for how is it possible for the Court to know how many shareholders abstained from attending the meeting, being satisfied that the arrangement as it was proposed was advantageous to them, and being quite content to exercise no voice about it?" Per Page-Wood, V.-C., *Clinch v. Financial Corp.*, 5 Eq. 481.

"There is no obligation upon any shareholder receiving such notices either to attend the meetings or to make inquiries as to what is proposed to be done at them, in order to protect himself from being bound by acts or contracts *ultra vires* of any general meeting. He will, of course, be bound by all that the general meetings can do, as to the matters mentioned in the notices, within their powers; but he cannot, in his absence and without his knowledge, be taken to consent that they shall bind him by any resolutions or acts in excess of those powers, whether such acts or resolutions do or do not relate to the particular business for the transaction of which the meetings were called together." Per Lord Selborne, *Ashbury v. Riche*, L. R. 7 H. L. 693.

So where a meeting was convened to consider resolutions for reconstruction, and for winding-up in regard thereto, and at the meeting a naked resolution for winding-up was passed, it was held to be invalid as a departure from the scheme indicated by the notice. *Teece & Bishop, Ltd.*, W. N. (1901) 52; 84 L. T. 461; but see *Thompson v. Henderson's Transvaal Estates Co.*, (1908) 1 Ch. 765.

Where a meeting was convened to ratify and confirm a specified agreement for the sale of part of the undertaking, it was held that it was not necessary in the notice to state why such ratification was necessary, viz., because the directors were interested in the purchasing company. *Grant v. United Switchback Co.*, 40 C. D. 137; see also *Southall v. British Mutual*, 6 Ch. 614 (C. A.). On the other hand, where the meeting was convened to sanction an agreement for the sale of the undertaking and the notice did not mention that the agreement also provided for the payment by the purchaser to the directors of compensation for loss of office, it was held that the notice was irregular. See *Tiessen v. Henderson*, (1899) 1 Ch. 861; see also *Kaye v. Croydon Tramways Co.*, (1898) 1 Ch. 358, and *Normandy v. Ind, Coope & Co.*, (1908) 1 Ch. 84.

A resolution inconsistent with the articles is ineffectual unless it is to be confirmed as a special resolution. *Quin & Axtens v. Salmon*, (1909) A. C. 442.

Amendments.

As to amendments. No amendment can be moved which goes beyond the notice convening the meeting or, in the case of an ordinary meeting, beyond the scope of the ordinary business which by the articles may be transacted thereat without special notice. Thus, in the case of an ordinary meeting, where a motion is submitted that the report and accounts be received and adopted, an amendment that the directors be removed from office, or that the articles be altered, would be irregular; but an amendment to the effect that the accounts and balance-sheet be received, but not adopted, and that a committee of shareholders be appointed to look into them and report, would be competent. So, too, if the meeting be convened to pass a resolution for increasing the capital, an amendment that the directors be authorized to borrow, or that a dividend be declared, would be irregular, for any such amendment is not within the notice.

In other words, an amendment must be fairly relevant. If it is, and within the notice, it may generally be moved. **Form 251.**

Thus, where a meeting is convened to consider, and if thought fit to ratify, a particular agreement, it would seem to be permissible to ratify the agreement subject to modifications or conditions, provided that they do not make the agreement more onerous as regards the company. "An absent shareholder can hardly be allowed to say: 'I was invited to consider the agreement *simpliciter*, as it stood.' I quite understand his not being bound by a resolution that made the agreement *more onerous*, but . . . nobody would think of arguing that because there is not an express invitation to consider all possible modifications that might take place for the *benefit* of the company, therefore the meeting proceeded on that which was *ultra vires* in coming to any such modified resolution." Per Page-Wood, L. J., *Wright's case*, 12 Eq. 335, 341. n.

So if the notice is to consider a resolution for increasing the capital to 10,000/., an amendment to substitute 5,000/., for 10,000/., is allowable, but such a notice would not, it is conceived, justify an amendment to substitute 15,000/., or 150,000/., for 10,000/.. Where, however, the notice was in general terms, such an amendment would be allowable.

Or, where by the regulations or the Act there is general power to deal with certain business at a general meeting without notice of such business, the fact that the notice convening the meeting specifies a particular resolution for dealing with such business does not limit the powers of the meeting or prevent an amendment or substituted resolution. See *Bethell v. Trench Tubeless Co.*, (1900) 1 Ch. 408.

And where the notice was of a meeting to pass a resolution altering the scale of voting by giving to every qualified proprietor one vote for every share held by him, and a resolution was proposed with additional words [*q.v.* irregular], making the right of voting conditional on a member having held his shares for a specified period, it was held that an amendment to omit the additional words was *regular*. *Henderson v. Bank of Australia*, 45 C. D. 330.

A special resolution need not, at the *first* meeting, follow the exact terms of the resolution, but may to some extent be amended, e.g., by reducing the amount of remuneration proposed for directors on an alteration of the articles. *Torbark v. Lord Altonbury*, (1902) 2 Ch. 871. But when notice is given of a meeting to pass special resolutions for voluntary winding-up, the appointment of a liquidator, and reconstruction, and a resolution is passed simply for voluntary winding-up, although this is confirmed at the second meeting, it was held in *Teede & Bishop, Ltd.*, W. N. (1901) 52; 70 L. J. Ch. 409; 84 L. T. 564, that there was no valid special resolution for winding-up.

But the authority of this case is much impaired by the decision in *Thompson v. Henderson's Transvaal Estates Co.*, (1908) 2 Ch. 765, in which it was held that where the notice specified several resolutions, some of which were *ultra vires* and some *intra vires*, and all were passed, the *intra vires* resolutions were good, though the others were bad. And see *Clinch v. Financial Corp.*, 5 Eq. 461; *Wall v. London and Northern Assets Corp.* (No. 2), (1898) 2 Ch. 469, 484; and *Strand v. London Aquarium Society*, 80 L. T. 243.

Occasionally the articles contain a clause providing that any member may, on giving not less than three days' notice to the company, submit any resolution to the meeting beyond the matters contained in the notice convening such meeting; but such a clause is dangerous if it means what it apparently says, and the Court therefore treats it as referring only to something covered by the principal notice. *Imperial Hydro, &c. Co. v. Hampson*, 23 C. Div. 9.

Clause 60, *supra*, does not apply to a meeting of the subscribers of the memorandum. A reasonable notice only is necessary to convene the subscribers, and

Form 251. a two days' notice has been held reasonable and sufficient under the circumstances. *John Morley Building Co. v. Barras*, (1891) 2 Ch. 386.

Directors, in the absence of an express provision in the articles, have no power to postpone a meeting which has been duly convened. *Smith v. Parings Mines*, (1906) 2 Ch. 193.

Two meetings
convened by
one notice.

61. Where it is proposed to pass a special resolution, the two meetings may be convened by one and the same notice, and it is to be no objection to such notice that it only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting.

The object of the concluding paragraph of the above clause is to save the expense of the double notice, which in a large company may be considerable. In the absence of such words the second meeting cannot be thus convened on a contingency. *Alexander v. Simpson*, 43 C. D. 139; and *infra*, Chap. XII. The concluding paragraph was drafted by the author to meet that case, and was held to be valid by the Court of Appeal in *North of England Steamship Co.*, (1905) 2 Ch. 45.

In *Tiessen v. Henderson*, (1899) 1 Ch. 861, after the resolution had been passed on February 16 at the first meeting, an alternative scheme was proposed, and notice was given of a meeting on March 3, to pass resolutions embodying the new scheme, and stating that "if passed by the requisite majority," &c., as in the above form. The notice then went on to state that "in the event of such resolutions not being passed, immediately after such meeting, an extraordinary general meeting of the company will be held, when the following resolutions, which were passed at the extraordinary general meeting of the company held on February 16, 1899, will be submitted for confirmation," and it was held that the notice was not bad as notice of a confirmatory meeting.

The notice must state fairly the purpose of the meeting, and disclose any pecuniary interest to be taken by a director in the matter. See *Kaye v. Croydon Tramways Co.*, (1898) 1 Ch. 358; *Tiessen v. Henderson*, *supra*; *Hampshire Co.*, (1896) 2 Ch. 743.

Even in the absence of the clause, it is possible, as contended in former editions of this work, to convene the two meetings by one and the same notice, provided that both meetings are convened unconditionally, e.g., the second to receive a report of the proceedings at the first, and if the resolution has been passed to confirm it. *Jenner Institute*, 13 T. L. R. 394.

Where a meeting is convened with a view to passing a resolution intended to be subsequently confirmed as a special resolution, the notices convening the first meeting should, as sect. 69 of the Act provides, state that the meeting is convened to consider and, if thought fit, to pass the resolution as an extraordinary resolution which will be submitted for confirmation as a special resolution to a subsequent meeting. See *infra*, p. 1097.

As to omission
to give notice.

62. The accidental omission to give any such notice to any of the members shall not invalidate any resolution passed at any such meeting.

Sometimes this clause runs: "The non-receipt of the notice by any member shall not invalidate the proceedings of any general meeting, &c." This is the form in Table A. (clause 19)

In one form or the other the clause is almost always inserted.

In the absence of such a provision a meeting is irregular, for all members are not duly summoned as they have a right to be. *Smyth v. Darley*, 2 H. L. C. 789; *Reg. v. Langhorne*, 6 N. & M. 203.

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PROCEEDINGS AT GENERAL MEETINGS.

A speech by a shareholder at a meeting defamatory of the directors but in regard to a matter affecting the interests of the shareholders is privileged. *Parsons v. Surgey*, 4 Fost. & Fin. N. P. 247. And it would seem that where the occasion is privileged, and the words complained of are spoken without malice, the presence of reporters in ordinary course does not take away the privilege. *Pittard v. Oliver*, (1901) 1 Q. B. 474; *Marks v. Samuel*, (1904) 2 K. B. 287. Compare *Purcell v. Fowler*, 2 C. P. D. 215. But the privilege is gone if the public or the press are present at the meeting at the express invitation of the shareholder making the defamatory statement. *Parsons v. Surgey* *supra*.

If the directors of a company invite a newspaper to a private meeting, query whether the company can sue the newspaper for publishing in a report of that meeting a true statement of what was said by a shareholder because that statement is defamatory. *Liverpool Household Stores v. Smith* (1887), 37 Ch. D. 170.

A report in the public press of the proceedings of a general meeting, if containing libellous matter, is not privileged. *Popham v. Peckham*, 7 H. & N. 891; *Davison v. Duncan*, 7 E. & B. 229. But a report sent to the members is *prima facie* privileged. *Laughton v. Bishop of Sodor and Man*, 4 P. C. 495; *Waller v. Lock*, 7 Q. B. D. 619. And see *Quartz Hill Gold Mining Co. v. Beall*, 20 C. D. 508.

63. The business of an ordinary meeting other than the first one shall be to receive and consider the profit and loss account, the balance-sheet, and the reports of the directors and of the auditors, to elect directors and other officers in the place of those retiring by rotation, to declare dividends, and to transact any other business which, under these presents, ought to be transacted at an ordinary meeting. All other business transacted at an ordinary meeting, and all business transacted at an extraordinary meeting, shall be deemed special.

Business of
ordinary
meeting.

Special
business.

The last paragraph of this clause refers to clause 60. Sometimes it is provided that all special business shall be transacted at an extraordinary meeting; but as this precludes the transaction of special business at an ordinary meeting, even after notice, it may be found inconvenient. Of course, an extraordinary meeting can be convened to be held at the close of the ordinary; but if proxies are wanted, there must be a separate proxy paper for each. *Infra*, clause 81.

Where the clause is framed as above, special business can be dealt with at an ordinary meeting if the notice specifies it.

64. Three members personally present shall be a quorum for a Quorum
general meeting for the choice of chairman, the declaration of a
dividend, and the adjournment of the meeting. For all other

Form 251. purposes the quorum for a general meeting shall be members personally present, not being less than [5] in number, and holding, or representing by proxy, not less than one-tenth part of the issued capital of the coy.

If there be no provision as to a quorum in the articles two members are requisite to form a quorum. This is the common law rule. One member cannot as a rule, constitute a quorum or a meeting, even though he holds proxies *Sharpe v. Daws*, 2 Q. B. D. 26; *Re Sanitary Carbon Co.*, W. N. (1877) 223. But where a single person held all the preference shares of the company, it was held that such a person could exercise the power to consent on behalf of preference shareholders to a modification of their rights. *East v. Bennett Brothers, Lim.*, (1911) 1 Ch. 163. Even where the articles do not say personally present, as above, the word is implied. Per North, J., *Flintshire Oil and Cannel Co.*, 14th May, 1887, in which it was held, two years after date, that the winding-up resolution was invalid, on the ground that at one of the meetings there was no quorum personally present. And see *Cambrian, &c. Co.* 23 W. R. 405; *Ernest v. Loma Gold Mines*, (1897) 1 Ch. 1.

A resolution passed at a meeting at which a quorum is not present is void (*Romford Canal Co.*, 24 C. D. 85; *Cambrian Co.*, *supra*); and so also is passed by votes of persons not entitled to vote, e.g., because indebted to the company. See clause 82, *infra*, p. 708, and the last case above mentioned. The articles sometimes establish a scale for determining a quorum. As to whether provisions in the articles as to quorum apply in case of meetings held for passing a special or extraordinary resolution as defined by sect. 69 of the Act, see *infra*, introductory notes to Chap. XIII.

Sometimes the articles provide for a quorum "present in person or by proxy," and in such case proxies can be counted.

In the case of joint holders it would seem *prima facie* that any one of them may be counted in a quorum.

Quorum to be present when business commenced.

65. No business shall be transacted at any general meeting unless the quorum requisite shall be present at the commencement of the business.

Table A., clause 51, is as follows: "No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business: save as herein otherwise provided, three members personally present shall be a quorum."

In the case of a small company the quorum is not uncommonly fixed at two or three.

Chairman of general meeting.

66. The chairman of the directors shall be entitled to take the chair at every general meeting, or, if there be no such chairman, or, if at any meeting he shall not be present within fifteen minutes after the time appointed for holding such meeting, the members present shall choose another director as chairman, and, if no director be present, or, if all the directors present decline to take the chair, then the members present shall choose one of their number to be chairman.

Sometimes provision is made for a deputy chairman.
Conf. Table A., clauses 53, 54.

The duty of the chairman is to keep order and see that the business is properly conducted. *Indian Loedone Co.*, 26 Ch. D. 70. His decisions upon points of order and any incidental questions that arise are to be taken to be *prima facie* correct. *S. C.*, and see *Wandsworth Gaslight Co. v. Wright*, 22 L. T. 404. He may, by a vote of a majority, close a discussion after it has been reasonably debated. *Wall v. London & Northern Assets Corp.* (No. 1 (1898) 2 Ch. 467. **Form 251.**

67. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon such requisition as aforesaid, shall be dissolved; but in any other case it shall stand adjourned to the same day in the next week, at the same time and place, and if at such adjourned meeting a quorum is not present [those members who are present shall be a quorum, and may transact the business for which the meeting was called].

When, if quorum not present, meeting to be dissolved, and when to be adjourned

Or the words in brackets may be omitted, and the following inserted: "it shall be adjourned *sine die*." This is the form in Table A., clause 52; but the above is now frequently used, for it is found that members are often so supine that it is almost impossible to get together a quorum, although the business may be pressing.

68. Every question submitted to a meeting shall be decided, in the first instance, by a show of hands, and in the case of an equality of votes the chairman shall, both on a show of hands and at the poll, have a casting vote in addition to the vote or votes to which he may be entitled as a member.

How questions to be decided at meetings.
Casting vote.

A show of hands is the common law mode of ascertaining the sense of a meeting, and should be taken even where the articles do not expressly so provide. *Horbury Bridge Co.*, 11 C. Div. 109.

If the number of votes at a general meeting is equal, the chairman has no casting vote by common right.

In *Bidwell Brothers*, (1893) 1 Ch. 603, Vaughan Williams, J., dissenting from the decision of Kay, J., in *Caloria Engine, &c. Co.*, 52 L. T. 846, held that upon a resolution to take effect under sect. 51 of the Companies Act, 1862, a member present only by proxy had a right to vote upon a show of hands, and that the chairman was bound to ascertain as best he could the way such a member voted. This was contrary to common practice, and the decision was overruled by *Ernest v. Loma Gold Mines*, (1897) 1 Ch. 1, in which the Court of Appeal held that where proxy voting is allowed, the chairman, in ascertaining the number of votes on a show of hands, must count the hands only. This, too, is the common law rule.

"Equality of votes" means equality of valid votes, and the chairman may give a contingent or hypothetical casting vote, to come into operation if, in subsequent proceedings, it turns out that there is an equality of valid votes. *Ilford v. Buchanan*, (1901) 2 K. B. 75.

69. At any general meeting, unless a poll is demanded, in the case of a special or extraordinary resolution by at least five [or if thought fit any lesser number] persons entitled to vote, or in any

What is to be evidence of the passing of a resolution

Form 251. other case by [the chairman or by] at least [five] members, or by a member or members holding or representing by proxy or entitl to vote in respect of at least one-tenth part of the capital represented at the meeting, a declaration by the chairman that a resolution has been carried, or carried by a particular majority, or lost, or not carried by a particular majority, and an entry to that effect in the book of proceedings of the coy, shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution.

where poll not demanded.

There is a common law right to demand a poll, but the articles may exclude or restrict it. *Reg. v. The Wimbledon Local Board*, 3 Q. B. Div. 459; better reported in 30 W. R. 402, and 46 L. T. 47; *Campbell v. Maund*, 5 A. & E. 865.

Unless the articles otherwise provide, a proxy appointed to vote at a general meeting is not entitled to demand a poll (per Bacon, V.-C., *Haren Gold Co.*, 20 C. D. 151); and where the articles require the demand to be made by several holders of shares, a proxy is not a holder within the words. *Reg. v. Government Stock Co.*, 3 Q. B. D. 443.

When a poll is duly demanded it is the chairman's duty to grant it, and to fix the time and place for taking it. *Anthony v. Seger*, 1 Hagg. Cas. Con. 913.

A poll need not be demanded publicly; it is sufficient if the chairman acts on a private demand. *Phoenix Co.*, 48 L. T. 260. Nor need the demand be in writing, or, in the absence of express provision, seconded. *Re v. Mayor of Dover*, (1903) 1 K. B. 668.

The chairman's declaration is not "conclusive" where there is no quorum: so if the declaration states that the resolution was passed, but shows on the face of it that the resolution was carried by less than the requisite majority will not be conclusive. *Caratal (New) Mines*, (1902) 2 Ch. 498; *Clark & Co.*, (1911) 8 C. 243, Ct. of Sess.

Minutes of proceedings at meetings are not conclusive as to the regularity of the proceedings. *Betts & Co. v. Macnaghten*, (1910) 1 Ch. 430.

Where the resolution is to take effect as a special or extraordinary resolution under sect. 69 of the Act the declaration of the chairman is conclusive, unless at least three persons entitled to vote demand a poll, or such other number not exceeding five as the articles may fix, or the section so provides.

Poll.

70. If a poll is demanded as aforesaid, it shall be taken in such manner and at such time and place as the chairman of the meeting directs [and either at once, or after an interval or adjournment, or otherwise], and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded. [The demand of a poll may be withdrawn.]

A poll is an appeal to the whole constituency, and "is taken in order to ascertain the sense of the general body of persons qualified to vote, and to give others beside those who are present when the poll is demanded power to come in and exercise their right of voting, and in order to ascertain whether the voters have the qualification which is required in order to entitle them to exercise the privilege of voting." Per Cotton, L. J., *Reg. v. Wimbledon Local Board*, 3 Q. B. D. 459.

A poll should be demanded forthwith after the show of hands. *Campbell v. Maund*, 5 A. & E. 865; *The Queen v. Thomas*, 11 Q. B. D. 282. **Form 251.**

When a poll is duly demanded the show of hands goes for nothing, and the decision of the meeting depends on the result of the poll (*Anthony v. Seger*, 1 Hagg. Cas. Con. 913; *Queen v. Cooper*, L. R. 5 Q. B. 457); in contemplation of law the meeting continues until the poll has been taken. *Reg. v. Wimbledon Local Board*, *supra*. Hence, in the absence of express provision as above, a poll once demanded cannot be withdrawn. *Rex v. Mayor of Dover*, *supra*. In the absence of any provision in the articles to the contrary, the chairman is the person to grant the poll. *Reg. v. Hedges*, 12 A. & E. 159.

A poll may, it seems, without special provision in that behalf as above, be taken at the meeting at which it is demanded. Per Kay, J., in *Chillington Iron Co.*, 29 C. D. 159, following a dictum of Denman, C. J., in *Reg. v. D'Oyley*, 12 Ad. & El. 139. See, however, dicta to the contrary in *Horbury Bridge Co.*, 11 C. Div. 109.

If the articles show that a poll is not to be taken at once they must, of course, be observed. *British Share Co.*, 6 L. T. 215.

A voter may vote at the poll even though not present when the poll was demanded. *Campbell v. Maund*, *ubi supra*.

To exclude a voter may invalidate the poll. *Reg. v. Lambeth*, 8 Ad. & El. 356.

Upon taking a poll the right to vote and the number of shares is to be determined, if any question arises, by a reference to the register of members. *Pender v. Lushington*, 6 Ch. D. 70. The usual mode of taking a poll is to require every person who desires to vote to sign a paper headed, "For," or "Against" the motion. The votes of each member are then inserted, and, these having been added up, the chairman declares the result. There is no power at a poll, in the absence of express provision in the articles, to take it by voting papers. *Macmillan v. Le Roi Mining Co.*, (1906) 1 Ch. 331.

If the poll is not completed on the day on which it is commenced it must be continued subsequently, for the chairman is not entitled to close the poll whilst voters are coming in (*Reg. v. St. Pancras*, 11 Ad. & E. 15; *Reg. v. Graham*, 9 W. R. 738); but the chairman is not bound to wait for hours to see whether voters will come in. *Reg. v. Lambeth*, *ubi supra*. Nevertheless, the chairman may direct the continuance of the poll at a subsequent period in order to give an opportunity to other voters to come in.

The poll is to be regarded as part of the proceedings of the meeting. *Reg. v. Wimbledon Local Board*, *supra*.

To appoint a subsequent day for the taking or completion of the poll is not an adjournment of the meeting, although it in effect continues the meeting (*Reg. v. Chester*, 1 Ad. & E. 342; *Reg. v. Wimbledon*, *ubi supra*); but it is usual to adjourn the meeting to hear the result. Sometimes there is no formal adjournment, but it is arranged that notice of the result shall be given, and to this there would seem to be no legal objection.

As to a scrutiny: It is usual to appoint scrutineers to compute the votes at a poll and report to the chairman, but the regulations rarely provide for a scrutiny. The meeting can appoint scrutineers. *Wandsworth Co. v. Wright*, 22 L. T. 404. Very commonly they are appointed by the chairman with the assent of the meeting. Sometimes the chairman acts as scrutineer.

It is for the chairman to decide as to the validity of the proxies, and his decision will stand unless it is proved to the Court to be wrong. *Indian Zeddone Co.*, 26 C. D. 70.

A referendum by polling papers cannot, unless the articles so provide, be taken in lieu of a poll. *Macmillan v. Le Roi Mining Co.*, (1906) 1 Ch. 331.

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Power to adjourn general meeting.

71. The chairman of a general meeting may, with the consent of the meeting, adjourn the same from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

At common law it seems that the power to adjourn rests with the chairman *Reg. v. D'Oyley*, 12 Ad. & E. 158.

The chairman is, by clause 60 (*q. v.*), given a discretion, and he is not bound to adjourn the meeting. *Salisbury, &c. Co. v. Hathorn*, (1897) A. C. 268.

If the chairman improperly purports to adjourn or stop the meeting and leaves the chair, the meeting can elect some other chairman and proceed. *National Dwellings Society v. Sykes*, (1894) 3 Ch. 159.

But if the meeting is duly adjourned or dissolved, members who remain behind cannot continue the business. *Rex v. Gaboriau*, 11 East. 77. It would seem that a meeting may be adjourned to a day to be fixed by subsequent notice. *Reg. v. Mayor, &c. of London*, 9 B. & C. 1. But unless the regulations otherwise provide, no fresh notice of an adjourned meeting is necessary (*see supra*, clause 60; and *Wells v. Murray*, 4 Ex. 843), an adjourned meeting being a continuance of the original meeting (*Souding v. Roant*, 3 H. L. C. 418).

Clause 55 of Table A. empowers a chairman, with the consent of the meeting, to adjourn, and obliges him, if so directed by the meeting, to adjourn. This is considered objectionable.

In what cases poll taken without adjournment.

72. Any poll duly demanded on the election of a chairman of a meeting, or on any question of adjournment, shall be taken at the meeting, and without adjournment.

It has been questioned whether, in the absence of express power, a poll can be demanded on a question of adjournment. *Mardougal v. Gardiner*, 1 C. Div. 13. However, a clause as above is frequently inserted, and seems expedient. Not uncommonly it is provided that no poll shall be demanded in such cases, but no good reason can be suggested why proxies should be deprived of the power to vote on these matters. If a poll cannot be demanded, a few members who happen to be personally present may be able to effect an adjournment, say, for three months, though at a poll there would be a vast majority against adjournment. Besides, in the case of a meeting to confirm a special resolution very serious difficulties might arise.

Business may proceed notwithstanding demand of poll.

73. The demand of a poll shall not prevent the continuance of a meeting for the transaction of any business other than the question on which a poll has been demanded.

VOTES OF MEMBERS.

Votes of members.

74. On a show of hands every member present in person shall have one vote, and upon a poll every member present in person or by proxy shall have one vote for every share held by him. [Where a

corporation being a member is present by a proxy who is not a member, such proxy shall be entitled to vote for such corporation on a show of hands.] **Form 251.**

The right of voting requires careful consideration. Sometimes a scale is adopted, e.g., by adding in the above clause the words "up to ten, and to an additional vote for every ten shares beyond the first ten up to one hundred, and to an additional vote for every one hundred shares beyond the first hundred."

Sometimes one class of shares is given no vote, e.g.: "Every member holding ordinary shares shall have one vote for every ordinary share, &c. The preference shares shall not confer on the holder the right to attend or to vote at any general meeting, or to receive any notice thereof." The following is another form sometimes used:—"But the said preference shares shall not confer on the holders the right to attend or vote, either in person or by proxy, at any general meeting, or to have notice of such meeting, unless the meeting is convened for reducing the capital, or winding up or sanctioning a sale of the undertaking, or altering the regulations of the company, or where the proposition to be submitted to the meeting directly affects the rights and privileges of the holders, or the dividend thereon is in arrear for more than three months." And see Form 334, *infra*.

Sometimes it is declared that no member holding less than [100%] capital shall have a vote.

And where a large proportion of the capital is to be issued to a vendor, his rights of voting in respect thereof are sometimes limited. These are matters for the consideration of the promoters.

There is nothing in the Act to invalidate an article negating the right of any specified class of members to vote. On the contrary, sect. 67 (iv) provides that "In default of and subject to any regulations in the articles, every member shall have one vote." This is a recognition that voting rights depend on the articles. Table A, clause 63, for instance, denies the right of voting to a member in default in payment of a call. Hence, it is for the articles to determine what shall be the rights of voting, and whether any particular shares shall or shall not confer votes. Moreover, there is nothing in the Act to prevent the articles from conferring the right of voting on non-members, e.g., debenture holders, and the Court has frequently sanctioned such a scheme of government; but, of course, votes by non-members cannot be taken into account for the purposes of a special or extraordinary resolution, for the words of sect. 69 under it necessary to count in such cases the votes only of members.

In like manner there is nothing in the Act to invalidate an article which excludes a class of members from attending general meetings in person or by proxy, and it is quite common to so provide where the class is not entitled to vote.

The right to vote is determined by the register of members. *Pender v. Lushington*, 6 C. D. 80.

A member is (subject to agreement) entitled to vote as he likes (*East Pant, &c. Co. v. Merryweather*, 2 H. & M. 254; *London & Merc. Dir. Co.*, 1 Eq. 277; *Pender v. Lushington*, 6 C. D. 70; *N. W. Transportation Co. v. Beatty*, 12 App. Cas. 589; *Burland v. Earle*, (1902) A. C. 94. For a shareholder's vote is a right of property, which he may exercise as he pleases, even though he uses it in his private interests, and against the interests of the company, but a majority will not be allowed to obtain for themselves an unfair advantage at the expense of the minority. *Menier v. Hooper's Telegraph Works*, 9 Ch. 350; see also *Atwood v. Merryweather*, 5 Eq. 464, n.; *Mason v. Harris*, 11 C. Div.

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97; *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56; *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656; *Punt v. Symons & Co.*, (1900) 1 Ch. 656. The right of voting given by articles may be given up or controlled by special agreement. *Greenwell v. Porter*, (1902) 1 Ch. 530.

A member is entitled to transfer his shares to nominees, so as to secure to himself the maximum of voting power, and the directors must register the transfers, unless the articles give them a power to decline, which is applicable in such case. *Stranton Iron Co.*, 16 Eq. 550; *Pender v. Lushington*, 6 Ch. D 70; see further, *supra*, p. 686.

It is seldom, however, deemed necessary expressly to restrict the right of transfer in this respect. Clause 82a, *infra*, is sometimes inserted, and in all ordinary cases prevents what was done in the case above mentioned. But though clause 82a may be found useful in this respect, it is open to objection on the score of inconvenience and defeating the voting right of new members coming into the company *bona fide*.

If the articles so provide, the chairman's decision as to the validity of a vote is, in the absence of fraud, conclusive. *Wall v. London and Northern Assets Corp.*, (1898) 2 Ch. 489.

A provision in articles that no objection shall be taken to any vote except at the meeting at which it is tendered, or any adjournment thereof, is binding, and votes not thus disallowed cannot afterwards be challenged. *Wall v. London and Northern Assets Corp.* (No. 2), (1899) 1 Ch. 550. But such a provision is unusual.

By the Collecting Societies and Industrial Assurance Companies Act, 1896, restrictions are placed on the voting by "collectors" who are members of an industrial assurance company.

As to a company voting by its officials or any other representative, see sect. 68 of the Act of 1908.

Votes in
respect of
shares of
deceased and
bankrupt
members.

75 Any person entitled under the transmission clause [*supra* clause 38] to transfer any shares may vote at any general meeting in respect thereof in the same manner as if he were the registered holder of such shares, provided that forty-eight hours at least before the time of holding the meeting or adjourned meeting, as the case may be, at which he proposes to vote he shall satisfy the directors of his right to transfer such shares, or the directors shall have previously admitted his right to vote at such meeting in respect thereof.

Joint holders.

76. Where there are joint registered holders of any share, any one of such persons may vote at any meeting, either personally or by proxy, in respect of such share as if he were solely entitled thereto, and if more than one of such joint holders be present at any meeting, personally or by proxy, that one of the said persons so present whose name stands first on the register in respect of such share shall alone be entitled to vote in respect thereof [or, those so present shall respectively be entitled to an equal part of the votes conferred by the joint holding]. Several executors or administrators of a deceased member in whose name any share stands shall for the purposes of this clause be deemed joint holders thereof.

The above clause is common, but the following is, perhaps, more usual:—

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"76. If there be joint registered holders of any shares, the member whose name stands first on the register, and no other, shall be entitled to vote in respect of such shares; but the other or others of the joint holders shall be entitled to be present at the general meeting."

Sometimes the words following are inserted in clause 76 before the word "several": "upon a show of hands; but upon a poll each of them shall be entitled, as nearly as may be, to a rateable proportion of the total number of votes conferred by the joint holding."

In the absence of the concluding paragraph of clause 76, it seems that the executors or administrators, if they want to vote, must all vote together in person or by proxy.

77. A vote may be given either personally or by proxy.

Proxies permitted

There appears to be no right at common law to vote by proxy (*Harben v. Phillips*, 23 C. D. 35); the right must be expressly given by the articles. Such a mode of voting being the only way of ascertaining the wishes of the whole body of shareholders, many of whom may reside at a distance, the directors acting *bona fide* in the interests of the company may properly send out stamped proxy forms at the expense of the company. *Peel v. L. & N. W. Ry. Co.*, (1907) 1 Ch. 5, overruling *Stoddart v. Glenconner*, 33 Ch. D. 528.

As to proxies voting on a show of hands, see clause 68, *supra*.

78. The instrument appointing a proxy shall be in writing, under the hand of the appointor or of his attorney, or, if such appointor is a corporation, under its common seal [or the hand of its attorney]. No person shall be appointed a proxy who is not a member of the company and qualified to vote, save that a corporation being a member of the company may appoint as its proxy one of its officers, though not a member of the company.

Instrument appointing proxy to be in writing.

Suppose the words in brackets are absent, must the proxy paper be under the appointor's own hand? It would seem that it must. *Wilson v. Wallcut*, 5 Ex. D. 155.

The clause sometimes contains words requiring attestation, but they are better omitted, for attestation may be forgotten, and in that case the instrument is not available. *Harben v. Phillips*, 23 C. Div. 14. There would not appear to be any legal objection to a proxy in blank. *Ex parte Lancaster*, 5 C. D. 911; *Solgrave v. Bryden*, (1907) 1 Ch. 368; *Ernest v. Loma Gold Mines*, (1897) 1 Ch. 1.

The appointor cannot attest the appointee's signature (*Ex parte Cullen*, (1891) 2 Q. B. 151) or *vice versa*. *Re Parrott*, 61 L. T. 801.

Where A. appoints B. his proxy for a particular meeting, and afterwards appoints C. for the same meeting, does the second revoke the first? It would seem that it does. *Ex parte Mure*, 2 Cox, 67; *Re Lucas*, 17 Jur. 1186.

Suppose the appointor is himself present at a meeting, it would seem that his presence does not avoid the instrument of proxy, but if he votes before his proxy has voted for him, it is clear that he has impliedly revoked the proxy. *Knight v. Bulkley*, 5 Jur. (N. S.) 817; 33 L. T. 7; Story on Agency, s. 475.

Under the latter part of the clause it has been held that the instrument is not invalid if the person named was not a member when the proxy was signed pro-

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vided he was a member when it was lodged and acted on, and that under such words it is sufficient if the person appointed is sufficiently described although not named in the instrument. *Bombay Burmah Trading Corp. v. Darahji Curnetji Shroff*, (1905) A. C. 213 (P. C.).

As to a company's mode of voting, see sect. 69 of the Act of 1908.

and to be
deposited
at office.

79. The instrument appointing a proxy [and the power of attorney, if any, under which it is signed] shall be deposited at the office not less than forty-eight hours before the time for holding the meeting or adjourned meeting, as the case may be, at which the person named in such instrument proposes to vote [but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution].

Sometimes the words within brackets in the above clause are omitted, and the following substituted: "and no proxy shall be entitled to vote except at the particular meeting mentioned in the instrument, or any adjournment thereof, and upon every poll that may take place at or in consequence of any such meeting or adjournment." But there seems no sufficient reason why a member should not be enabled to appoint a proxy for a specified period, *e.g.*, where he is going abroad. It was very proper to insert such a provision when the law would not permit the appointment of a proxy, except in regard to a specified meeting. See *infra*, note to clause 81.

Very commonly such a clause does not contain the words "or adjourned meeting as the case may be," and the question sometimes arises whether in the absence of those words a proxy is incapable of use at an adjourned meeting unless it was deposited forty-eight hours before the original meeting. The words are capable of that construction; for an adjourned meeting is to be considered at any rate for some purposes a continuation of the original meeting [*supra*, note to clause 60]; but it is also capable of the construction that a proxy deposited forty-eight hours before the adjourned meeting is available thereat.

Now the object of the clause is to give forty-eight hours for the examination of the proxy papers, and that object as regards an adjourned meeting would be attained by admitting proxies filed forty-eight hours before such adjourned meeting. Why should a man who attends in person at the original meeting be unable to attend by proxy at the adjourned meeting? for that is what it comes to. Is such a man to be disfranchised seeing that the words are capable of another and more reasonable construction?

It is conceived that the inclination of the Court would be to construe the clause so as not to restrict the use of proxies.

If it is desired to exclude the vote, the words following should be added to the clause: "and no proxy shall be used at an adjourned meeting which could not have been used at the original meeting."

When vote by
proxy valid,
though autho-
rity revoked.

[79a. A vote given in accordance with the terms of an instrument of proxy shall be valid notwithstanding the previous death of the principal, or revocation of the proxy, or transfer of the share in respect of which the vote is given, provided no intimation in writing of the death, revocation, or transfer shall have been received at the office before the meeting.]

This is occasionally inserted and may be useful.

80 Holders of share warrants shall not be entitled to vote by proxy in respect of the shares or stock included in such warrants. **Form 251.**

81 Every instrument of proxy, whether for a specified meeting or otherwise, shall, as nearly as circumstances will admit, be in the form or to the effect following:—

Holders of
share war-
rants not to
vote by proxy.
Form of
proxy.

The - Coy, Limtd. I, the undersigned, - , of - , in the
count of - , being a member of the - Coy, Limtd. hereby appoint
of - or failing him, - , of - , or failing him, - , of
as my proxy, to vote for me and on my behalf at the ordinary
or extraordinary, as the case may be, general meeting of the coy to
be held on the - day of - , and at any adjournment thereof.

As witness my hand this - day of - .

Signed by the sd - in the presence of - . *Omit if no witness
intended*

Conf. Table A., clause 67.

By virtue of 7 & 8 Vict. c. 21, s. 6, and 19 & 20 Vict. c. 81, s. 2, a proxy could only be appointed for a specified meeting, but both those Acts were repealed by the Inland Revenue Repeal Act, 1870 (33 & 34 Vict. c. 99). By the Stamp Act, 1891, a letter or power of attorney or commission, factory or mandate, or other instrument in the nature thereof, for the sole purpose of appointing or authorizing a proxy to vote at any one meeting at which votes may be given by proxy, whether the number of persons named in such instrument be one or more, is charged with the duty of one penny, and any other instrument appointing a proxy is liable to a duty of 10s. Such an instrument, if executed abroad, may be stamped within thirty days after its arrival in this country. 54 & 55 Vict. c. 39, s. 15 (2). And, *namely*, it may be acted on before it is stamped. *English, Scottish and Australian Bank*, (1893) 3 Ch. 385.

Hence, a proxy as above only requires a penny stamp. If the proxy is to be for a specified period, e.g., "at any general meeting of the company that may be held before the - day of -," or for several specified meetings, it requires a 10s. stamp. It is often found convenient to name several in the alternative as above, lest one should be absent.

Sect. 80 of the Stamp Act, 1891, provides as follows:

- (1.) Every letter or power of attorney for the purpose of appointing a proxy to vote at a meeting, and every voting paper, hereby respectively charged with the duty of one penny, is to specify the date upon which the meeting at which it is intended to be used is to be held, and is to be available only at the meeting so specified, or any adjournment thereof. [This paragraph does not apply where a 10s. duty is paid as above.]
- (2.) The duty of one penny may be denoted by an adhesive stamp which is to be cancelled by the person by whom the instrument is executed, and a letter or power of attorney, charged with the duty of one penny, is not to be stamped after the execution thereof by any person. [The cancellation may now be effected without writing the name and date across it. *McAleen v. Sir Alfred Hickman Steamship Co.*, 18 T. L. R. 650.]
- (3.) Every person who makes, or executes, or votes, or attempts to vote, under or by means of any such letter or power of attorney or voting paper, not being duly stamped, shall incur a fine of fifty pounds; and every vote given or tendered under the authority or by means

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of any such letter or power of attorney or voting paper, not being duly stamped, shall be void.

When proxies are sent out, it will be found expedient to have them impressed with the requisite stamp: for even where precise directions as to the proper mode of cancelling an adhesive stamp are given, it is generally found that a good many shareholders will make some mistake. It would seem that a proxy bearing a stamp not duly cancelled ought not to be counted, unless it is executed abroad. See *supra*.

To cancel an adhesive stamp the signatory should place his initials and the date on it, or otherwise mark it so as to be incapable of subsequent use. *McMullen (Sir Alfred Hickman) Steamship, Limited*, 71 L. J. Ch. 755; see *supra*, p. 337.

In *Studdert v. Grosvenor*, 33 C. D. 528, Kay, J., held that it was *ultra vires* for directors to expend the money of the company in sending out proxy papers with the names of the directors filled in as proxies; but this decision was overruled in *Peel v. L. & N. W. Rail. Co.*, (1907) 1 Ch. 5, on the ground that such expenditure is in the interests of the company by ascertaining the wishes of the shareholders; and see *Lindley on Companies*, 6th ed. 430.

"To the effect." Substituting, for instance, the words "a proprietor" for "a member" would not be objectionable. Per Kay, J., *Indian Zoedona Co.*, 26 C. D. 78.

When a proxy is to be in a specified form or "to the like effect," requisite modifications may be made to suit the circumstances. *Queen v. General Council of Medicine*, (1897) 9 Q. B. 203.

A proxy signed in blank as to the name of the appointee, or as to the date of the meeting, and delivered with authority to fill up the blank, is not open to objection if, when deposited with the company, the blank has been duly filled up. *Re Lancaster*, 5 C. Div. 911; *Nadgrove v. Bryden*, (1907) 1 Ch. 364, and see *Whitchour*, 42 L. T. 385; *Ernest v. Loma Gold Mines*, (1897) 1 Ch. 1. It is not a deed, and there is therefore no objection to the blank being filled up by the agent of the appointor, even though appointed by parol. *Cartier v. White*, 25 C. D. 666. The instrument in such circumstances is not complete until it is filled up, and when filled up the only question is whether it is duly stamped as required in its then condition. *Gatey v. Fry*, 2 Ex. Div. 265; *Royal Bank v. Tottenham*, (1894) 2 Q. B. 715.

Moreover, the delivery of an instrument, thus signed in blank, impliedly authorizes the person to whom it is given to fill in his own name. *Re T. Cotton Co.*, 17 Eq. 273; *Re Tees Bottling Co.*, 33 L. T. 834; *France v. A.*, 26 C. D. 257; as to which, see *Herdman v. Wheeler*, (1902) 1 K. B. 361, 368.

No member entitled to vote, &c., while call due to company.

82. No member shall be entitled to be present, or to vote on any question, either personally or by proxy, or as proxy for another member, at any general meeting, or upon a poll, or be reckoned in a quorum, whilst any call or other sum shall be due and payable to the company in respect of any of the shares of such member.

The disability attaches to a buyer. Thus, after forfeiture of shares and resale to another person, that person cannot vote while the original holder owes calls. *Randt Gold Mining Co. v. Wainwright*, (1901) 1 Ch. 184.

See *Cambrian, &c. Co. v. W. N.* (1875) 6. As to the invalidity of a meeting failing a quorum, the following clause is not uncommon:—

82a. No member shall be entitled to be present or to vote on any question either personally or by proxy, or as proxy for another member, at any general

meeting, or upon a poll, or be reckoned in a quorum, whilst any call or other sum shall be due and payable to the company in respect of any of the shares of such member; and no member shall be entitled to be present or to vote in respect of any share that he has acquired by transfer at any meeting held after the expiration of three calendar months from the registration of the company, unless he has been possessed of the share in respect of which he claims to vote for at least three months previously to the time fixed for holding the meeting at which he proposes to vote, or (if such meeting be an adjourned meeting) to the time originally fixed for holding the same.

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82b Any resolution passed by the directors, notice whereof shall be given to the members in the manner in which notices are hitherto directed to be given, and which shall, within one month after it shall have been so passed, be ratified and confirmed in writing by members entitled at a poll to three-fifths of the votes, shall be as valid and effectual as a resolution of a general meeting; but this clause shall not apply to a resolution for winding up the company, or to a resolution passed in respect of any matter which by the statutes or these presents ought to be dealt with by special or extraordinary resolution.

Resolution in writing of directors, in certain cases, to be equivalent to resolution of general meeting.

This clause is now commonly inserted, and is found very useful. It is sometimes next to impossible to get a general meeting together, and meantime business is obliged to be left in abeyance. But where quotation is desired it had better be omitted, as the Stock Exchange Committee sometimes object to it, although it has in numerous cases been passed.

DIRECTORS.

The business of a joint stock company is usually carried on by a body or "board," as it is generally called, of directors. The office of a director is one of honour and responsibility, and it was worthily vindicated from the unfair aspersions sometimes cast upon it in a memorable speech by the Rt. Hon. A. J. Balfour when Prime Minister in the House of Commons in 1903: "It would appear," he said, "from the tone of the debate that there is supposed to be something disgraceful in being the director of a public company. (Opposition cries of 'No.') I am not in the least exaggerating the tone of the comments of the honourable gentleman who moved the amendment. The honourable Member talked of a Minister being 'guilty' of holding a directorship. The Minister is still more guilty if he holds two or three directorships, and if he holds four he is a downright criminal. Talk as you will about this motion being made in the interest of commercial purity, its effect will be precisely the opposite. To spread abroad the idea that a man is derogating from his position as a man of unspotted honour if he gives his labours as a director of public companies is the worst thing you can do in the interest of this great commercial country. (Hear, hear.) No one has thought it worth while, I am sorry to say, to come to become a director, and I can assure you that I should regard such a request from an honourable company as a very high compliment indeed. (Hear, hear.) I strongly object, in the public interest, to the notion that a man is doing something he ought not to do, something of which he ought to be a little ashamed, if he accepts the responsibility of aiding one of those great public corporations who carry on so much of the business upon which, re-

They are special agents of company

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member, the prosperity of the country depends. (Hear, hear.) I cannot imagine a more honourable use of such brains and energy as Providence may have given any citizen of this country than that he should expend them in such a good work." —*The Times*.

"Director" under the Companies (Consolidation) Act, 1906, s. 266, includes "any person occupying the position of director by whatever name called."

A director is not bound to bring any special qualifications to his office, but if he is acquainted with the particular business carried on by the company he must give the company the advantage of his knowledge when transacting the company's business. *Reedman Woods' Statutes*, No. 1, 1911, 1 Ch. 125.

The directors are agents of the company (*Perghman v. Widom*, 2 Ch. 77); they are special, not general, agents; that is to say, they have such powers only as are vested in them by the memorandum and articles, and in dealing with the company is presumed to have read those documents, and accordingly to be cognizant of the extent of, and the restrictions on, the powers of the directors. *Ernest v. Nicholls*, 6 H. L. C. 419; *Moham v. East Ang. Ford Co.*, L. R. 7 H. L. 406; *Chaplin v. Henrick Building Soc.*, 6 Q. B. D. 606; and see *Introductory Chapter*. In most cases the powers of the directors are very wide. See clause 113, *infra*, p. 746. But even where the directors exceed their powers or infringe the restrictions imposed on them, the company may be bound; for an outsider dealing with the company is only bound to see that the transaction is apparently regular and consistent with the articles.

Royal British Bank v. Tapscott, 6 Ell. & B. 327; *Bohmer v. I. Co., ubi supra*. He need not go into internal matters, e.g., ascertain that a particular resolution has been passed, that a particular meeting has been duly held, or that particular formalities have been complied with; he is entitled to presume *omnia rite acta*. *Turner v. London Bank of Indemnity*, 2 App. Cas. 366; *Davies v. R. R. & Co.*, 1894, 34 Ch. 678; *Carr v. Carr*, 1895, 1 Ch. 629; *Rudra, & Co.*, (1895) 1 Ch. 629; *Hammersmith Loan Co.*, 1896, 2 Ch. 743; *Broadwater v. Rowatt's Wharf, Ltd.*, 1896, 2 Ch. 93, *supra*, pp. 79, 81; *Re Canada Insurance Co.*, L. R. 5 Ch. 286; *Moham v. East Ang. Ford Co.*, *supra*; but if a director knows of the irregularity the case is different. *Howard v. Paton Tea Co.*, 38 Ch. D. 156; *Turn. Mod. L.*, 7, 283.

Nor if directors have power to borrow money on its behalf is the lender bound to ascertain that the money is required for the purposes of the company. *Daniel Payne & Co.*, (1904) 2 Ch. 608; *Harker v. Eastern Counties Rail. Co.*, 5 H. L. C. 331; *Re Marseilles, &c. Rail. Co.*, 7 Ch. 161.

But directors who act in excess of their authority, e.g., borrow in excess of the borrowing limit, may be personally liable on the ground that they warrant their authority. *Colten v. Wright* (1857), 8 Ell. & Bl. 647; *Weeks v. Propert*, L. R. 8 C. P. 427; *Fisbank's Executors v. Humphreys*, 18 Q. B. D. 54; *Oliver v. Bank of England*, (1901) 1 Ch. 810.

A director is not in the position of a managing partner, with individual powers as such. *Ridley v. Plymouth Co.*, 2 Ex. 711; 17 L. J. Ex. 252; *R. A. Cunningham*, 58 L. T. 16. He is only one of a body of directors, and alone has no power, except such as is delegated by them to him, or vested in him individually by the articles. *Ernest v. Nicholls, ubi supra*. "Whatever authority is given by shareholders to directors is given to them as a body, and not to each of them individually." Per Turner, L. J., *Nicol's case*, 3 D. & J. 440 (1859); and see *D'Arey v. The Tamar Rail. Co.*, L. R. 2 Ex. 158; *Re Portuguese Consolidated Copper Mines*, 42 Ch. D. 167. The company is entitled to their collective wisdom in meeting assembled (*Imperial Co. v. Colman*, 6 Ch. 559) unless the articles otherwise provide.

The director has a separate existence and entity from that of the company,

but their
wrong acts
may bind
company

Comparison
with manag-
ing partners

and although largely interested in it as a shareholder, is not bound by oral promises to answer for its debt, default or misarranging, the company being "another" within the meaning of sect. 4 of the Statute of Frauds. *Harburg v. Biber Comb Co. v. Martin*, (1902) 1 K. B. 778.

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As directors are, in the eye of the law, agents of the company for which they are the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors. Hence (1) where directors make a contract in the name of or purporting to bind the company, the company - the principal - which is liable on it, not the directors (*Green v. Wilson*, 2 Ch. 77; *Gadd v. Houghton*, 1 Ex. D. 357); they are personally liable unless it appears that they undertook personal liability (*v. Melrose*, 3 H. & N. 177; *McCallan v. Gilpin*, 5 Q. B. D. 390; *Devlin v. Ashworth*, 21 T. L. R. 510), e.g., by contracting in their own name, or by contracting for the company without using the word "limited" as part of the name. See sect. 63 of the Act of 1908. (2) Where directors contract in their own names, but really on behalf of the company, the other party to the contract can, on discovering that the company is the real principal, sue the company on the contract. (3) Where directors enter into a contract which is within the power of the company, but is beyond the powers of the directors, the

Their acts generally bind company only, and not themselves, except in certain cases.

Law of principal and agent obtains.

like any other principal, can ratify the contract. *Grant v. United Railways*, 30 C. D. 135; *Lucas v. Union Bank of Australia*, Cas. 300; *London and New York Investment Corp.*, (1895) 2 Ch.

When directors enter into a contract on behalf of a company they must state that they are what they purport to be, that is, the company's agents in fact, and must answer for any damage which directly results from con- being given to the representation that they have authority. *Colten v. E. & B.* 301; 8 E. & B. 447, 657; *Fishback's Executors v. Ham*, 18 Q. B. D. 54 and see *supra*. And this, although the misrepresentation innocent. *Starkey v. Bank of England*, (1903) A. C. 114, 116; *Hall v. Bank of England*, (1902) 1 Ch. 610. The rule in *Royal British*, *supra*, p. 79, goes far, however, to render the doctrine of warranty of comparatively small importance.

Directors are not only agents, but they are in some sense and to some extent in the position of trustees. No doubt their position differs considerably from that of the trustees of a marriage settlement or will, and as we pointed out the strict rules applicable to such trustees do not apply in all respects to directors. The difference between an agent and a trustee is well explained by James L. J. in *Smith v. Anderson*, 15 Ch. D. 27.

Directors how far trustees

Nevertheless it is impossible now to dispute the proposition that they are in the same sense trustees that proposition having been established by a long series of cases.

Thus, in *Charitable Corporation v. Sutton* (1742), 2 Atk. 400, Lord Hardwicke, L. C., held that committeemen or directors of a chartered corporation who had misapplied its funds and committed breaches of its by-laws were liable as trustees for "breach of trust." So, in *York & N. Ry. Co. v. Hudson* (1853), 16 Beav. 185, directors who had improperly dealt with funds of the company were held liable as trustees.

So again, in *Ferguson v. Wilson* (1866), 2 Ch. 90, Lord Cairns said that directors being in the position of trustees, are, of course, liable in this court.

This twofold character of directors is, perhaps, best expressed in Lord Cairns's words in *G. E. Ry. Co. v. Turner* (1872), 8 Ch. 149, where he said:

Form 251. (p. 152): "The directors are the more trustees or agents of the company trustees of the company's money and property; agents in the transactions which they enter into on behalf of the company." And this is the way in which it is put by Sir George Jessel in the case of *Forest & Dean, &c. Co.* (1879), 10 C. D. 450: "Directors," said that learned judge, "are called trustees. They are, no doubt, trustees of assets which have come into their hands, or which are under their control." "Commercial trustees" is the title he gives them in the same case. And see *York and North Midland Rail. Co. v. Hudson*, *supra*; *Parker v. McKenna*, 10 Ch. 96. Farwell, J., expresses himself to the same effect in *Young v. Naval, &c. Society of South Africa*, (1905) 1 K. B. 687, 693. "Directors," he says, "being both agents of and trustees for the company, are entitled to be indemnified by the company against all losses and expenses properly sustained and incurred by them in the due performance of their office."

So in *Joint Stock Discount Co. v. Brown*, 8 Eq. 381, and many subsequent cases. *Flitcroft's case*, 21 Ch. D. 529; *Pelly's case*, *ib.* 492; *Faure Electr. Co.*, 40 Ch. D. 150; *Oxford Benefit Society*, 35 Ch. D. 502; *Leeds Estate Co. v. Shepherd*, 36 Ch. D. 787; *Masonic & General Life Co. v. Sharpe*, (1892) 1 Ch. 154, where directors had misapplied funds of the company, it was declared that they had "committed a breach of trust and were jointly and separately liable" accordingly. It was as trustees that directors were held, before the Trustee Act, 1888, disentitled to claim the benefit of the Statutes of Limitation (see *Flitcroft's case*, 21 C. D. 519); and it is as trustees that they have since that Act been held entitled to the benefit of the qualified provisions for limitation of actions contained in sect. 8 of the Act of 1888. This was decided in *Lords Motment Co.*, (1894) 1 Ch. 616, where Lindley, L. J., said: "Although directors are not, properly speaking, trustees, yet they have always been considered and treated as trustees of money which comes to their hands, or which is actually under their control, and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied, upon the same footing as if they were trustees."

"But this fiduciary position of directors does not extend to them as shareholders in their individual capacity; there is nothing, for instance, to prevent directors purchasing on their own account shares in the company from the executors of a deceased shareholder. *Perceval v. Wright*, (1902) 2 Ch. 421, *conf.* *Barland v. Earle*, (1902) A. C. 83."

And where a company had agreed to manage certain property of a landowner for a share in the profits of the estate, it was held that there was nothing in the doctrine of fiduciary relationship to prevent the company employing and paying one of its directors, who was an estate agent, to act professionally, and another director, who was an auctioneer, to sell. *Both v. Standard Land Co.*, (1911) 1 Ch. 618.

As throwing some light on the process of reasoning by which directors are regarded as trustees, it is to be borne in mind that the funds of a company are by statute made applicable only to specific purposes, and are in that way impressed with the qualities of a trust fund. See *Ement v. Croxwell* (1866) 2 D. F. & J. 175, per Knight-Bruce and Turner, L. JJ.; and *Great Eastern Rail. Co. v. Turner*, 8 Ch. 149, per Lord Selborne; and *Jehbun v. Rich*, L. R. 7 H. L. 633, per Lord Hatherley; and *Russell v. Wakefield Waterworks*, 20 Eq. 474, per Jessel, M. R.; *Morham v. Grant*, (1900) 1 Q. B. 88. Thus they may be followed into the hands of any alienee who takes with notice of the breach of trust.

Frauds and
torts of
directors.

Any director who is a party to a fraud, such as the issuing of a fraudulent prospectus, or to the commission of any tort, is personally liable. This is on the principle that whoever commits a wrong is liable for it himself, and none

the less so that he was acting as an agent or servant on behalf and for the benefit of another. *Collins v. Thompson's Trustees*, 4 Macq. 424, 432; Pollock on Torts, 7th ed. 190. So, too, if, by the order of the directors, a trespass is committed, a patent infringed, or other wrongful act committed, the directors who are parties to it are personally liable.

Again, if a director neglects to comply with the various requirements of the Companies Act, 1908, or brings himself within sect. 84 of the Act (replacing the provisions of the Directors' Liability Act, 1890), he is, or may be, liable in damages personally.

The Act imposes a number of penalties on the directors for breach of its provisions. See, for example, sect. 9 (default in relation to alterations of objects); sect. 18 (default in supplying copies of memorandum or articles); sect. 25 (default in keeping register of members); sect. 26 (default in making annual returns); sect. 30 (default in allowing inspection of register); sect. 41 (default as to sub-division of shares); sect. 44 (default in giving notice of increase of capital); sect. 63 (default as to publishing name); sect. 75 (default as to register of directors); sect. 87 (commencing business prematurely); sect. 88 (default in making a return of allotments); sect. 94 (default in issuing certificates); sect. 95 (default in filing accounts of receiver); sect. 99 (default in registering mortgages); sect. 100 (default in registering mortgages or charges); sect. 101 (default in allowing inspection); sect. 281 (false returns and statements).

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Statutory penalties imposed on directors.

"By accepting a trust of this sort (*i.e.*, a directorship) a person," says Lord Hardwicke, "is bound to exercise it with fidelity and reasonable diligence" (*Charitable Corporation v. Sutton*, 2 Atk. 405); and Jessel, M. R., in another case, said "directors are bound to use fair and reasonable diligence in the discharge of their duties and to act honestly, but they are not bound to do more." (*Forest of Dean, &c. Co.*, 10 C. D. 452. "A director is not bound to take any definite part in the conduct of the company's business, but so far as he does undertake it he must use reasonable care in its despatch." Per Neville, J., *Brazilian Rubber Plantations* (No. 1), (1911) 1 Ch. 425. They are not liable for a mere error of judgment, and there is no implied warranty by a director that he is competent. *Turquand v. Marshall* (1869), 4 Ch. 376; *Gurney & Co. v. Gill*, L. R. 5 H. L. 480; *Dovey v. Cory*, (1901) A. C. 477. "If the directors act within their powers, and with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company which they represent, they discharge both their legal and equitable duty to the company, and will not be liable for mistakes or errors of judgment." *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate*, (1899) 2 Ch. 392.

It has sometimes been said that directors are only liable for gross negligence, but there is not in fact any decision to that effect, and the expression "gross" does not really assist in defining the directors' liability; for, as observed by Rolfe, B., in *Widom v. Brett*, 11 M. & W. 115, "gross negligence is the same thing as 'negligence,' with the addition of a vituperative epithet." And this epigram was cited with approval by Willes, J., in *Griff v. General, &c. Co.*, L. R. 1 C. P. 603; affirmed L. R. 3 C. P. 576; and Erie, C. J., referring to this expression in 35 L. J. C. P. 321, said: "I advisedly abstain from using a word to which I can attach no definite meaning; and no one, so far as I know, ever was able to do so." The expression, however, was defended by Lord Chelmsford in *Giblin v. McMullen*, L. R. 2 P. C. 317, 336, and was resuscitated by the Court of Appeal in *National Bank of Wales*, (1899) 2 Ch. 672; but the dissent of Lords, upon the appeal in the same case (*Dovey v. Cory*, *supra*), significantly abstained from using the term.

It may be taken, however, that, in determining whether a director has been

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guilty of negligence, the Court will, of course, take into account the character of the business, the number of the directors, the provisions of the articles, the ordinary course of management and practice of directors, the extent of their knowledge and experience, and, in fact, all the surrounding and special circumstances of the particular case; there can be no question that the directors are not expected to take every possible precaution to safeguard the interest of the company and prevent deception.

A director is not to be held responsible for the fraud of his co-directors unless he has expressly or impliedly authorized it. *Cargill v. Bower* (1878), 10 C. D. 502. "A director cannot be held liable for being defrauded: to do so would make his position intolerable." Lord Hatherley, *Land Credit Co. of Ireland v. Lord Fermoy* (1876), 3 Ch. 772; and see *Re Charles Denham & Co.*, 25 Ch. D. 752; *Durey v. Cory*, (1901) A. C. 477; *Prelontaine v. Goss*, (1907) A. C. 191.

So, too, if a director acts honestly and in accordance with a course of business which appears reasonably calculated to protect the interests of the company

is not to be held liable merely because his subordinates or co-directors have deceived him: he is not called upon to distrust, to guard against the possibility of fraud being committed by the subordinates. "It is obvious," said Halbury, L. C., "that if there is such a duty, it must render anything like an intelligent devolution of labour impossible." See *Durey v. Cory*, (1901) A. C. 477.

Non-attendance at board meetings is not necessarily negligence. *Boys' case*, 34 L. T. 716; *Forest of Dean Co.*, 10 C. D. 452; *Denham & Co.*, 25 C. D. 752; *Marquis of Rute's case*, (1892) 2 Ch. 101; *Exploring Land & Minerals Co.*, 94 L. T. 234; for a director is not bound to attend every board meeting, but the non-attendance may amount to such a dereliction of duty as to constitute negligence. *Charitable Corporation v. Sutton*, 2 A. K. 105.

Misfeasance and breach of trust.

Besides negligence, directors, as agents and trustees, may be held liable for various other kinds of misconduct and delinquency. These are generally grouped together under the head of what is known as "misfeasance or breach of trust": the term "breach of trust" being generally confined to the misapplication of the funds of the company, and the term "misfeasance" to other breaches of duty which do not involve such misapplication.

"The words 'breach of trust' in sect. 215 of the Companies (Consolidation) Act, 1908 (the misfeasance section), are intended to include breach of duty." Per Neville, J., *Brasiliian Rubber Plantations* (No. 1), (1911) 1 Ch. 425.

Examples of misfeasance and breach of trust.

The following are some cases in which directors have been made liable for misfeasance or breach of trust: *Stringer's case*, L. R. 4 Ch. 475; *London General Bank* (1), (1895) 2 Ch. 673 (directors ordered to repay dividends declared and paid under delusive balance-sheet); *Rand's case*, L. R. 10 Ch. 104 (director ordered to repay bonus improperly paid to him); *Merchants' Office v. Armstrong, W. N.* (1901) 163; 17 T. L. R. 700 (directors ordered to repay large sums paid to one of their body before the company started for "services" in obtaining subscriptions for shares, this being extra remuneration); *National Funds Assurance Co.*, 10 C. D. 118; *Alexander v. Palace*, 21 C. D. 149; *Flitcroft's case*, 21 C. D. 519; *Denham & Co.*, 25 C. D. 752; *Sharpe*, (1892) 1 Ch. 154; *London and General Bank* (2), (1895) 2 Ch. 673 (directors ordered to repay dividends improperly paid to shareholders out of capital); *De Ruigne's case*, 5 C. D. 306; *Pearson's case*, 5 C. D. 306; *Metcalf's case*, 13 C. D. 169; but not where the shareholders complained had participated in the dividend; *Towry v. African Tug Co.*, (1904) 1 Ch. 558; *De Ruigne's case*, *supra*; *Pearson's case*, *supra*; *Metcalf's case*, *supra*; *Co-operative Association*, 27 Ch. D. 322 (orders against directors who had improperly obtained their qualification shares from promoters or vendors).

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Archers case, (1892) 1 Ch. 332 (orders against directors who had accepted their qualification from the promoter in trust for the promoter, and then executed blank transfers of the shares in favour of the promoter, thus enabling him at any moment to displace them); *London and South Western Canal Co.*, (1911) 1 Ch. 316 (order to compel director who had obtained from promoter secret advantage an indemnity against loss on his qualification - to account to company); *Postage Stamp, &c. Co.*, (1892) 3 Ch. 566 (directors ordered to account for gift of shares by vendor); *Englefield Co.*, 8 C. D. 388 (directors ordered to make good sum paid to promoter for preliminary expenses, out of which directors' qualification provided); *Marzetti's case*, 28 W. R. 511 (director ordered to repay sums nominally paid for preliminary expenses, but really for rigging the market); *Geo. Newman & Co.*, (1895) 1 Ch. 674 (director held liable for present made to himself without the sanction of the company's articles); *Loughlan v. Miller*, 6 F. 413, Ct. of Sess. (agreement by director with the manager to share latter's bonus); *Parker v. McKenna*, 10 Ch. 118 (directors held liable for illegitimate profits made by dealings with the company's shares); *Houston Deep Sea Co. v. Ansell*, 39 C. D. 339 (managing director held liable for secret commission); *Cape Breton Co.*, 29 C. D. 795 (as to which see *Burland v. Earle*, (1902) A. C. 83; and 12 App. Cas. 652 (director selling his own property to the company without disclosure). "The misfeasance in such a case is not selling, but in not disclosing." Per Lord Herschell. And see Part II., 9th ed. 612.

Directors who purposely abstain from making inquiries in pursuance of an understanding between them to that effect into the price paid to each other for properties sold to the company are guilty of a gross dereliction of duty. *Good v. A. P. Co., Ltd. v. Grosland*, 20 T. L. R. 800.

In cases of misfeasance or breach of trust the delinquent director has no right to set-off. *Anglo-French Co-operative Society*, 21 C. D. 492; *Carrage Supply Association*, 27 C. D. 322; *Fletcher's case*, 21 C. D. 519.

A very material alteration of the law in favour of directors has been made by sect. 279 of the Companies Act, 1908, empowering the Court to grant relief in certain cases. The section runs as follows:

279. If in any proceeding against a director, or person occupying the position of director, of a company for negligence or breach of trust it appears to the Court hearing the case that the director or person is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think proper.

It is not enough to prove that the applicant for relief acted reasonably and honestly. It must further be proved that he ought fairly to be excused. *National Trustee Co. of Australasia v. General Finance Co.*, (1905) A. C. 373. Nor is it enough that he acted "honestly," he must have acted "reasonably" as well. *Re Dice, Dice v. Roebuck*, (1909) 1 Ch. 328. See also *Re Smith, South v. Thompson*, 71 L. J. Ch. 411; *Re Turner, Barker v. Turner*, (1897) 1 Ch. 536; *Re Second East Dulwich 745th Starr-Bowkett Building Society*, 68 L. J. Ch. 196; *Re Grindley, Clews v. Grindley*, (1898) 2 Ch. 593; *Perrins v. Bellamy*, (1899) 1 Ch. 797; *Re Lord de Clifford*, (1900) 2 Ch. 707; *Palmer v. Emerson*, (1911) 1 Ch. 758; and *Re Mackay*, (1911) 1 Ch. 300.

Directors who dispose of the company's property pending a winding-up petition are *prima facie* liable, on a winding-up, for all such moneys not expended by them in the ordinary course of business. Companies Act, 1908, s. 205 (2); *North Harbour Works*, 35 W. R. 827.

The remedy of a company against a delinquent director, whether for negligence, fraud, misfeasance, or breach of trust, is, whilst the company is a going

Power of Court to grant relief in certain cases.

Disposition of property by directors pending winding-up petition.

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concern, by action. *Joint Stock Bank v. Brown*, 6 Eq. 361; *Nant-y-Glo, &c. Co. v. Evans*, 13 C. D. 736. If the company is being wound up, the remedy is in most cases under sect. 215 of the Companies Act, 1908.

**Effect of
Companies
Act, 1908.**

The Act of 1908, reproducing the Companies Act, 1900, considerably affects the position of directors, and the following points with reference to it should be noted:

1. If they are to be appointed by the articles of association and the company is to issue a prospectus inviting subscriptions for shares, they should see that sect. 72 is duly complied with.
2. They should bear in mind sect. 73 (3), imposing a fine for acting without qualification.
3. They should bear in mind sect. 85, and the serious danger of personal liability for the return of subscriptions if the company allots shares in violation of sect. 85 of the Act of 1900.
4. They should remember their liability to pay damages for breach of sect. 26.
5. They should avoid, by complying with the Act, their liability to heavy fines under sect. 87 (5) if the company commences business before it is entitled.
6. They should remember the limits of their power to pay underwriting and other commissions under sect. 89, and their liability for payments not authorized by paragraph (1) of that section.
7. They should bear in mind their duty under sect. 80 as to filing prospectuses.
8. They should study under proper advice the elaborate and burdensome provisions of sect. 81 as to prospectuses and the disclosure to be made thereby, and should remember the liabilities of the directors for non-compliance.
9. They should have due regard to sect. 83 as to variation of contracts.
10. They should not forget their duties under sect. 85 of the Act as to statutory meetings.
11. They should not forget sect. 84 as to convening general meetings.
12. They should bear in remembrance sects. 93-102 as to registration of mortgages and charges and the penalties imposed on the directors.
13. They should not forget sect. 26 as to annual summaries, and sect. 75 as to keeping a register of directors and filing copy with the Registrar of Companies.
14. They should see that the provisions of sects. 112, 113 as to audit are carried out, and above all that they do not subject themselves to the penalties of misdemeanour under sect. 281 as to false statements.

**Number of
directors.**

83. [Until otherwise determined by a general meeting] the number of the directors shall not be less than [three] or more than [seven].

It is seldom that a large number of directors is a benefit to a company; if the company is a large one, and there is much business to be done by the board it may be a necessity; but in many companies the powers and duties of the board are for the most part delegated to a managing director or manager, and where this is the case there is no reason for having a large number of directors. Even where this is not done, it is commonly found that a moderate number are by reason of the increased individual responsibility, more likely to work. In the absence of the first seven words it seems that the number cannot be reduced

without a special resolution. *Bennett Bros., Ltd. v. Lewis*, 40 S. J. 14. But **Form 251.** query whether this is so where a clause like 98, *infra*, appears. *Prima facie* where the number is below the prescribed minimum the remaining directors cannot act, but usually this is met by a clause like 90, *infra*.

The quorum clause does not operate unless and until the minimum number of directors is duly appointed. *Nly, Npink & Co.*, (1911) 2 Ch. 430.

81. The persons hereinafter named shall be the first directors, that is to First
say: A. of —; B. of —; and C. of —, &c. directors.

It is usual to appoint the directors by the articles, but the plan adopted in clause 69 of Table A. is sometimes preferred, namely, to provide that: "The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association"; or preferably thus: "The first directors shall be appointed by the subscribers hereto, or the majority of them, by an instrument in writing under their hands." In either case the appointment should be made at a meeting of the subscribers at which a majority is present. *Howbeach Coal Co., Ltd. v. Teague*, 5 H. & N. 151; 29 L. J. Ex. 137; *London & Southern Co.*, 31 C. D. 223. The notice convening the meeting, which need not be a seven days' notice (*John Morley Building Co. v. Barras*, (1891) 2 Ch. 386), ought to specify the purpose for which it is convened. *Howbeach Coal Co. v. Teague*, *supra*. An appointment in writing signed by all the subscribers is valid. *Girard Northern Salt Co.*, 44 C. D. 472.

Where the subscribers are to appoint the directors, the articles generally declare that: "Until the first directors shall have been appointed, the subscribers to the memorandum of association shall be deemed for all purposes to be the directors, save that clause 86 hereof is not made to apply."

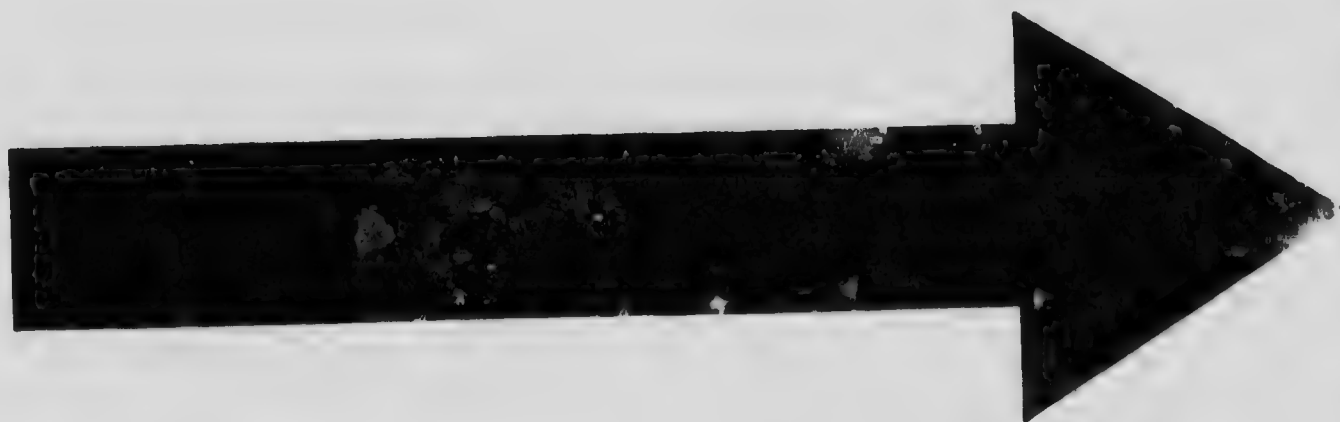
And where the subscribers are directors under such a clause, they hold office until the first directors are actually appointed, notwithstanding there is an article to the effect that the whole of the directors shall retire at the first general meeting. *John Morley Building Co. v. Barras*, *supra*.

Where no directors are appointed, and a meeting could not be called in accordance with the articles, it was held that sect. 52 of the Companies Act, 1862 (now replaced by sect. 67 of the Act of 1908), applied, and accordingly that five members could call a meeting. *Brick and Stone Co.*, W. N. (1878) 140.

NOTE. See sect. 72 of the Act as to the necessity for qualifying a person named in articles as a director where the public are to be invited to subscribe for shares, *supra*, p. 6.

As to clergy, see 1 & 2 Vict. c. 106, s. 28 *et seq.*, and 4 & 5 Vict. c. 14, by which it is provided under penalty that it shall not be lawful for any spiritual person holding any cathedral preferment or benefice, or any curacy or lectureship, or who shall be licensed to perform the duties of any ecclesiastical office, to act as director of any trading concern.

85. The directors shall have power from time to time and at any time to appoint any other persons to be directors, but so that the total number of directors shall not at any time exceed the maximum number, fixed as above, and so that no such appointment shall be effective unless two-thirds of the directors [in the United Kingdom] concur therein. Power for directors to appoint additional directors.



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This clause is very commonly inserted, and is found convenient, especially where less than the maximum number are appointed by the articles. Sometimes it is considered expedient to insert, after the word "time," "before the ordinary general meeting to be held in the year —." In that case clause 99a, as to casual vacancies, must be inserted.

Although it is often done, it is doubtful whether, under such a clause, or under clause 99a, *infra*, directors can be appointed in pursuance of a contract with some person or company for the purpose of giving such person or company a voice in the management. See *Stace and Worth's case*, 4 Ch. 682; *James v. Eve*, L. R. 6 H. L. 335; *De Ruvière's case*, 5 C. Div. 396. Conf. *Greenwell v. Porter*, (1902) 1 Ch. 530.

As to an alternate director, see Form 280, *infra*.

Where quotation on the Stock Exchange, London, is required, the following clause should be substituted for the above:

[85a. The directors shall have power at any time, and from time to time, to appoint any qualified person as a director, either to fill a casual vacancy or as an addition to the Board, but so that the total number of directors shall not at any time exceed the maximum number fixed as above. But any director so appointed shall hold office only until the next following ordinary general meeting of the coy, and shall then be eligible for re-election.]

The word "until" may be read either as inclusive or exclusive according to the sense. In many cases it includes the day named. See *Kerr v. Jones*, 1 Dow, 538; *Dawkins v. Rudnor*, 3 Dow, 535; *Isaacs v. Royal Insurance*, L. R. 5 Ex. 396; *Bellhouse v. Mellor*, 28 L. J. Ex. 141; *Government Stock v. Manila Rail. Co.*, (1897) A. C. 81.

**Qualification
of directors.**

86. The qualification of a director shall be the holding of shares in the coy [or shall be the holding of shares in the coy of the nominal value of £——].

No qualification of a director was required by the Act of 1862, nor is it required by the Act of 1908. By Art. 70 of Table A., where it applies, a director's qualification is made the holding of one share at least.

The above clause must be read in conjunction with sects. 72 and 73 of the Companies Act, 1908.

Sect. 72 is only material where the first directors are named in the articles, as in clause 81, *supra*. It has no application to a "private company." In such cases, sect. 72 in effect requires that a director shall either subscribe the memorandum of association for his qualification, or shall sign and file a contract to take his qualification. See further, *supra*, p. 6. If compliance with sect. 72 would be inconvenient—(1) omit the clause (81) "naming" the first directors, and in lieu thereof provide, as in clause 84a, that the subscribers may appoint the first directors; or (2) omit the qualification clause; or (3) insert in the above qualification clause, after the word "director," the words "not being one of the first directors."

73.--(1.) Without prejudice to the restrictions imposed by the last foregoing section, it shall be the duty of every director who is by the regulations of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the regulations of the company.

(2.) The office of director of a company shall be vacated if the director does not within two months from the date of his appointment, or within such shorter time as may be fixed by the regulations of the company, obtain his qualification, or if after the expiration of such period or shorter time he ceases at any time to hold his qualification: and a person vacating office under this section shall be incapable of being re-appointed director of the company until he has obtained his qualification.

(3.) If after the expiration of the said period or shorter time any unqualified person acts as director of a company, he shall be liable to a fine not exceeding five pounds for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director.

In relation to this section, it is to be observed as follows:

- 1) The section does not require the insertion in the articles of a qualification clause. It is therefore legal, as it was under the old law (viz., the law in force prior to 1st January, 1901, when the Companies Act, 1900, came into operation), to omit the qualification clause, or to make the qualification as small as desired, or to make it applicable only to some of the directors.
- 2) The section does not touch the cases in which the qualification clause provides that no person shall be "eligible" as a director unless he holds a specified number of shares, for in such cases the possession of the requisite qualification is a condition precedent to a valid election; and if a person who does not possess the qualification is expressed to be elected, the election is void and he does not become a director (*Barber's case*, 5 C. D. 963; *Jenner's case*, 7 C. D. 132), and therefore does not come within the words of the section.
- 3) The section applies to companies formed before the Act of 1900 came into operation (1st January, 1901) as well as to companies formed after that Act came into operation. See sect. 31 of the Act.
- 4) Under the old law a director, under a clause as above, had a reasonable time within which to obtain his qualification. *Brown's case*, 9 Ch. 102. But what was a reasonable time was undefined: it depended on the circumstances of the particular case. *Lord Inchiquin's case*, (1891) 3 Ch. 28. It might be a month or more, though if the articles provided that a director was to vacate office if he did not acquire his qualification within a specified period, that was regarded as indicating what was in the circumstances a reasonable time. *Ex parte Cammell*, (1894) 2 Ch. 392; *Pandora Theatre*, 28 S. J. 238; *Onslow's case*, 57 L. J. Ch. 338; *Self-acting Sewing Machine Co.*, 34 W. R. 658. But the section has altered the law in this respect, and has fixed the time within which the qualification is to be acquired, viz., within two months from the director's appointment, or such shorter time as may be fixed by the regulations.
- (5) Under the old law a director who did not qualify within a reasonable time did not at the expiration of that time vacate office, unless

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indeed the articles of the company so provided. On the contrary, he continued in office until by resignation or removal or otherwise he vacated the office. The section alters the law in this respect, and in effect provides that at the expiration of the two months or shorter time the director shall *ipso facto* vacate office.

- (6) Under the old law (where the qualification clause was as above, imposing a duty to qualify), a director who did not qualify within a reasonable time might at the expiration of that time be placed by the officers of the company on the register of members for shares sufficient to qualify him, and although this was done behind his back and without his consent, he was estopped from repudiating the allotment and liable to pay for the shares in due course. See *Brown's case*, 9 Ch. 109; *Lord Inchiquin's case*, (1891) 3 Ch. 28; *Molins v. London, B. and M. Insurance Co.*, (1902) 2 K. B. 589; but the allotment was not effective unless made before resignation and winding-up. See *Cammell's case*, (1894) 2 Ch. 392; and *The Isan Co.*, *Hutchinson's case*, (1895) 1 Ch. 226.

The section appears to alter the law in this respect, for at the expiration of the time limited the director vacates office; it therefore ceases to be his duty to take up the qualification, and if without his request the shares are allotted to him, there appears to be nothing to preclude him from repudiating. *Cammell's case*, (1894) 2 Ch. 392; *Salisbury Jones' case*, (1904) 3 Ch. 356.

- (7) Under the old law a director who did not qualify within a reasonable time, or who ceased to hold his qualification, might nevertheless continue to act as a director without incurring any definite responsibility to the company for damages. In theory he was liable to pay damages for his breach of duty, but in practice it was impossible to prove damage. *Coventry and Dixon's case*, 14 C. D. 660. The section alters this, and renders the director liable to a fine not exceeding 5*l.* a day. See sub-sect. 3. This sub-section, however, does not appear to apply to a person who is invalidly appointed as a director, but only to one who is validly appointed.
- (8) Under the old law a director under a clause framed as above was duly qualified if he held the requisite shares, even though he had no beneficial interest in them and merely held as trustee for another person, nor did the insertion in the clause, after the word "holding," of the words "in his own right" render a beneficial ownership necessary, for it was long since held that those words did not refer to beneficial ownership, and meant in his own right as contrasted with a holding as legal personal representative or trustee in bankruptcy. *Pulbrook v. Richmond Mining Co.*, 9 C. D. 610. Whether this remarkable construction of the words was or was not right it is now too late to question. See *Bainbridge v. Smith*, 41 C. Div. 642; *Cooper v. Griffin*, (1892) 1 Q. B. 740, C. A.; *Howard v. Suttles*, (1893) 1 Q. B. 1; *Archer's case*, *supra*; *Sutton v. English and Colonial Produce Co.*, (1902) 2 Ch. 502. It certainly goes far to defeat the object of a qualification clause, which is that the director should have a personal stake in the company. The section has not altered the law in this respect, and accordingly a director may still under a clause as above qualify by borrowing the shares or taking a transfer in trust for the transferor. But if a person is entered on the register as holding shares as liquidator of some other company, he does not hold "in his own right." *Boschoek Proprietary Co. v. Fuke*, (1906) 1 Ch. 148; and see *Sutton v. English and*

Colonial Produce Co., (1902) 2 Ch. 502, according to which if the beneficiary gives notice to the company that he claims the shares, the holder thereupon ceases to hold "in his own right," but it seems doubtful whether this decision can stand consistently with the older cases.

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- (9) Under the old law a director could, under a clause as above, qualify by being one of the joint holders of the requisite number of shares. *Glory Paper Mills Co.*, *Dunster's case*, (1894) 3 Ch. 473, C. A. The section has not altered the law in this respect. See *Grundy v. Briggs*, (1910) 1 Ch. 444.

The object of a qualification clause as above mentioned is to give the director a pecuniary interest in the company so that he may be risking his own as well as other people's money (*Archer's case*, (1892) 1 Ch. 337); and some people have great faith in this feature of a qualification as a guarantee of good management; but of course the mere holding a qualification in no way assures the competence of the director: he may be duly qualified and yet wholly incompetent. It is only calculated to make him more careful. Sometimes a man manages other people's affairs better than his own.

Moreover, as he may hold the shares as a mere trustee, or as one of several joint holders, the qualification may afford only a modicum of security if it does not render the security wholly illusory. To fortify the position it is sometimes deemed expedient to insert after the word "holding" the words "AS SOLE ABSOLUTE BENEFICIAL OWNER AND NOT MERELY AS TRUSTEE."

In the absence of a qualification clause, the law does not require a director to be a member of or to have any interest in the company which he directs, and there are thousands of companies the articles of which require no qualification, including the many companies to which Table A., *simpliciter*, applies. Sometimes, so far from benefiting a company, a qualification clause may detrimentally affect its interest, *e.g.*, by excluding from the directorate an able man who could render great services to the company, but has not the requisite funds to take up the qualification.

Where there is a qualification clause it is allowable to modify its operation to any extent, *e.g.*, by providing that "the qualification of a director, *not being one of the first directors*, shall be," &c.; or that "the qualification of the directors *other than A. B.* shall," &c.; or that "the qualification of every director elected or appointed after the — day of — shall be," &c.; or that "the qualification of the directors shall be fixed by the statutory meeting, and until so fixed no qualification shall be necessary."

As to the amount of the qualification: This is usually fixed with reference to the capital of the company, but a qualification of 100*l.* or 200*l.* of shares or less is very common. Where, however, the capital exceeds 50,000*l.* or 100,000*l.*, the qualification is sometimes larger, *e.g.*, 500*l.* or 1,000*l.*, and occasionally in very important concerns and in private companies the qualification is as much as 5,000*l.* or 10,000*l.*, or even more. As a guarantee of careful management, a share qualification is, of course, useless unless it is substantial.

Where the qualification clause is framed as above, that is to say, provides that the qualification of a director shall be the holding of so many shares, this does not mean that the director must take that number of shares *from the company*. The meaning of such a clause is that the director is to acquire the requisite qualification in some way or other, whether from the company or by transfer from a friend, or by purchase in the market. *Brown's case*, 9 Ch. 102; and the Companies Act, 1908, has not altered this. *Molincaux v. London, &c. Insurance Co.*, (1902) 2 K. B. 589.

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Unless the articles otherwise provide, it would seem that a director may transfer his qualification shares as freely as if he were not a director. *Cawley & Co.*, 42 C. Div. 209. The decision in *South London Fish Market*, 39 C. Div. 324, was based on the terms of the special Act; but if he does, he gives up his directorship. *Gilbert's case*, L. R. 5 Ch. 565.

Whether the acts of a director who has not been duly appointed, or who is disqualified, are void, must depend on the circumstances of the case. Clause 111, *infra*, and sects. 71, 74 of the Act (see *infra*, p. 743) will apply in most cases, but only as to acts done before the defect or disqualification is shown. *Hallowes v. Fernie*, 3 Ch. 467; *Murray v. Bush*, L. R. 6 H. L. 53; *Bridport, &c. Co.*, 2 Ch. 191; *Briton Medical v. Jones*, 61 L. T. 384; *British Asbestos Co. v. Boyd*, (1903) 2 Ch. 439; *Re Bank of Syria*, (1900) 2 Ch. 272; *Dawson v. African Co.*, (1898) 1 Ch. 6. And not, it would seem, in favour of any person at the time of the act done having notice of the defects or disqualification. *Staffordshire Gas Co.*, 66 L. T. 413; *Tyne Steamship Co. v. Brown*, 75 L. T. 483; *Howard v. Patent Ivory Co.*, 38 Ch. D. 186.

A director who accepts his qualification shares as a secret gift from the promoters or vendors is guilty of a gross breach of trust. *Hay's case*, 10 Ch. 593, 604; *Englefield Co.*, 8 C. Div. 388; *Carling's case*, 1 C. Div. 115; *Twyecross v. Grant*, 2 C. P. Div. 493; *De Ruvigne's case*, 5 C. D. 306; *Pearson's case*, 5 C. D. 336; *Carriage Supply Association*, 27 Ch. D. 322; *Boston Shipping Co.*, 39 C. D. 339. And he is liable to give up the shares or, at the option of the company, to account for their value. *S. C.*; *Hay's case*, 10 Ch. 593; *Weston's case*, 10 C. Div. 579; *Postage Stamp, &c. Co.*, (1892) 3 Ch. 566. And there is no right of set-off. *Carriage Supply Association*, 27 C. D. 322.

And where he buys his qualification from a promoter who agrees to indemnify him, he is accountable to the company, for the indemnity is a thing of value. *Archer's case*, (1892) 1 Ch. 322, C. A.

In *London and S. W. Canal Co.*, (1911) 1 Ch. 346, where the articles of association provided that the qualification of a director should be "the holding of at least 100 shares in the company," and some of the directors accepted their qualification from the promoter of the company on the terms that they should hold the shares in trust for him and should execute (as they in fact did) blank transfers so that he might deal with them as he might require, the Court held that the directors were guilty of misfeasance and must contribute to the assets of the company (which had gone into liquidation) a sum equal to the par value of the shares.

The London Stock Exchange requires a qualification, and also the addition of the words following:—

First directors
—qualification
as to.

87. A first director may act before acquiring his qualification, but shall in any case acquire the same within one month from his appointment; and unless he shall do so, he shall be deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him accordingly.

Having regard to sect. 73 of the Companies Act, 1908, *supra*, p. 719, this clause may be superfluous.

Under the old law it was decided in relation to a clause as above—

- (a) That a person who continued to act as a director after the month was up was liable in a winding-up to be placed on the list of contributors for his qualification shares, even though no allotment was

made before the commencement of the winding-up. *Isaacs' case*, **Form 251**. (1892) 2 Ch. 158.

- (b) That *à fortiori* he was liable where the qualification shares were allotted to him before the commencement of a winding-up, even though that allotment was made after notice of his resignation. *Hercynia Copper Co.*, (1894) 2 Ch. 403.
- (c) That a director who without qualifying resigned within the time allowed for qualification ought not, in a winding-up, to be placed on the list of contributories for his qualification shares, no allotment thereof having been made before the commencement of the winding-up. *Salisbury-Jones and Dale's case*, (1894) 3 Ch. 356.

But the new Act materially affects the operation of the clause, for in specifying one month as the time within which the director must acquire his qualification the clause fixes within the meaning of sect. 73 of the Companies Act, 1908, a "shorter time" than two months, and accordingly, at the end of the month, the director, if he has not obtained his qualification, vacates office. Now, it may be that notwithstanding this the company might act on the clause, and allot him his qualification—that is to say, the shares which he agreed to take. See *Molineux v. London, &c. Insurance*, (1902) 2 K. B. 589. But if no allotment is made prior to a winding-up, it would seem that the ex-director should not be held liable in a winding-up to be placed on the list of contributories for the shares, for, the company not having accepted the offer whilst it was a going concern, it is not just and equitable to place him on the list of contributories in the winding-up. See the above case, and *Hutchinson's case*, (1895) 1 Ch. 226; *Salisbury-Jones and Dale's case*, (1894) 3 Ch. 356; and *Ex parte Cammell*, (1894) 2 Ch. 392.

[88. A director may retire from his office upon giving one month's notice in writing to the coy of his intention so to do, and such resignation shall take effect upon the expiration of such notice or its earlier acceptance.] Power for director to retire.

More commonly a paragraph, "If by notice in writing to the company he resign his office," is added to clause 90, and this seems the best plan; for a director cannot be compelled to act.

Even in the absence of any express power to resign, it is submitted that, unless the articles are specially framed, a director may by notice to the company resign his directorship. Directors "are merely agents of the company" (per Lord Cairns, *Ferguson v. Wilson*, 2 Ch. 89), and an agent may determine his agency. Story on Agency, sect. 478.

Where a director, who was both a permanent and an ordinary director, resigned his seat on the board, it was held on the facts that he had resigned both directorships. *Moseley v. Koffyfontein Mines*, (1910) 2 Ch. 382.

It is conceived that the requisite notice should be served on the company in the manner provided for by sect. 116 of the Act, viz., by leaving it at the registered office of the company, and that a notice so served is effective. In *Municipal Freehold Land Co. v. Pollington*, 63 L. T. 238, it was held that, under Table A., a director might resign, but that he must resign "into the hands of the company," and that a notice read at a board meeting (and, therefore, no doubt served on the company in accordance with sect. 116 of the Act) was not an effective notice to the company for such a purpose. Apparently therefore the resignation, to be effective, must be given to all the members. This decision appears to disregard the fact that the company is a separate

Form 251. *persons* (pp. 27 and 28), and that the Act has provided by sect. 116 special means of giving notice to that *persons*. Why are the plain terms of sect. 116 not to have full effect?

In *Metropolitan Bank v. Heiron*, 5 Ex. Div. 319, Cotton, L. J., said that "it was made known in the only way in which the company can know anything, by a communication made to the directors at a regular board meeting."

It may be observed that Table A. contains no clause as to resignation.

In practice it is always assumed that a director can retire *mero motu*—the object of a clause is to fix the length of notice, or to restrict the right; and Warrington, J., so held in *Transport Co. v. Schonberg* (1905), 21 T. L. R. 395.

A director may part with his qualification shares, and so vacate office by disqualification. *Gilbert's case*, 5 Ch. 565; Companies Act, 1908, s. 73 (2).

A resignation once made is irrevocable. *Reg. v. Mayor of Wigan*, 14 Q. B. D. 908; *Glossop v. Glossop*, (1907) 2 Ch. 270.

Remuneration of directors.

89. The directors shall be pd out of the funds of the coy by way of remuneration for their services at the rate of £— p.a. and such further sums as the coy in general meeting may from time to time determine, and such remuneration shall be divided among them in such proportions and manner as the directors may determine, and in default of such determination within the year equally. [The directors shall also be pd their travelling expenses of attending and returning from board [and committee] meetings.]

Under such a form of article a decision by the directors as to how the remuneration is to be divided is a condition precedent to a director's right to sue the company for remuneration. *Morrell v. Oxford Portland Cement Co.*, 26 T. L. R. 682.

Sometimes these words are added: "And in default of such determination, among them in proportion to their respective attendances at board meetings," or "among them equally."

The amount of remuneration to be paid to directors is a matter of internal management. *Burland v. Earle*, (1902) A. C. 83; *Normandy v. Ind, Coopr & Co.*, (1908) 1 Ch. 84.

Directors are not entitled to remuneration, except by virtue of the articles of the company. *Dunstan v. Imperial, &c. Co.*, 3 B. & Ad. 125; *George Newman & Co.*, (1895) 1 Ch. 674, 686; *Young v. Naval, &c. Society*, (1905) 1 K. B. 687, 693. But where the articles fix remuneration as above, the clause is not only an authority to the directors to pay themselves the remuneration out of the funds of the company, but a director, who is a member, has a right of action against the company for his remuneration. Whatever the effect of sect. 14 of the Act of 1908 may be—as to which, see *supra*, p. 632—if the director is not a member, the articles are to be regarded as an offer made by the company; and if he acts, he and the company are to be treated as having agreed by parol that he shall be employed on the terms specified. *Swabey v. Port Darwin Gold Co.* (1889), 1 Meg. 385; *International Cable Co.*, 66 L. T. 254; *Ex parte Beckwith*, (1898) 1 Ch. 324; *Isaacs' case*, (1892) 2 Ch. 158; *Peruvian Co.*, (1894) 3 Ch. 690; *Molineaux v. London, &c. Insurance*, (1902) 2 K. B. 589.

A director can, therefore, sue for remuneration agreed to be paid him by the company (*Orton v. Cleveland*, 3 H. & C. 868; *Nell v. Atlantic Co.*, 11 T. L. R. 407, C. A.), and prove for it in the winding-up like an ordinary creditor. *Beckwith's case*, (1898) 1 Ch. 324; *Al Biscuit Co.*, W. N. (1899)

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115; *Dale v. Plant*, 43 Ch. D. 255; *Leicester Club Co., Cannon's case* (1885), 30 Ch. D. 620—which was a decision that a director's remuneration is a sum due to him "in his character of a member by way of dividends, profits, or otherwise" within the meaning of the Companies Act, 1862, s. 38 (7) (Companies Act, 1908, s. 123 (1) (vii))—cannot be relied on.

The directors may vote themselves a sum on account of fixed remuneration even where the articles provide for remuneration by way of annual salary. *Wood Ships, &c. Co.*, 62 L. T. 760.

Where the remuneration is payable "at such times as the directors may determine," it is a condition precedent to the right to payment that the directors should have determined the time. *Caridad Copper Mining Co. v. Swallow*, (1902) 2 K. B. 44; *Inman v. Acroyd*, 82 L. T. 620; affirmed, (1901) 2 K. B. 613; and see *Morrell v. Oxford Portland Cement Co.*, 26 T. L. R. 682, *supra*.

Where a director is entitled to act before qualifying, he is entitled to remuneration under the clause. *Portsmouth & Southsea Cable Co.*, 66 L. T. 253.

A director's remuneration is for his services, and, accordingly, a director entitled to a percentage of the profits of a company as remuneration is not entitled to a percentage of the proceeds of sale of assets sold in a winding-up, unless the contrary is clearly expressed. *Frames v. Bullfontein Mining Co.*, (1891) 1 Ch. 140.

If the articles contain a provision for remuneration, a promise by a director to give his services *gratis* in the absence of some valid consideration, and therefore not binding (*Lambert v. Northern, &c. Co.*, 18 W. R. 180); at any rate, as regards the persons who were members of the company at the time of the promise.

But according to Wright, J., the observations of the Vice-Chancellor in that case are only directed to a case where the remuneration has already been earned, and where the agreement as to acting as a director is only partially performed, and there has been no breach of it, the directors by resolution may make a new contract with the company varying any agreement as to remuneration. *McConnell's claim*, (1901) 1 Ch. 728, 733.

Unless the articles provide that the fees shall be paid out of the profits only, there is nothing to prevent their being paid out of capital. *Harvey Lewis' case*, 26 L. T. 673. But if the articles provide that directors' fees are to be paid out of profits only, or that the directors are not to be entitled to remuneration until certain profits have been realized, the directors will be liable to refund any sums received by them in contravention of such regulations. *Oxford Benefit, &c. Society*, 35 C. D. 502; *Leeds, &c. Society v. Shepherd*, 36 C. D. 787.

Directors' remuneration is subject to deductions for income tax. *Boschoek Proprietary Co. v. Fuke*, (1906) 1 Ch. 645, and a contract to pay free of income tax is void. Sect. 103 of the Income Tax Act, 1842.

The taking of remuneration beyond that fixed is a misfeasance. *Whitehall Court*, 56 L. T. 280; *George Newman & Co.*, (1895) 1 Ch. 674; *Merchants' Fire Office v. Armstrong*, 17 T. L. R. 709; *Young v. Naval, &c. Society of South Africa*, (1905) 1 K. B. 687; *Leeds Estate Co. v. Shepherd* (1887), 36 Ch. D. 809.

And unless the articles otherwise provide, as in the concluding words of the above clause, a director is not, in addition to his remuneration, entitled to his travelling expenses of attending board meetings. *Young v. Naval, &c. Society*, *supra*. And co-directors who authorize such payments are personally responsible. *Ibid.* But under a special article or a resolution of the company the payment may be made. *Ibid.* And see *Marmor Limited v. Alexander* (1908), S. C. 78, Court of Sessions. Where the articles fix the remuneration of directors and provide that the company may by resolution in general meeting grant to

Form 251. the directors any additional remuneration, this will not authorize the directors granting a retiring pension to a managing director. *Normandy v. Ind. Crops & Co.*, (1908) 1 Ch. 84, *sed quare*.

Where the clause provides that a director is to be paid so much per annum, the words "at the rate of" being omitted, and he vacates office before the end of a current year, the question whether he can maintain a claim for an apportioned part of the remuneration for that year has given rise to some difference of opinion. In *Swabey v. Port Darwin Gold Mining Co.*, in the Court of Appeal (1889), 1 Meg. 385, the article was as follows, and not as stated in the report: "The directors shall each receive by way of remuneration out of the funds of the company in each year the sum of 200*l.*, and the chairman in addition 100*l.* per annum." The words "at the rate of" were not present (as appears from the articles registered at Somerset House). A director resigned in the course of a current year, and was held entitled to an apportioned part of the remuneration for that year. Lord Halsbury said: "As to the point of the service being determined in the middle and not at the end of the year, disentitling the plaintiff to anything because the service was for a year, the judgment of Stephen, J., was right. But upon the articles there are two cases in which the service could be brought to an earlier termination than a year, namely, if the directors give a month's notice of resignation, the resignation must be accepted by the company; but if this were done, then both the parties contemplated an earlier determination of the service than a full year. On the other hand, the company could, if it thought fit, by special resolution [presumably for removal or winding-up] determine the service between it and its servants. There was, therefore, a reciprocal right to put an end to the service at an earlier period than the end of the year. It follows from that, as a necessary consequence, that both parties must have contemplated that, as this was a service for hire and reward, a proportionate part of the remuneration agreed upon should be paid if the service . . . determined at an earlier period than the full year."

But in *Salton v. New Beeston Cycle Co.*, (1899) 1 Ch. 775, where the article provided that "the directors shall be entitled to receive by way of remuneration in each year 5,000*l.*," Cozens-Hardy, J., held, that a director who vacated office before the end of a current year was *not* entitled to any apportionment. This case was followed by Wright, J., in *McConnell's case*, (1901) 1 Ch. 728, the words being "each director shall be paid the sum of 300*l.* per annum"; and by Bruce, J., in *Inman v. Acroyd and Bert*, 82 L. T. 621. See also *Central de Kaap Gold Mines*, W. N. (1899) 216, 235; 69 L. J. Ch. 18 (Wright, J.). In these four cases the Court no doubt proceeded on the assumption that the report of *Swabey's case* was correct, and that the article in that case contained the words "at the rate of." Certainly, Lord Alverstone, C. J., acted on this assumption in *Harrison v. British Mutoscope, &c. Co.* (*Times*, Nov. 10, 1903). There the words were "the sum of 1,000*l.* per annum." In the meantime, *Inman v. Acroyd* had been taken to the Court of Appeal, (1901) 1 Q. B. 614, and affirmed, but on the ground that it was by the articles left to the directors to apportion the remuneration at the end of each year.

This case, therefore, really turned on the construction of the particular article, and, as it was carefully distinguished from *Swabey's case*, the authority of that case, on an article omitting the words "at the rate of," remains unshaken.

Further, it is not easy to see why the Apportionment Act, 1870, does not apply. That Act expressly provides that all rents, annuities (including salaries and pensions), and other periodical payments in the nature of income shall be apportionable, and provides for the recovery in due course of an apportioned part of an annuity determined by death or otherwise. The Act was, however, clearly referred to and declared to be inapplicable, both in *Salton v. Neu*

Beeston Cycle Co. and Inman v. Acroyd; but it is evident that the point requires reconsideration. In *Salton v. New Beeston Cycle Co.*, *supra*, *Lowndes v. Earl Stamford* (1852), 18 Q. B. 425 (decided on the Apportionment Act, 1834), was relied on against apportionability, but the wording of that Act was very different to that of the Act of 1870.

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Where the remuneration was payable "for each year," and the company went into liquidation a few days before the expiration of a year, but the director's work for the year was completed, he was held entitled to remuneration for the year. *Shaws, Bryant & Co.*, W. N. (1901) 124.

A director may in some cases be entitled to remuneration although not qualified. *Salton v. New Beeston, &c. Co.*, (1899) 1 Ch. 775; *International Cable Co.*, 66 L. T. 253.

Where a director is appointed receiver and manager by the Court in a debenture holders' action, he is entitled to remuneration in both capacities. *South Western of Venezuela, &c. Co.*, (1902) 1 Ch. 701. But a person acting as but not duly appointed a director is not entitled to a quantum meruit for his services. *Woolf v. East Nigel, &c. Co.*, 21 T. L. R. 660; *Rodega Co.*, (1904) 1 Ch. 276.

A set-off, within three months of a winding-up, of calls payable by directors against their remuneration, was held a fraudulent preference, even though the directors had reasonable grounds for supposing the company would not have to pay the original debt shown to have been existing at the time. *Washington Diamond Mining Co.*, (1893) 3 Ch. 95.

The proper way of taking in execution overdue directors' fees is attachment of the debt. A receiver of directors' fees was refused altogether in *Hamilton v. Brogden*, W. N. (1891) 36.

Directors purchasing their shares to discharge fees due to them (if the articles authorize prepayment) is not misfeasance, nor is it a fraudulent preference, unless there is a winding-up within three months. *Manon's case*, 30 W. R. 378; *R. A. W. Wood v. Ship Woodite Co.*, 2 Meg. C. R. 164; but see *Sykes' case*, 13 Eq. 255.

Directors must not, it need hardly be said, pay income tax on their remuneration out of the company's funds. *Boschoek Proprietary Co. v. Fuke*, (1906) 1 Ch. 148.

The following alternative clauses are given by way of illustration of the many modes of providing for remuneration which are to be found in articles of association:—

"As remuneration for their services each director shall be paid a fixed salary at the rate of £— per annum, and the chairman shall be paid an additional sum at the rate of £— per annum, and the directors shall be paid such further remuneration, if any, as the company in general meeting shall from time to time determine, and such further remuneration shall be divided," &c.

"The directors shall be paid by way of remuneration for their services a sum at the rate of £— per annum, and whenever the profits of any year available for dividend on the ordinary shares shall be more than sufficient to pay a dividend at the rate of 10 per cent. on the capital paid up on the ordinary shares the directors shall be entitled to — per cent. of the surplus profits of such year, and such further remuneration shall be divided," &c.

"Each of the directors of the company shall be entitled by way of remuneration for his services to a fixed salary at the rate of £— per annum, and also whenever in respect of any year a dividend at a rate exceeding 10 per cent. is paid on the ordinary shares in the capital of the company, the directors shall be entitled to a sum equal to 10 per cent. on the dividend in excess of — per cent. so divided [or they shall be entitled to an additional sum of £— in

Form 251. respect of every 1 per cent. of dividend for such year declared in excess of — per cent.]."

Where the division of the remuneration is left to the directors to determine, and there is no provision for default as in the above clause, no director can claim remuneration until after such determination. *Inman v. Acroyd*, (1901) 1 K. B. 613; *Morrell v. Oxford Portland Cement Co.*, 26 T. L. R. 682. It seems expedient to divide the remuneration by the articles.

Where, in addition to fixed remuneration as above, the directors are given a share in, or commission on, the profits, the Stock Exchange generally require a limit.

A director who holds his qualification share as trustee for another company is not liable to account to the latter for his director's fees. *Re Dover Coalfield Extension*, (1908) 1 Ch. 65.

Directors may act notwithstanding vacancy.

90. The continuing directors may act notwithstanding any vacancy in their body; [but so that if the number falls below the minimum above fixed the directors shall not, except for the purpose of filling vacancies, act so long as the number is below the minimum].

Where a maximum and minimum number are fixed as above [clause 90], the directors cannot act if the number falls below the required minimum (*Alma Spinning Co.*, 16 C. D. 681; *British Empire Match Co.*, 59 L. T. 292). However, in *Sly, Spink & Co.*, (1911) 2 Ch. 430, it was held that power to act notwithstanding vacancies only applied after a board consisting of more than the minimum number had been constituted, unless there is power to act notwithstanding vacancies. *Scottish Petroleum Co.*, 23 C. Div. 431; *Faure v. Phillipart*, 58 L. T. 527; *Bennett v. Lewis*, 48 S. J. 14. The words in brackets are sometimes inserted, and occasionally the words "so long as the minimum number exists" are used instead: but they may cause inconvenience.

Where the words in brackets are omitted, the remaining words are not to be limited to the case of filling up a vacancy or to cases of emergency. Per Wright, J., *Owen and Ashworth's Claim*, (1900) 2 Ch. 272; affirmed on this part of the case, (1901) 1 Ch. 115. Sometimes the words "but this provision shall be deemed directory only" are added to clause 90, i.e., directory as distinguished from imperative (*Lindley on Companies*, 6th ed. 226); but the words are not intelligible to an average director.

The acts of directors of a defective board may still be valid in favour of a person who has no notice of the irregularity. *British Asbestos Co.*, (1903) 2 Ch. 439; but see *Sly, Spink & Co.*, *supra*.

91. The office of a director shall *ipso facto* be vacated:—

It is clear that even without the words *ipso facto* a director in each of the cases specified vacates office automatically. *Bodega Co.*, (1904) 1 Ch. 276; *Hunnings v. Williamson*, 11 Q. B. D. 3. They were originally inserted to meet the decision in *Turnbull v. Winding Club*, 70 L. T. 92.

When office of director to be vacated.

(a) If he accepts or holds any other office [or place of profit] under the coy [except that of managing director or departmental manager—but the position of trustee of a deed for securing

debentures or debenture stock of the company, or of solicitor, or banker, is not to be considered an office or place of profit]. **Form 251.**

The words in brackets will be inserted where deemed expedient.

Prima facie a director who accepts another incompatible office under the company vacates his directorship. *Milman v. Thatcher*, 2 T. R. 81; *Eales v. Cumberland Lead Co.*, 6 H. & N. 481; 3 L. T. 861; *Iron Ship, &c. Co. v. Bunt*, L. R. 3 C. P. 484. In the last-mentioned case the articles contained a provision as above (a). A. had been appointed secretary at a salary, and, whilst secretary, was elected a director, and acted as such, still, however, continuing to perform the duties of the secretary. It was held that the acceptance of the office of director vacated the office of secretary, and that the subsequent gratuitous performance of the duties of the latter office did not disqualify him under (a).

As to the words in brackets, cases very commonly arise in which it is desirable to allow of the appointment of a director as departmental manager or trustee of a debenture deed, and occasionally as solicitor or banker, and it may therefore be expedient to qualify the clause accordingly, for the words "place of profit" are far-reaching, and have been held to cover a trusteeship of a debenture deed. *Ashley v. New Tivoli*, (1899) 1 Ch. 151. But, as a rule, it is not desirable that a director should be trustee of a debenture holders' trust deed, involving as such a position does a divided duty. As to a director vacating his office by being appointed secretary, and subsequent acts curing the defect, see *British Asbestos Co. v. Boyd*, (1903) 2 Ch. 439.

Sometimes this sub-clause is omitted and a clause inserted that—

"A director may hold any other office under the company in conjunction with the office of director and on such terms as to remuneration and otherwise as the directors may arrange."

Under such a clause he cannot hold office as an auditor. See sect. 112 (3) of the Act.

(b) If he becomes bankrupt or suspends payment or compounds with his creditors.

Sometimes the word "insolvent" is inserted. This word was construed, in *Reg. v. Sudlers' Co.*, 10 H. L. C. 404, to mean publicly insolvent; but that case has recently been distinguished in *James v. Rookwood Colliery Co.*, 28 T. L. R. 215, where it was held that "insolvent" does not mean public or notorious insolvency, but what Jessel, M. R., called commercial insolvency, that is, simply a man's not being able to pay his debts as they become due.

The real aim of the disqualification is to rid the board of an unfit man; for a person who has mismanaged his own affairs to the extent of bankruptcy or insolvency is not likely to be a successful manager of the company's business. Not to speak of the temptations to irregularities incident to impecuniosity. To have an insolvent director, moreover, reflects on the credit of a company; all these considerations for vacating a director's office on insolvency are independent of whether the insolvency is private or public. It is the same with lunacy. If a director is *non compos mentis* it matters nothing whether he has been found lunatic by inquisition or not. His presence on the board would be equally disastrous to the management.

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In *Sissons & Co. v. Sissons*, 64 Sol. J. 862, a director was held disqualified under an "insolvent" clause where he had called a meeting of his creditors and submitted to them a statement of affairs showing an excess of liabilities over assets, and the creditors had resolved to accept a composition.

"Becomes bankrupt" here means after election. The article does not prevent the appointment of a person who at the time is an undischarged bankrupt to be a director. *Dawson v. African Consolidated Land and Trading Co.*, (1898) 1 Ch. 6 (C. A.).

(c) If he is found lunatic or becomes of unsound mind.

(d) If he ceases to hold the required amount of shares or stock to qualify him for office [or do not acquire the same within two months after election or appointment].

See *supra*, p. 719, as to sect. 73 of the Companies Act, 1908.

A director does not "cease to hold shares" where he has never acquired them. *Forbes' case*, 8 Ch. 777. Or by the qualification being raised. *Molineux v. London, &c. Co.*, (1902) 2 K. B. 589.

When a director ceased for a few days to hold his qualification and so vacated office, but shortly afterwards acquired the same and was recognized as a director by the continuing directors who had power to fill up casual vacancies, it was held that the case must be treated in effect as a re-appointment. *Dawson v. African Consolidated Co.*, (1898) 1 Ch. 6. And the same conclusion was reached when the vacancy was caused by a director being appointed secretary. *British Asbestos Co. v. Boyd*, (1903) 2 Ch. 439.

(e) If he is absent from the meetings of the directors during a period of three calendar months without special leave of absence from the directors.

This sub-clause is sometimes inserted. Occasionally the words, "If he absents himself" have been used; but a clause in that form applies only to voluntary or deliberate absence, not to involuntary absence such as that caused by illness. *Mack's Claim*, W. N. (1900) 114; *McConnell's Claim*, (1901) 1 Ch. 28.

As to the validity of acts done by a disqualified director, see *infra*, clause 111. p. 743, and *supra*, p. 722. See also *Halifax Sugar Refining Co. v. Franklyn*, 62 L. T. N. S. 563; *Owen and Ashworth's Claim*, (1901) 1 Ch. 115; *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; *Dawson v. African Land Co.*, (1898) 1 Ch. 6; *Iron Ship Co. v. Blunt*, L. R. 3 C. P. 484; *Sharp v. Dawes*, 2 Q. B. D. 26.

Where an office was to be vacated "if he absents himself during six months, except from temporary illness or other cause approved by the board," it was held that the officer was entitled to an opportunity of explaining his absence. *Richardson v. Methley School Board*, (1893) 3 Ch. 510.

As to a director's liability for negligence by non-attendance at board meetings, see p. 714, *supra*.

[(f) If he is concerned or interested in or participates in the profits of any contract with or work done for the coy; but no director shall vacate his office by reason of his being a member of any coy which has entered into contracts with or

done any work for this coy, or which is concerned in or Form 251.
participates in the profits of any contract with the coy.
Nevertheless he shall not vote in respect of any contract in
which he is so interested.]

Where this is used, clause 93, *infra*, will be omitted. Although being interested, &c. automatically vacates the office, the disqualification only continues so long as the contract continues, and if after the contract has come to an end the person interested is re-elected, his election is good, although the fact of his having been interested has not then been discovered. *Bodega Co.*, (1904) 1 Ch. 276. A man who is a shareholder in another company which contracts with the company is "interested" in the contract. *Todd v. Robinson*, Q. B. Div. 739; *Dimes v. Grand Junction*, 3 H. L. C. 759; and see *Whiteley v. Barley*, 21 Q. B. Div. 154; *City of London Electric Lighting Co. v. Mayor of London*, (1903) A. C. 434; *Turnbull v. West Riding Club*, 70 L. T. 92.

(g) If by notice in writing to the coy he resigns his office.

A valid resignation cannot be withdrawn. *Reg. v. Mayor of Wigan*, 14 Q. B. D. 908.

It does not require acceptance. *Transport, Ltd. v. Schonberg*, 21 T. L. R. 305; and see notes to clause 88, *supra*.

Sometimes a further paragraph is added:—

(h) If he is requested in writing by all his co-directors to resign.]

92. No director shall be disqualified by his office from contracting with the coy either as vendor, purchaser, or otherwise, nor shall any such contract, or any contract or arrangement entered into by or on behalf of the coy in which any director shall be in any way interested, be avoided, nor shall any director so contracting or being so interested be liable to account to the coy for any profit realized by any such contract or arrangement by reason of such director holding that office or the fiduciary relation thereby established, but it is declared that the nature of his interest must be disclosed by him at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest, and that no director shall as a director vote in respect of any contract or arrangement in which he is so interested as aforesaid; and if he do so vote his vote shall not be counted [but this prohibition shall not apply to the agreement mentioned in clause 3 hereof or to any matters arising thereout, or to any contract by or on behalf of the coy to give to the directors or any of them any security for advances or by way of indemnity, or to a settlement or set-off of cross-claims, and it may at any time or times be suspended or relaxed to any extent by a general meeting].

Directors may contract with company.

Sometimes the words are added: "A general notice that a director is a member of any specified firm or company, and is to be regarded as interested

Form 251. in any subsequent transactions with such firm or company, shall be sufficient disclosure under this clause, and after such general notice it shall not be necessary to give any special notice relating to any particular transaction with such firm or company."

The reference to the preliminary agreement is only required where a director is interested in that agreement as a vendor or otherwise.

But when the number of directors is small it may be necessary to relax the rule still further, as otherwise a proper quorum (see clause 106, *infra*) cannot be obtained, for a quorum of directors means a quorum competent to transact and vote on the business before the board, which an interested director *hypothetically* is not. *Greymouth Point, &c. Co.*, (1904) 1 Ch. 32.

As a director stands in a fiduciary relation towards the company, he cannot, unless the articles otherwise provide, contract with the company. *Albion, &c. Co. v. Martin*, 1 C. Div. 580. Nor does it make any difference that the contract is open and above-board as between the contracting director and his co-directors. *Ibid.* For the company is entitled to the collective wisdom of its directors. *Imperial, &c. Association v. Coleman*, 6 Ch. 558; as to which, see *Costa Rica Rail. Co. v. Forwood*, (1900) 1 Ch. 756, affirmed (1901) 1 Ch. 746. And a director is not "allowed to enter into engagements conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into." *Aberdeen Co. v. Blackie*, 1 Macq. 461; *Parker v. McKenna*, 10 Ch. 111; *Bray v. Ford*, (1896) A. C. 50; *Re Cape Breton Co.*, 29 Ch. D. 795; *Chesterfield and Boythorpe Colliery v. Black*, 26 W. R. 207; *Leeds and Hanley Co.*, (1902) 2 Ch. 809; *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339.

But a company may unquestionably waive the benefit of the rule. *Imperial, &c. Association v. Coleman*, 6 Ch. 568; *L. R. 6 H. L. 190*; *Southall v. British Mutual, &c. Society*, 6 Ch. 619; *Black v. Mallalue*, 7 W. R. 303; *Adamson's case*, 18 Eq. 670; *Kaye v. Croydon Tramways Co.*, (1898) 1 Ch. 358; *Costa Rica Rail. Co. v. Forwood*, *supra*. (In the last case cited, the profits were only collateral, the director being interested as a large shareholder in another company and a partner in the firm that managed it.)

And it has now become very common to do so, and to insert clauses to the effect of the above. Moreover, the company in general meeting can sanction a contract in which a director is interested. *Grant v. United Switchback Co.*, 40 C. Div. 135.

But when a contract is to be submitted to a meeting for confirmation, and directors of the company are interested therein, the notice convening the meeting must give particulars as to such interest. *Kaye v. Croydon Tramways Co.*, (1898) 1 Ch. 338 (C. A.); *Tieszen v. Henderson*, (1899) 1 Ch. 861; *Normandy v. Ind, Coope & Co.*, (1908) 1 Ch. 84.

It may be convenient here to refer more explicitly to the well-settled rule that an agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency beyond his proper remuneration. This rule applies with peculiar stringency to the directors of joint-stock companies.

This rule, as Lord Cairns, L. C., said (*Parker v. McKenna*, 10 Ch. 96, 118), is "not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can, in this Court, acting as an agent, be allowed to put himself into a position in which his interest and duty will conflict."

Lord Herschell has put the proposition somewhat differently, thus:—"It is an inflexible rule of a Court of Equity that a person in a fiduciary position such as the respondent's is not, unless otherwise expressly provided, entitled to

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make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger in such circumstances of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services." *Bray v. Ford*, (1896) A. C. 44, 51.

All that is required is that the other directors should have such knowledge as will enable them to scrutinize the terms of the contract with more than usual care. *Imperial Association v. Coleman*, 6 H. L. 190; *Southall v. British Mutual*, 6 Ch. 619; *Adamson's case*, 18 Eq. 670; *Costa Rica Co. v. Forwood*, (1906) 1 Ch. 756.

It is sufficient to bring the case within the rule if, although the contract is not directly with the company, the interest is such as to cause a conflict between interest and duty. *Barnacle v. Clark*, (1900) 1 Q. B. 279. And even without showing privity of contract between them a sub-agent is liable to the original principal. *Powell v. Evan Jones & Co.*, (1905) 1 K. B. 11.

See the above cases and the following:—

Parker v. Lewis, 8 Ch. 1035; *Ottoman Bank v. Farley*, 17 W. R. 761; *Carling's case*, 1 C. Div. 123; *Morvah Consols, &c. Co.*, 2 C. Div. 1; *Morison v. Thompson*, L. R. 9 Q. B. 480; *Pearson's case*, 5 C. Div. 336; *Phosphate Co. v. Hartmont*, *ibid.* 394; *Dunne v. English*, 18 Eq. 524; *De Buscho v. Alt*, 8 C. Div. 300; *Eden v. Ridsdale's Co.*, 23 Q. B. D. 368; *Boston Deep Sea Co. v. Ansell*, 39 C. Div. 339.

Mere notice of an intention not to perform a contract will not put an interested director in an uninterested position; he must obtain a proper release from persons competent to give it. *Gloucester Municipal Election Petition*, (1901) 1 Q. B. 683; *Shipway v. Broadwood*, (1899) 1 Q. B. 369.

A director cannot sue for a bribe. *Harrington v. Victoria Dock*, 3 Q. B. D. 549. And a dishonest agent cannot recover his remuneration from his principal (*Andrews v. Ramsey*, (1903) 2 K. B. 635); but if he has obtained, without fraud and *bona fide* believing that under a custom he is entitled to retain it, a discount, he is not debarred from recovering his remuneration less such discount. *Hippisley v. Knee*, (1905) 1 K. B. 1.

The company can sue the briber for the amount, because what the agent acquires he acquires for the company. *Mayor of Salford v. Lever*, (1891) 1 Q. B. 188; *Whaley Bridge Co. v. Green*, 5 Q. B. D. 109; *Grant v. Gold Exploration and Development Syndicate*, (1900) 1 Q. B. 233, in which case the company was held entitled to sue for the full amount of the commission promised less the amount actually paid, although by subsequent arrangement the amount had been reduced.

In the alternative the company may, if it chooses, rescind the contract, for where one party to a contract bribes or has any underhand dealing with the agent of the other party, the latter on discovery may repudiate the contract. *Panama and Pacific, &c. Co. v. Indiarubber, &c. Co.* (1875), 10 Ch. 515 (C. A.); *Shipway v. Broadwood*, (1899) 1 Q. B. 369 (C. A.); and see the Prevention of Corruption Act, 1906.

In such cases the Court will not enter into an inquiry what effect the bribe had on the agent. "Directly it is proved that money was paid or promised to the

Form 251. agent of the other party, it is quite unnecessary to go farther and see what effect that had on the mind of the person to whom it was paid or to be paid." Per Chitty, L. J., in the case last mentioned. In direct conflict with these decisions is *Rowland v. Chapman*, W. N. (1901) 153, in which Buckley, J., held that a contract was not rendered voidable by bribing the other party's agent, if, having regard to the amount, the balance of his interest was in favour of doing his duty to his principal.

Sometimes voting is permitted; and it would appear that even when the party interested may not vote as a director he may vote as a shareholder in the event of the matter being referred to a general meeting. *N. W. Transportation Co. v. Beatty*, 12 App. Cas. 589; *Greenfield v. Porter*, (1902) 1 Ch. 530; *Burland v. Earle*, (1902) A. C. 83.

At times a clause as follows is inserted:—

93. A director of this coy may be, or become, a director of any coy promoted by this coy, or in which it may be interested as a vendor, shareholder, or otherwise, and no such director shall be accountable for any benefits received as director or member of such coy."

Such a clause is occasionally inserted where the formation of other companies is in view.

Prima facie a director may act as a director of even a rival company. *London, &c. Co. v. New Mashonaland Co.*, W. N. (1891) 165. And if he holds his qualification in trust for another concern he is not accountable for his fees to that concern. *Dover Coalfields Extension, Ltd.*, (1908) 1 Ch. 65.

A limited company which has the requisite power may be the sole director of another company. *Bulawayo Market Co.*, (1907) 2 Ch. 458.

ROTATION OF DIRECTORS.

Rotation and retirement of directors.

94. At the ordinary general meeting to be held in the year —, and at every succeeding ordinary general meeting, one-third of the directors, or, if their number is not a multiple of three, then the number nearest to, but not exceeding one-third, shall retire from office.

The above is a clause which is in very general use. Sometimes it is provided in the case of a small number of directors, *e.g.*, five or less, that "two [or one] of the directors shall retire."

Sometimes the clause is framed like clause 82 of Table A., and provides that the meeting is to stand adjourned for a week; and that if at the adjourned meeting their places are not filled up the directors shall continue in office. It has been held that in such case, even if the adjourned meeting is not in fact held, the directors will continue in office. *Great Northern Salt*, 44 C. D. 472.

Table A. provides that:—

"At the first ordinary meeting of the company, the whole of the directors shall retire from office; and at the ordinary meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office."

But this form of clause is seldom adopted in its integrity. The promoters generally nominate the first directors, and it is considered only fair that they should have a reasonable time to try their policy. Of course, if the company chooses, it can at any time remove them under clause 99.

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95. The one-third, or other nearest number, to retire at the ordinary meeting to be held in the year — shall, unless the directors agree among themselves, be determined by lot; in every subsequent year the one-third, or other nearest number, who have been longest in office shall retire. As between two or more who have been in office an equal length of time the director to retire shall in default of agreement between them be determined by lot. The length of time a director has been in office shall be computed from his last election or appointment where he has previously vacated office. A retiring director shall be eligible for re-election.

Which directors to retire.

96. The coy at any general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons to be directors [and without notice in that behalf may fill up any other vacancies].

Meeting to fill up vacancies.

The words in brackets are very commonly absent, and in such case it is by no means clear that the meeting could, without notice, fill up a vacancy, unless it was caused by retirement "in manner aforesaid." But see *Munster v. Cammell Co.*, 21 C. D. 188, and compare with *Imperial Hydropathic Co. v. Hampson*, 23 C. Div. 1.

Votes given in favour of a disqualified person may be thrown away where notice of the disqualification is brought home to the voters. *Reg. v. Tewkesbury*, L. R. 3 Q. B. 635. And in the result the candidate who stands next may be entitled to office.

Where there are several vacancies to be filled up, each candidate's name should be put and voted on separately. To put forward a list and vote for the candidates therein in a batch is not allowable, for the meeting is not bound to fill up the vacancies, and list voting, in the absence of special provision, is only allowable where a given number are to be elected on a given day under a statute to an official position. See *Reg. v. Brightwell*, 10 A. & E. 176; *Reg. v. Player*, 2 B. & A. 707; *Re v. Monday*, 2 Cowp. 530.

97. If, at any general meeting at which an election of directors ought to take place, the places of the retiring directors are not filled up, the retiring directors, or such of them as have not had their places filled up, shall, if willing, continue in office until the ordinary meeting in the next year, and so on from year to year until their places are filled up, unless it shall be determined at such meeting [on due notice] to reduce the number of directors.

Retiring directors to remain in office till successors appointed.

If by reason of the refusal of a director to continue there remains a vacancy, it can be filled up as a casual vacancy. See *Munster v. Cammell Co.*, *ubi supra*. "Casual vacancy" means any vacancy not occurring by effluxion of time,

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that is, any vacancy occurring by death, resignation, or bankruptcy. *York Tramways v. Willows*, 8 Q. B. D. 694.

But for this clause the acts of a director who, after his office was vacated, under clause 95, continued to act, would, subject to sect. 74 of the Act (*infra*, p. 743, note to clause 111), be void as against the members. *Garden Gully, &c. Co. v. McLister*, 1 App. Cas. 39. Apart from such a clause, a director whose term of office is up vacates office, and if he continues to act is merely a *de facto* director. See *Tyne Steamship Insurance Association v. Brown*, 74 L. T. 283. See *infra*, clause 111.

A shareholder can vote for his own election, for he is not in a fiduciary position. If he appoints a proxy, clearly the proxy can vote for the appointor, and it would seem that he can vote in his own favour with or without express authority, for it is the appointor who votes. *Qui facit per alium facit per se*. The doctrine that a person empowered to appoint new trustees cannot appoint himself trustee (*Skrat's Settlement*, 42 C. D. 522), is not applicable, for in that case the power is a fiduciary one.

If the words in brackets are omitted, it seems that a resolution not to fill up the places of the retiring directors, and to "reduce the number of directors accordingly," is operative without notice, if the reduced number is not below the minimum fixed by the articles. *Bennett Bros., Ltd. v. Lewis*, 48 S. J. 14.

Power for
general
meeting to
increase or
reduce
number of
directors.

98. The coy in general meeting may from time to time increase or reduce the number of directors, and may [alter their qualification and may] also determine in what rotation such increased or reduced number is to go out of office.

The words in brackets are sometimes found useful.

Power to
remove
director by
extraordinary
resolution.

99. The coy may by extraordinary resolution remove any director before the expiration of his period of office, and appoint another [qualified] person in his stead: the person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

Directors of a company cannot be removed during their term of office by the shareholders, unless there is a special provision for that purpose in the articles. *Imperial Hydropathic Co. v. Hampson*, 23 C. Div. 1; *Isle of Wight Rail. Co. v. Tahourdin*, 25 Ch. D. 330; *Browne v. La Trinidad*, 37 Ch. D. 11; and see *Logan v. Davis*, 104 L. T. 914, *infra*, p. 738.

If there is no power the articles must first be altered, and then the power exercised. However, if in any case where there is no power it is desired to act promptly, a special resolution can be passed giving power to a general meeting to remove, and the notice convening the confirmatory meeting can state that if the resolution is confirmed a further resolution will be proposed removing Mr. A. from office. Sometimes the majority is not sufficiently powerful to pass a special resolution for removal, as was the case in *Automatic Self-cleansing Filter Syndicate Co. v. Cunniffame*, (1906) 2 Ch. 34. Where this is the situation a mere majority of the shareholders cannot interfere with the mandate given to the directors by the whole body of shareholders. *Gramophone and Typewriter*, (1908) 2 K. B. 80; *Salmon v. Quin and Axtens*, (1909) 1 Ch. 311, affirmed by House of Lords; *Logan v. Davis*, *supra*. See, however,

Marshall's Valve Gear Co. v. Manning, Wardle & Co., (1909) 1 Ch. 267. But it may still be expedient in such a case to pass a resolution approving of the director's exclusion, for where the majority of shareholders is against a director, the Court will not force him on the company by injunction. *Harben v. Phillips*, 23 C. Div. 14; *Bainbridge v. Smith*, 41 C. Div. 462. It is a different matter where the directors—as distinguished from the company—exclude a co-director from acting. Then the Court will interfere, as against the directors, by injunction. *Pulbrook v. Richmond Mining Co.*, 9 Ch. D. 610.

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As to the meaning of extraordinary resolution, see sect. 69 of the Act, and p. 1092, *infra*. Table A., clause 86, provides for removal by extraordinary resolution. Sometimes the clause is framed as follows: "The company in general meeting may," &c.

Sometimes where paragraph (A) of clause 91 is not inserted, it is considered expedient to insert a clause to the effect that "the directors may, at a meeting specially convened for the purpose by a resolution of a three-fourths majority of the directors present thereat, suspend any director, and at the expiration of fourteen days a director so suspended shall vacate office, unless he, within that period, gives notice to the company that he appeals to a general meeting; and if he so appeals the directors shall, with all convenient speed, convene a general meeting to consider such appeal, and such meeting may annul the suspension or may affirm it and remove the director."

Where the power to remove is only for reasonable cause, it is for the meeting to decide what is reasonable cause, and the Court will not interfere with their decision. *Underwick v. Snell*, 2 M. & G. 216; and see *Gresham Life*, 8 Ch. 449; *Osgood v. Nelson*, L. R. 5 H. L. 636. If a director cannot be removed, and the result is a deadlock, a winding-up order may, *semble*, be obtained. *Sailing Ship Kentmere*, W. N. (1897) 58; and see *Brick and Stone Co.*, W. N. (1878) 58.

99a. Any casual vacancy occurring among the directors may be filled up by the directors; but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.]

Directors may fill up casual vacancies.

This clause is usually inserted where clause 85 is not used. It would be extremely inconvenient in most cases if a general meeting of the company had to be called to fill up a casual vacancy.

A casual vacancy means any vacancy arising otherwise than by retirement under clause 94 (*Munster v. Cammell Co.*, 21 C. D. 183), *e.g.*, any vacancy occurring by death, resignation, or bankruptcy. *York Tramways v. Willows*, 8 Q. B. Div. 694. The Court will not interfere with the exercise of a discretion. *Lambert v. Neuchatel Asphalt Co.*, 30 W. R. 914.

To fill up a vacancy there must be a quorum. *Newhaven v. Newhaven*, 30 C. D. 380.

Where the directors are given a general power [*supra*, note to clause 85] to appoint additional directors, this clause will be omitted.

100. No person, not being a retiring director, shall, unless recommended by the directors for election, be eligible for election to the office of director at any general meeting, unless he, or some other member intending to propose him, has, at least seven clear days

When candidate for office of director must give notice.

Form 251. before the meeting, left at the office a notice in writing duly signed, signifying his candidature for the office, or the intention of such member to propose him.

This clause is found convenient and for the benefit of a company. It enables inquiries to be made as to a candidate's antecedents, &c., &c. See *Barber's case*, 5 C. Div. 963.

Register of directors and notification of changes to registrar.

101. The coy is to keep at its office a register containing the names and addresses and occupations of its directors, and is to send to the Registrar of Companies a copy of such register, and shall from time to time notify to the registrar any change that takes place in such directors, as required by sect. 75 of the Cos (Consolidation) Act, 1908.

The above clause is in the terms of sect. 75 of the Companies Act, 1908. It seems desirable to insert such a clause by way of reminder, but if preferred the clause can easily provide that the directors shall comply with sect. 75 in regard to keeping a register of directors or managers, and notifying changes to the registrar.

MANAGING DIRECTOR.

Power to appoint managing director.

102. The directors may, from time to time, appoint one or more of their body to be managing director or managing directors of the coy, either for a fixed term or without any limitation as to the period for which he or they is or are to hold such office, and may from time to time remove or dismiss him or them from office and appoint another or others in his or their place or places.

The above and the following are the usual clauses as to a managing director. It seems expedient in most cases to insert them in order to avoid the necessity of having to alter the articles. Of course, the exercise of the powers contained in these clauses is optional. Not uncommonly the first managing director is appointed by the articles.

Where directors, under a power vested in them by the articles, have appointed one of themselves managing director, a majority of the shareholders, though disapproving the appointment, cannot interfere, because by another article the directors are to carry on the business "subject to such regulation as may be made by the company in general meeting." *Logan v. Davis*, 104 L. T. 914.

What provisions he will be subject to.

103. A managing director shall not, while he continues to hold that office, be subject to retirement by rotation, and he shall not be taken into account in determining the rotation of retirement of directors, but he shall, subject to the provisions of any contract between him and the coy, be subject to the same provisions as to resignation and removal as the other directors of the coy, and if he cease to hold the

office of director from any cause, he shall, *ipso facto* and immediately, **Form 251.** cease to be a managing director.

104. The remuneration of a managing director shall from time to time be fixed by the directors, and may be by way of salary, or commission, or participation in profits, or by any or all of those modes. **Remuneration of managing director.**

Sometimes the articles give him a commission on the profits, or on the surplus profits, or on the dividend paid.

A managing director may be entitled in a winding-up to prove for arrears of salary in competition with outside creditors. *Dale and Plant*, 43 C. D. 255. And see *Ex parte Beckwith*, (1898) 1 Ch. 324; *Shaw, Bryant & Co.*, W. N. (1901) 124.

But a managing director whose salary has not been duly assigned to him may have to account for it. *Liverpool Household Stores*, 62 L. T. 878.

Where a managing director is appointed for a term with a covenant not to compete with the company, and a winding-up commences whereby the company is disabled from continuing his employment, he may be entitled to disregard the covenant. *Measures Brothers v. Measures*, (1910) 2 Ch. 248; *General Billposting Co. v. Atkinson*, (1909) A. C. 118.

105. The directors may from time to time entrust to and confer upon a managing director for the time being such of the powers exercisable under these presents by the directors as they may think fit, and may confer such powers for such time, and to be exercised for such objects and purposes, and upon such terms and conditions, and with such restrictions as they think expedient; and they may confer such powers, either collaterally with, or to the exclusion of, and in substitution for, all or any of the powers of the directors in that behalf; and may from time to time revoke, withdraw, alter, or vary all or any of such powers. **Powers and duties of managing director.**

These powers will be conferred by resolution of the directors. In the absence of express power to delegate, the maxim "*delegatus non potest delegare*" applies to directors. *Howard's case*, 1 Ch. 561; *Harris's case*, 7 Ch. 587. In the latter case, there being a power to delegate, it was held that an allotment made by a committee, instead of by the board of directors, was valid. See also *Land Credit Co.*, 4 Ch. 460. See the general power of delegation, *infra*, clause 109. For exceptions to rule, see *De Bussche v. Alt*, 8 C. Div. 300; and *Rossiter v. Trafalgar Co.*, 27 Beav. 380. The mere appointment of a manager by directors under a power for that purpose will only operate as a delegation to such manager of the ordinary commercial business of the company. *Cartmell's case*, L. R. 9 Ch. 696. Persons dealing *bond fide* with a managing director are entitled to assume that he has all such powers as he purports to exercise, if they are powers which, according to the constitution of the company, a managing director might have. *Biggerstaff v. Rowatt's Wharf*, (1896) 2 Ch. 93; *Owen and Ashworth's Claim*, (1901) 1 Ch. 115.

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PROCEEDINGS OF DIRECTORS.

Meetings of
directors, and
quorum.

106. The directors may meet together for the dispatch of business, adjourn, and otherwise regulate their meetings and proceedings, as they think fit, and may determine the quorum necessary for the transaction of business. Until otherwise determined, two directors shall be a quorum. [A director interested is to be counted in a quorum notwithstanding his interest.]

The directors must, *prima facie*, act by resolution at a board meeting duly convened and constituted (per *Cozens-Hardy, J., Haycraft Gold Reduction and Mining Co.*, (1900) 2 Ch. 230; see also *Harben v. Phillips*, 23 Ch. D. 14), for the company is entitled to the benefit of their combined wisdom in board meeting assembled. But if the articles so provide (see clause 112), a resolution in writing, signed by the directors without meeting, is as effective as a resolution passed at a meeting.

If a general meeting is convened by the secretary without proper authority, it is irregular (*Haycraft Gold Reduction, &c. Co.*, (1900) 2 Ch. 230; *State of Wyoming Syndicate*, (1901) 2 Ch. 431 (Wright, J.)), unless before the day fixed the directors ratify the act of the secretary. *Hooper v. Kerr, Stuart & Co.*, 45 S. J. 139 (22 December, 1900); *Transport Co. v. Schonberg*, 21 T. L. R. 305.

Where, as above (clause 83), it is provided that there shall be a certain minimum number of directors, and the articles fix the quorum, it seems that if by vacancies the number be reduced to less than the minimum, in the absence of a clause similar to 90, nothing can be done until the minimum number is made up (*Alma Spinning Co.*, 16 Ch. D. 681; *Kirk v. Bell*, 16 Q. B. 290; *Scottish Petroleum Co.*, 23 C. Div. 413; *Faure v. Phillipsart*, 58 L. T. 527; *Owen & Ashworth's Claim*, (1901) 1 Ch. 115; *British Empire Match Co.*, 59 L. T. 292; *Sly, Spink & Co.*, (1911) 2 Ch. 430); though it may be that in such cases the remaining directors could exercise a power to fill up the vacancy. *York Tramways Co. v. Willows*, 8 Q. B. Div. 685. Notwithstanding the defectiveness of the board the acts of the directors may be valid in favour of a person who has no notice of the irregularity. *British Asbestos Co.*, (1903) 1 Ch. 439.

A quorum, it has been held, means a quorum competent to transact and vote on the business before the board, and a resolution passed only by what would be a quorum if one of the number was not interested and prohibited from voting is invalid. *Greymouth Point, &c. Co.*, *Yuill v. Same*, (1904) 1 Ch. 32.

Where no quorum is fixed by the articles, and no power to fix a quorum is given, the directors must act on the footing that, to constitute a valid meeting, all the directors must be summoned, and a majority must be present. *York Tramways Co. v. Willows*, *ubi supra*. And where the articles give power to appoint a quorum, and do not provide as above for an interim quorum, there must be a majority of the directors present at a duly convened meeting in order effectually to exercise the power. *Portuguese Copper Mines Co.*, 42 C. Div. 161. If no quorum has been fixed the number that usually act will do. *Lyster v. Cass* (1867), 4 Eq. 233. Moreover, a meeting of the directors to be effective must be duly convened by proper notice to each director. *Browne v. La Trinidad*, 37 C. D. 1; *Harben v. Phillips*, *supra*; *Homer Co.*, 39 C. D. 546; *Haycraft Gold, &c. Co.*, (1900) 2 Ch. 230. But there may be cases in which, even in the absence of a provision to the contrary as above, notice need not be given to a director who is abroad (*Halifax Sugar Co.*, 62 L. T. 564); unless, perhaps, he is within easy reach. *Portuguese Copper Mines Co.*, 42 C. Div. 167. Reasonable notice should be given; but where very short notice is given to a

director, and he does not at once object, he may be taken to waive any objection. *Broena v. La Trinidad*, 37 C. Div. 1; see *supra*. Unless otherwise provided by the regulations of the company, or of the directors, the notice convening a meeting of the directors need not specify the business to be transacted. *La Compagnie de Mayville v. Whitley*, (1896) 1 Ch. 788.

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Very commonly the directors determine to hold ordinary board meetings on a specified day or days in each week or month, and at a specified place and hour, and of course notice of such determination renders it unnecessary to give further notice of each such meeting.

If the directors act at an irregular board meeting, what they do may be void (*Homer Co.*, 39 C. D. 546), and the company may be involved in serious consequent difficulties. But it is usually open to a subsequent regular board meeting to ratify what has been done by an irregular board. *Portuguese Copper Mines Co.*, 45 C. Div. 28; *Land Credit Co.*, 4 Ch. 473; *Hooper v. Kerr, Stuart & Co.*, 83 L. T. 729; *State of Wyoming Syndicate*, (1901) 2 Ch. 431. In *Portuguese Copper Mines* there was an allotment of shares to A. made by an irregular board. Some time afterwards, A. not having repudiated the allotment, it was ratified by a regular board, and it was held that A. was bound.

The decision of the Court of Appeal in *Bolton Partners v. Lambert*, 41 C. Div. 295, goes much further. In that case it was held that a contract made by A., purporting to act on behalf of a company (but in fact without authority), could be ratified by the company notwithstanding that the other party to such contract had repudiated before the ratification. This is a startling doctrine. The cases of *National Coffee Palace*, 24 C. Div. 374; *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Firbank v. Humphreys*, 18 Q. B. Div. 54, which show that where one person purports to act as agent for another he is to be regarded as representing that he is authorized by that other, were not cited; and, having regard to these cases, it may be that, if the agent is in fact unauthorized, the other party may, on the ground of misrepresentation, repudiate the contract before it has been ratified. It has now been judicially declared that *Bolton Partners v. Lambert* may require reconsideration. *Fleming v. Bank of New Zealand*, (1900) A. C. 587, 588. In any case ratification must be within a reasonable time. *Portuguese Copper Mines Co.*, 45 C. Div. 30; *Metropolitan Asylums Board v. Kingham*, 6 T. L. R. 217.

Where the director intends but does not purport to act as agent for the company, the company cannot ratify. *Keighley, Mazted & Co. v. Durant*, (1901) A. C. 240.

A formal resolution is not in all cases necessary to show that directors have sanctioned a particular transaction, as the following observations of Giffard, L. J., show. "I have no hesitation in saying," remarked the learned judge, "that it was not necessary for the directors to pass any resolution in order to make the acceptance of bills binding on the company, or in saying that if the directors met together, and the chairman, with their knowledge, accepted a bill of exchange, that would bind the company. In the same way, if a bill of exchange had been accepted by the chairman, without due authority, and the directors afterwards, at a meeting, knowing that the acceptance had been given and dealt with, acted on the footing that the bill had been properly accepted, I should not have the least hesitation in saying that the acceptance would bind the company." *Land Credit Co.*, 4 Ch. 460, 473. But see the note to clause 111.

As to ratification by a general meeting. *Grant v. United Switchback Co.*, 40 C. D. 135; *Boschoek Proprietary Co., Ltd. v. Fuke*, (1906) 1 Ch. 148.

106a. A director may at any time [and the secretary, upon the request of a director, shall] convene a meeting of the directors. [It Director may summon meeting.]

Form 251. shall not be necessary to give notice of a meeting of the directors to a director who is not in the United Kingdom.] Questions arising at any meeting shall be decided by a majority of votes, and in case of an equality of votes, the chairman shall have a second or casting vote.

How questions to be decided.

A person dealing with the company is not bound to ascertain that the seal has been affixed by the authority of a duly constituted board. *County of Gloucester Bank v. Rudry Co.*, (1895) 1 Ch. 629; *Owen and Ashworth's Claim*, (1901) 1 Ch. 115; conf. *Mayor of Sturges v. Bank of England*, 21 Q. B. D. 161, and other cases, *supra*, p. 83.

Where, as in Table A., the power to appoint the first directors is vested in the subscribers, they need not hold a meeting in order to make a valid appointment. *Great Northern Salt, &c. Co.*, 44 C. D. 472, *supra*, p. 717. But in such a case all the subscribers must sign and not merely a majority. *John Morley Building Co. v. Bourne*, (1891) 2 Ch. 392.

Sometimes proxies are allowed, as thus:—"A director may attend and vote by proxy at any meeting of the directors, provided such proxy is a member and has been approved of as such by the unanimous vote of the directors, and has been appointed by writing under the hand of the appointor. The appointment may be general or for any particular meeting or meetings. The appointee may be another director of the company."

Chairman.

107. The directors may elect a chairman of their meetings, and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.

Sometimes the first chairman is specified, so as to avoid discussion.

Powers of quorum.

108. A meeting of the directors for the time being at which a quorum is present shall be competent to exercise all or any of the authorities, powers, and discretions by or under the articles of the company for the time being vested in or exercisable by the directors generally.

This clause merely expresses that which has hitherto been generally assumed; but as some doubt has been raised whether the ordinary clause (106) as to a quorum enables a board meeting to act in regard to important matters, it seems desirable to provide as above. See *New Sombbrero Co. v. Erlanger*, 5 C. Div. 73; 3 App. Cas. 1218; *Alma Spinning Co.*, 16 C. D. 681; *York Tramways v. Willows*, 8 Q. B. Div. 697. A director who, being interested, is disqualified from voting cannot *prima facie* be counted in a quorum. *Ibid.*; *Re Greymouth Point Elizabeth Rail. Co.*, *Yuill v. Same*, (1904) 1 Ch. 32. And it must not be forgotten that, although a quorum may in fact be present, if they have not been duly summoned they do not form a properly constituted meeting capable of transacting business. *Homer District Co.*, 39 C. D. 546.

Power to appoint committees and to delegate.

109. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit. Any committee so formed shall, in the exercise of the powers so dele-

gated, conform to any regulations that may from time to time be **Form 251.** imposed upon it by the directors.

Without an authority of this kind directors cannot delegate. *Cobb v. Becke*, 6 Q. B. 929.

The above clause is generally inserted, and is of great practical convenience. See *Taurine Co.*, 25 C. D. 118; *Harris's case*, 7 Ch. 587; *Leeds Estate Co. v. Shepherd*, 36 Ch. D. 787. It will be observed that the committee may consist of one member only.

Where the directors have authority to delegate their powers to committees, such delegation may be presumed, if one or two directors act for the company in a matter which might have been delegated to them. *Totterdell v. Farsham Brick Co.*, L. R. 1 C. P. 674; *Regent's Canal Co.*, W. N. (1867) 79; *Lyster's case*, 4 Eq. 238; *Mahoney v. East Holyford Co.*, L. R. 7 H. L. 869. See, however, *Premier Industrial Bank v. Carlton Manufacturing Co.*, (1909) 1 K. B. 106.

Delegation does not prevent the directors generally from acting in regard to the matter delegated. *Huth v. Clarke*, 25 Q. B. D. 391.

If directors delegate their powers to a committee without fixing a quorum, whatever the committee does must, unless the articles otherwise provide, be done in the presence of all its members. *Liverpool Household Stores*, 62 L. T. 876.

110. The meetings and proceedings of any such committee, consisting of two or more members, shall be governed by the provisions herein contained for regulating the meetings and proceedings of the directors, so far as the same are applicable thereto, and are not superseded by any regulations made by the directors under the last preceding clause. Proceedings of committee.

It is conceived that this clause gives power to a committee of several to appoint a quorum. But *prima facie* a committee cannot appoint a quorum, or sub-delegate or act unless all the members are present. *Liverpool Household Stores*, *ubi supra*; *Cook v. Ward*, 2 C. P. D. 255.

111. All acts done by any meeting of the directors, or by a committee of directors, or by any person acting as a director, shall, notwithstanding that it shall afterwards be discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director. When acts of directors or committee valid, notwithstanding defective appointment, &c.

It is to be observed that this clause, unlike sects. 71 (3), 74 of the Act, is not qualified by the words "until the contrary is proved." The clause is effective not only in favour of the members, but of outsiders. Thus, in *Mahoney v. East Holyford Co.*, L. R. 7 H. L. 887, the *de facto* directors had not been duly appointed, but the company was bound by their acts as regards an outsider. The articles contained sect. 74 (85) as above, and Lord Cairns said:—

Form 251. "It appears to me that this is exactly such a case as the 85th section of the articles is meant to meet. There is no regular appointment of directors, and the persons so acting may perhaps have been disqualified; but the acts done by them are to be taken as being as valid as if they had been duly appointed and qualified."

See also *Newhaven v. Newhaven*, 30 C. D. 363; *Re Bank of Syria*, (1900) 2 Ch. 272; *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; and *Briton Medical Co. v. Jones*, 61 L. T. 384, in which it was held that under sect. 67 of the Companies Act, 1862 (Companies Act, 1908, ss. 71 (3), 74), a call made by directors who had not been duly appointed was valid; and *Dawson v. African Consolidated, &c. Co.*, (1898) 1 Ch. 6; 46 W. R. 132, is to the same effect. So where B., one of the directors of a company with an article in the form above, vacated office by being appointed secretary in October, but resigned the latter office on 2nd December, and at a board meeting on 4th December attended only by B. and R. (another director) a letter was received from M., the third director, resigning his directorship, and B. and R. thereupon resolved that B. should be managing director, and at the next meeting B. and R. purported to appoint D. a director, and B. and R. acted as directors till after 3rd March, 1903, when they discovered the irregularities: Farwell, J., held that the irregularities in the appointments of B. and D. (the quorum being two), and the subsequent acts of the three, were validated by the article and by sect. 67 of the Act of 1862, and that the three were a duly constituted board. *British Asbestos Co. v. Boyd*, (1903) 2 Ch. 439. See also *Transport Ltd. v. Schonberg*, 21 T. L. R. 306; *County Life Ass. Co.*, 5 Ch. 288; *Gre. Northern Salt Co.*, 44 C. D. 472; and *Murray v. Bush*, L. R. 6 H. L. 37. A director who takes part in irregular proceedings may be estopped from setting up the irregularity. *Faure v. Phillipart*, 58 L. T. 527; *York Tramways v. Willows*, 8 Q. B. Div. 685.

As to convening a general meeting by *de facto* directors, see *Roschoek Proprietary Co., Ltd. v. Fuke*, (1906) 1 Ch. 148.

The clause may not protect a person who knows of the defect. *Staffordshire Gas*, 66 L. T. 414; *Tyne, &c. Co. v. Brown*, 74 L. T. 483; *Murray v. Bush*, L. R. 6 H. L. 77. As to invalidity of a directors' meeting where some directors are not summoned, see *Harben v. Phillips*, 23 C. D. 34.

Resolution
without board
meeting valid.

[112. A resolution in writing, signed by all the directors, shall be as valid and effectual as if it had been passed at a meeting of the directors duly called and constituted.]

As regards this clause, it must be borne in mind that the London Stock Exchange Committee regard it as objectionable, and accordingly, where a quotation is desired, it should be omitted. In other cases it is found convenient. In the absence of such a clause directors cannot act without a board meeting. *Nicol's case*, 3 D. & J. 440; *Hayercraft Gold Reduction and Mining Co.*, (1900) 2 Ch. 230; *State of Wyoming Syndicate*, (1901) 2 Ch. 431; *D'Arcy v. The Tamar, &c. Co.*, L. R. 2 Ex. 158; *Re Marseilles Rail. Co.*, L. R. 7 Ch. 169; *Re Great Northern Salt Works*, 59 L. J. Ch. 288. Compare *Collie's Claim*, 12 Eq. 258.

Remuneration
for extra
service.

112a. If any director, being willing, shall be called upon to perform extra services, or to make any special exertions in going or residing abroad, or otherwise for any of the purposes of the company, the

coy shall remunerate the director so doing, either by a fixed sum or by a percentage of profits, or otherwise as may be determined by the directors, and such remuneration may be either in addition to or in substitution for his or their share in the remuneration above provided. **Form 251.**

This clause is commonly inserted. It must be clearly made out that the services are extra: for when services are rendered to a company by one of its own directors the presumption is that they are not "extra services." *Lockhart v. Moldacott*, 5 T. L. R. 307. Travelling expenses to attend board meetings will not be allowed, see *Young v. Naval Soc.*, (1905) 1 K. B. 687; *Marmor, Lim. v. Alexander*, 8. C., 78 Ct. of Sess. 78.

MINUTES.

[112b. The directors shall cause minutes to be duly entered in books provided for the purpose— *Minutes to be made.*

- (a) Of all appointments of officers.
- (b) Of the names of the directors present at each meeting of the directors and of any committee of directors.
- (c) Of all orders made by the directors and committees of directors.
- (d) Of all resolutions and proceedings of general meetings and of meetings of the directors and committees.

And any such minutes of any meeting of the directors, or of any committee, or of the coy, if purporting to be signed by the chairman of such meeting, or by the chairman of the next succeeding meeting, shall be receivable as *prima facie* evidence of the matters stated in such minutes.]

See sect. 71 of the Act of 1908 as to the company's duty to cause minutes to be kept.

The above clause is sometimes inserted, and may possibly be useful as a reminder, but if brevity is desired it can be omitted; for sect. 71 of the Act sufficiently provides for these matters.

Even apart from the Act, the clause would appear to be effectual as against any member of the company, although, of course, not against strangers. See *Roney's case*, 12 W. R. 816, 994; 4 D. J. & S. 426.

Entries in the company's books which would be irregular unless based on resolutions of the board afford *prima facie* evidence of the resolutions, even though no minute thereof is forthcoming. *Re Knight*, 2 Ch. 321; *Grent Northern Salt*, 44 C. D. 483; and see *Lane's case*, 1 D. J. & S. 509.

And so, too, a letter written by the secretary will be presumed *prima facie* to have been written with the authority of the directors. *Johnson v. Lyttle's Iron Agency*, 5 C. Div. 687; but see *George Whitchurch, Limited*, (1902) A. C. 117, 124.

The absence, however, of any minute of an alleged transaction is material when the party who alleges the transaction was a director. *Re Rotherham Co.* (1884), 25 Ch. D. 109.

The fact that the proceeding at a meeting are entered in the minute book is not conclusive that the proceedings were regular, and does not preclude the

Form 251. Court from inquiring into the validity of the notice convening the meeting. *Betts & Co. v. Macnaghten*, (1910) 1 Ch. 430.

The minutes, being only *prima facie* evidence, may be contradicted by other evidence (*Totthill's case*, 1 Ch. 85; and see 16 W. R. 1192), but if signed by the chairman are to be taken *prima facie* as correct. *Indian Zedane Co.*, 26 C. D. 70; and see *Southampton Docks Co. v. Richards*, 1 Man. & Gr. 448.

A bargain may be made out, even though not recorded in the book (*Pyl. Works* (No. 2), (1891) 1 Ch. 184), and a man may be held to be a member although no allotment is entered in the minutes. *Great Northern Salt Co.*, 44 C. D. 472. But absence of any minute of an alleged transaction is material where the party alleging the transaction was a director. *Rotherham Co.* (1884), 25 C. D. 109.

A director who is present at a meeting of the Board at which the minutes of proceedings at a prior board are confirmed is not thereby made responsible for what was done at the prior board. *Lands Allotment Co.*, (1894) 1 Ch. 616.

POWERS OF DIRECTORS.

General powers of company vested in directors.

113. The management of the business of the company shall be vested in the directors, who, in addition to the powers and authorities by these presents or otherwise expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company and are not hereby or by statute expressly directed or required to be exercised or done by the company in general meeting, but subject nevertheless to the provisions of the statutes, and of these presents, and to any regulations from time to time made by the company in general meeting: provided that no regulation so made shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

The above clause is usual. If it is desired to limit the authority of the directors, express provision is accordingly made, but, subject thereto, the general powers of the company are almost always given to the directors. See and compare clause 55 of Table A.

And such a general delegation is valid and effectual. Thus, in *Patent Fil. Co.*, 6 Ch. 13, the articles authorized the borrowing of money with the sanction of an extraordinary meeting of the company; they also contained a clause substantially the same as above. The directors overdraw the company's banking account, and, being required by the bank to give security, deposited title deeds of property belonging to the company. It was held in the winding-up of the company that the mortgage was valid. James, L. J., said (*inter alia*) that it was "plain that, under these articles, the directors can do anything which the company could do, unless it is an act which they are specially prohibited from doing. I can find nothing in the memorandum or articles to prevent the directors from making the best terms they can with a creditor of the company by selling or pledging part of the property of the company." And Mellish, L. J., said (*inter alia*): "The articles give to the directors the whole powers of the company, subject to the provisions of the articles and of the Companies Act, 1862, and I cannot find anything either in the Act or the articles to prohibit their making a mortgage by deposit. . . . There being nothing in the articles to prohibit the giving of such security, I am of opinion that the company can give it as well for a past debt as a future one."

See also *Anglo-Danubian Co.*, 20 Eq. 339. There the articles contained express power to borrow (clause 29), and also (clause 66) a general delegation of powers as above. The question was, whether the directors had power to issue debentures at a discount. *Jessel, M. R.*, held that they could: "There is nothing in these articles to limit the amount of interest; the directors might give 10 per cent., 20 per cent., or 30 per cent., and they might give that interest by way of discount. If, therefore, I went on the mere words of the 29th clause, I should hold this was within their powers. But, looking to the 66th clause, I cannot have any possible doubt. The directors can do anything the company can do; and as there are no regulations prescribed by the articles or the company under the 66th clause, they may borrow on any terms they think fit." See also *Australian Co. v. Mounsey*, 4 K. & J. 733; *Peruvian Rail. Co.*, 2 Ch. 617; *Hampson v. Pries's Patent Candle Co.*, 45 L. J. Ch. 437; *Pyle Works* (No. 2), (1891) 1 Ch. 173.

In exercising these powers, whether general or special, directors must always bear in mind that they are trustees for the company and must exercise the powers for the benefit of the company and for that alone. *Richmond's case*, 4 K. & J. 325; *Gilbert's case*, 5 Ch. 559; *Re Gresham Life Assurance Society*, *Ex parte Penney*, L. R. 8 Ch. 907; *Punt v. Symons & Co.*, (1903) 2 Ch. 506; *Percival v. Wright*, (1902) 2 Ch. 421.

And where the directors act *bonâ fide* in exercise of a discretion vested in them by the regulations, the Court will not interfere with the exercise of such discretion. *Gresham Life, supra*.

If the directors propose to enter into some contract, or do something of which the majority disapprove, it may sometimes be practicable to make a regulation under the above clause; and if the directors threaten to disobey, an action can be brought in the name of the company to restrain them.

Where the articles vest the general powers of the company in the directors "subject to such regulations not being inconsistent with the aforesaid regulations" as may be prescribed by the company in general meeting, the company in general meeting cannot override the directors' powers by prescribing a regulation or passing a resolution inconsistent with the articles. *Automatic Self-Cleansing Co. v. Cunningham*, (1906) 2 Ch. 34; *Gramophone and Typewriter*, (1908) 2 K. B. 89; *Salmon v. Quin and Axtens*, (1909) A. C. 433; *Logan v. Davis*, 104 L. T. 914. See, however, *Marshall's Valve Gear Co. v. Manning, Wardle & Co.*, (1909) 1 Ch. 267.

Where it is desired to give general meetings more effective control, omit the words "and to any regulations from time to time made by the company in general meeting" and substitute the words "and the exercise of such powers, authorities and discretion shall be subject also to the control and regulations of any general meeting specially convened for the purpose"; thus following the provisions of s. 90 of the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16).

114. Without prejudice to the general powers conferred by the last preceding clause, and the other powers conferred by these presents, it is hereby expressly declared that the directors shall have the following powers; that is to say, power—

Specific powers given to directors.

From what is said in the note to clause 113, it seems that many of the subsections of this clause might without danger be omitted. Nevertheless, it is usual expressly to confer all, or some, of the powers contained in them, and reasons for doing so are not wanting; e.g., 1. Directors like, as far as possible,

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to have express authority; for where express authority is given by the articles, the company cannot complain that an act of the directors pursuant thereto is *ultra vires*. Thus, where the articles authorized the directors to pay 6,000*l.* to the promoters of the company, it was held, on demurrer, that payment without taxation was not improper. *Croskey v. Bank of Wales*, 4 Giff. 314. But express authority is no protection unless the directors act *bond fide* and are not guilty of negligence or fraud. *Englefield Co.*, 8 C. Div. 388; *Marzetti's case*, 28 W. R. 541. So where the articles authorized the directors to acquire a specific business "upon such terms and under such stipulations as to guarantee or otherwise as may be agreed upon," it was held that they were under no obligation to consult the company in general meeting before making the purchase, although the business was insolvent and the purchase would involve undertaking vast liabilities. *Overend & Gurney Co. v. Gibb*, L. R. 5 H. L. 480. See also *Blakely Ordnance Co.*, 3 Ch. 159; *Bank of Turkey v. Ottoman Bank*, 14 W. R. 819; *Eley v. Positive, & Co. Soc.*, 1 Ex. Div. 88.

2. The insertion of express powers relieves the directors from responsibility; for, in the absence of fraud or gross negligence, they will not be under any personal liability to the company, even though, in the exercise of the powers entrusted to them, they are guilty of imprudence and want of judgment which result in a great loss to the company. *Overend & Gurney Co. v. Gibb*, *ubi supra*; *Brazilian Rubber Plantations* (No. 1), (1911) 1 Ch. 425.

3. Mortgagees, vendors, and other persons dealing with a company like to see the powers of the directors in black and white.

4. Commercial people like to have their powers clearly defined, and to be absolved from the duty of constantly consulting their legal advisers.

To carry
agreement
into effect.

(1.) To take such steps as they think fit to carry into effect the said agreement of the — day of —.

If clause 3, *supra*, is inserted, this should be omitted.

To pay
preliminary
expenses.

(2.) To pay the costs, charges, and expenses preliminary and incidental to the promotion, formation, establishment, and registration of the company.

Such a power, though it is an authority to the directors to pay the costs, &c., will not give a promoter a right of action in respect of preliminary expenses against the company (*Melhado v. Porto Alegre Rail. Co.*, L. R. 9 C. P. 503; *Re Rotherham Alum and Chemical Co.*, 25 Ch. D. 103), at any rate, if he is not a party to the articles. *Eley v. Positive, & Co. Soc.*, 1 Ex. D. 88. A promoter can only recover from the company what he has paid in preliminary expenses where he proves a contract by the company to pay (*English and Colonial Produce Co.*, (1906) 2 Ch. 435); not even the registration fees. *National Motor Mail Coach Co.*, (1908) 2 Ch. 515. See also *Croskey v. Bank of Wales*, 4 Giff. 318, cited *supra*, and *Englefield Colliery Co.*, 8 C. Div. 388, where directors were held liable for moneys paid without vouchers or inquiry. See also *Marzetti's case*, 28 W. R. 541. The clause does not, of course, give power to pay that which it would be *ultra vires* the company to pay.

To acquire
property.

(3.) To purchase or otherwise acquire for the company any property, rights, or privileges, which the company is authorized to acquire, at such

price, and generally on such terms and conditions, as they think fit. **Form 251.**

- (4.) At their discretion, to pay for any ppty, rights, or privileges required by, or services rendered to, the coy, either wholly or partially in cash or in shares, bonds, debentures, or other securities of the coy, and any such shares may be issued either as fully pd up or with such amount credited as pd up thereon as may be agreed upon; and any such bonds, debentures, or other securities may be either specifically charged upon all or any part of the ppty of the coy and its uncalled capital, or not so charged.

To pay for property in debentures, &c.

Debentures issued by a company under a general power of borrowing in part discharge of existing liabilities are valid. *Inns of Court Hotel Co.*, 6 Eq. 82. See also *Howard v. Patent Ivory Co.*, 38 C. D. 156.

If paid-up shares are issued under the above power, a contract in relation thereto will have to be filed under sect. 88 of the Act of 1908. See further, *supra*, pp. 64 *et seq.*

- (5.) To secure the fulfilment of any contracts or engagements entered into by the coy, by mortgage or charge of all or any of the ppty of the coy and its uncalled capital for the time being, or in such other manner as they may think fit.

To secure contracts by mortgage.

- (6.) To appoint, and at their discretion remove or suspend, such managers, secretaries, officers, clerks, agents, and servants for permanent, temporary, or special services, as they may from time to time think fit, and to determine their powers and duties, and fix their salaries or emoluments, and to require security in such instances and to such amount as they think fit.

To appoint officers, &c.

- (7.) To accept from any member such terms and conditions as shall be agreed, a surrender of his shares or stock or any part thereof.

To accept surrender of shares.

A power to accept surrenders is valid, at any rate to some extent; but, having regard to the decision in *Trevor v. Whitworth*, 12 App. Cas. 409, it is a power which can rarely be exercised without the sanction of the Court to the reduction of capital thereby effected.

Forfeiture of shares is recognized by sect. 26 (2) (g) of the Act of 1908, and by clauses 24—30 of Table A. (*Bellerby v. Rowland, &c. Co.*, (1902) 2 Ch. 14 (C. A.)), but subject to this the law seems to be as follows:—

Firstly, as to paid-up shares.—A gratuitous surrender to the company may be valid (*Balgoolie Distillery Co.*, L. R. 17 Ir. Eq. 263), if the circumstances are very special, *e.g.*, where the surrender is part of a compromise. *Trevor v. Whitworth*, 12 App. Cas. 409; *Bellerby v. Rowland, supra*. A company cannot make any payment or give any valuable consideration for the surrender, for, as Lord Macnaghten said in *Trevor v. Whitworth, supra*, "A surrender of shares in consideration of a payment in money or money's worth by the company is

Form 251. a purchase by it of its own shares and is *ultra vires*—that is to say, unless confirmed by the Court as a reduction of capital.

Secondly, as to shares on which there is a liability.—It may be that where a company is in a position to forfeit such shares, a *bona fide* arrangement for a surrender as a short cut to the same end, and without payment or consideration, is valid. See what was said in *Trevor v. Whitworth*, 12 App. Cas. 409; but it is rarely expedient to accept such a surrender. It is far better to proceed to forfeit the shares in due course, and thus avoid any question as to whether there has been an *ultra vires* reduction of the capital; for in accepting a surrender the directors incur a special risk. In the case of forfeiture the calls in arrear remain a recoverable debt, whereas in the case of surrender this is *prima facie* not the case. And, as a consequence, such a surrender of shares, partly paid, in consideration of a release from further liability is equivalent to a purchase by the company of its own shares, and is *ultra vires* and void *Bellerby v. Rowland, &c. Co.* In that case there was a surrender by the directors of partly paid shares, not as a short cut to forfeiture, but in order to reduce the paid-up capital and thus rectify the balance-sheet. The transaction was a *bona fide* one and greatly to the benefit of the company, yet Kekewich, J., and the Court of Appeal both held that it was *ultra vires* as a purchase by the company of its shares; and the Court of Appeal, reversing the decision of Kekewich, J., in an action by the surrenderor, ordered his name to be restored to the register in respect of the shares.

And *a fortiori* nothing can be paid by the company for a surrender of partly paid shares. See what Lord Macnaghten said, *supra*.

A surrender of shares presents also this logical dilemma: If it is not intended to re-issue the shares, there is a reduction of capital; and if it is intended to re-issue them, the transaction involves a trafficking by the company in its own shares. See *Hope v. International Financial Society*, 4 C. D. 327.

In *Eichbaum v. City of Chicago Co.*, (1891) 3 Ch. 459, Stirling, J., it is true, held that a surrender in exchange for other shares was valid. In coming to this decision he did not act on his own judgment, but on what he took to be the decision in *Teasdale's case*, 9 Ch. 54; but the decision in that case was only that Teasdale, having more than six years before the winding-up surrendered his shares in exchange for others, was not to be put on the list of contributories in respect of the surrendered shares. There was no decision that the shares given by the company in exchange were validly credited as paid up. No doubt there are in the judgments *dicta* which go far beyond the point decided, but they are associated with other *dicta* which have since been displaced by the decisions in *Trevor v. Whitworth*, 12 App. Cas. 409, and other cases. And in *Bellerby v. Rowland*, Stirling, L. J., with characteristic candour, admitted that he ought not to have followed *Teasdale's case*.

The following are some of the objections to surrenders in exchange:

According to the law as now settled, shares cannot be issued as paid up unless they are paid up in cash or money's worth. They have to be paid up somehow. But if shares credited as fully paid up are to be issued in exchange for paid up shares, the amount of the shares so issued is not thereby paid up either in cash or in kind, for the company gets nothing. The share (say 10*l.*) is one which the company could issue for cash, and instead of doing this it issues it credited as paid up without any equivalent addition to its capital assets. The 10*l.* already paid on the surrendered shares already belongs to the company absolutely; how, then, can the shareholder effectively pay up the share which is to be issued to him by agreeing that the company shall keep 10*l.* of its own money in payment and satisfaction of the 10*l.* which he is by the Acts bound to pay up in cash or in kind?

Again, the share to be issued in exchange is part of the capital of the com-

pany, and how can the company properly give any part of its capital as the consideration for the surrender to it of shares in its own capital? Surely this is a purchase of the company's own shares. See observations of Lord Macnaghten in *Trevor v. Whitworth*, *supra*, and per Lindley, L. J., *Denver Hotel*, (1893) 1 Ch. 504; *British, & Co. v. Couper*, (1894) A. C. 399.

Again, it may be said that to issue shares in exchange for other shares is in effect to traffic in the company's own shares, especially where it is part of a scheme, as in *Hope v. International Co.*, 4 C. D. 327. It is, *ex hypothesi*, not a single transaction, but a whole series of like transactions; and where is the company's power to traffic in its own shares? Does not this dilemma presented in that case arise? That is to say, either it is intended not to re-issue the surrendered shares, in which case there is a reduction of capital, or it is intended to issue them, in which case the scheme involves trafficking in the company's own shares. See the observations on that case in *Trevor v. Whitworth*, 12 App. Cas. 425.

It is well known that Rigby, L. J., when at the Bar, advised, on the above grounds, that a proposed scheme of exchange would be *ultra vires*, and that the decision of Stirling, J., in *Eichbaum v. City of Chicago Co.*, *supra*, could not be relied on, as it was based on a misapprehension of the point actually decided in *Fensholt's case*, *supra*, a view which was afterwards adopted by Stirling, L. J., himself. See *supra*.

Evidently, therefore, an exchange of shares involves very great risks and is most dangerous, and allottees of such shares under such an exchange, even though apparently protected by a filed contract (where the transaction was before 1901), may be held liable to pay up their shares in cash.

- 8.) To appoint any person or persons (whether incorporated or not) to accept and hold in trust for the coy any ppty belonging to the coy, or in which it is interested, or for any other purposes, and to execute and do all such deeds and things as may be requisite in relation to any such trust, and to provide for the remuneration of such trustee or trustees. To appoint trustees.
- (9.) To institute, conduct, defend, compound, or abandon any legal proceedings by or against the coy, or its officers, or otherwise concerning the affairs of the coy, and also to compound and allow time for payment or satisfaction of any debts due, and of any claims or demands by or against the coy. To bring and defend actions, &c.

Every company has an implied power to compromise disputes (*Bath's case*, 3 C. Div. 334; *Dixon v. Evans*, L. R. 5 H. L. 619), and directors may be able to compromise a claim by or against the company, even where some of the directors are interested. *General Exchange Bank*, 16 W. R. 1096. Such a clause does not authorize directors to pay costs of petition to wind up the company presented by themselves. *Smith v. Duke of Manchester*, 24 C. D. 611; 32 W. R. 83.

There is no need to say anything about proving in bankruptcy, for by sect. 148 of the Bankruptcy Act, 1883, it is provided that "For all or any of the purposes of this Act a corporation may act by any of its officers authorized in that behalf under the seal of the corporation." A clerk authorized under seal is an officer. *Re Tomkins & Co.*, (1901) 1 Q. B. 476.

As to a bankruptcy petition by a company, see *Re Calthrop*, L. R. 3 Ch. 252; *Re Whitley*, 65 L. T. 351; *Re Basset*, 2 Manson, 171; and *Peak Hill Goldfields*, 1 K. B. 430.

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The liquidator of a company may serve a bankruptcy notice, but the notice must be in the name of and on behalf of the company. *Re Winterbottom*, 18 Q. B. D. 446.

To refer to arbitration.

(10.) To refer any claims or demands by or against the coy to arbitration, and observe and perform the awards.

As to arbitration, see sect. 119 of the Act.

To give receipts.

(11.) To make and give receipts, releases, and other discharges for money payable to the coy, and for the claims and demands of the coy.

And such receipts may be effectual, even though the acting directors are not directors *de jure*. *Mahoney v. East Holyford Mining Co.*, L. R. 7 H. L. 869.

To authorize acceptance, &c.

(12.) To determine who shall be entitled to sign on the coy's behalf bills, notes, receipts, acceptances, indorsements, cheques, releases, contracts, and documents.

It must be borne in mind that directors and other persons who on behalf of a company sign any bill of exchange, note, indorsement, cheque, &c., may be subject to penalties and personally liable on the contract unless the name of the company is correctly set forth. See sect. 63 of the Act of 1908. *Atkin v. Wardle*, 61 L. T. 23; and *Dermatine Co. v. Ashworth*, 21 T. L. R. 510. The omission of the word "limited" makes the name incorrect (*Penrose v. Martyr*, F. B. & E. 499), and so does the omission of the words "and reduced" where, under sect. 48 of the Act, they are part of the name. But see as to "Ltd." *F. Stacey & Co.*, 28 T. L. R. 209, *supra*, p. 454.

To appoint attorneys.

(13.) From time to time to provide for the management of the affairs of the coy abroad in such manner as they think fit, and in particular to appoint any persons to be the attorneys or agents of the coy with such powers (including power to sub-delegate) and upon such terms as may be thought fit.

The above should be inserted where the company is likely to carry on business abroad, unless clause 114a, *infra*, is inserted. As to sub-delegation, see *supra*, clause 109.

As to the power to keep a colonial register, see sect. 34 of the Act of 1908.

To invest moneys.

(14.) To invest and deal with any of the moneys of the coy not immediately required for the purposes thereof, upon such securities (not being shares in this coy) and in such manner as they may think fit, and from time to time to vary or realize such investments.

A power to invest in securities does not warrant an application for a number of shares in a proposed company with a view to promoting it. It is not a *bonâ fide* investment. *Joint-Stock Discount Co. v. Brown*, 3 Eq. 139; 8 Eq. 381.

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- (15.) To execute in the name and on behalf of the coy, in favour of any director or other person who may incur or be about to incur any personal liability for the benefit of the coy, such mortgages of the coy's property (present and future) as they think fit, and any such mortgage may contain a power of sale and such other powers, covenants, and provisions as shall be agreed on.]

To give security by way of indemnity.

Such a provision is very desirable, for in its absence difficult questions arise as to the powers of the directors in this behalf. See *Southampton Co. v. Pincock*, 12 W. R. 30.

A security may be given, see *Pyle Works* (No. 2), (1901) 1 Ch. 173. The Stock Exchange objects to this clause.

- (16.) To give to any person employed by the coy a commission on the profits of any particular business or transaction, or a share in the general profits of the coy, and such commission, or share of profits, shall be treated as part of the working expenses of the coy.

To give percentages.

An interest in profits is often found to render the services of an agent more beneficial to his employer. Apart from a special power, a person standing in a fiduciary relation to the company could not be given such an interest by the board. See notes to clause 93.

It is sometimes desired to take express power to pay private commissions to the agents of other concerns which have dealings with the company, and unfortunately the success of some companies largely depends on such payments. But such commissions are bribes in the eye of the law and a misapplication of the funds of the company, and it is apprehended that an effective power to pay them cannot be taken expressly or impliedly. A company which by its agents thus bribes or agrees to bribe the agent of another party is responsible in damages to that party. See *supra*, p. 733; and *Harcnden & Sons v. Millhoff* (1900), 16 T. L. R. 506. The position of directors who authorize such payments is also hazardous. See the Prevention of Corruption Act, 1906. There is further the difficulty that an auditor may not unreasonably refuse to certify the accounts without vouchers, and further that he may refuse to certify unless the company's liability for damages is disclosed in the balance-sheet or otherwise.

In some cases it has been sought to meet these difficulties by giving to the manager or managing director an extra salary and a commission on profits, so that if he chooses to allow commission he will pay out of his own pocket; but it is doubtful whether a company can by such means escape responsibility, or whether the auditors, if they are cognizant of what is going on, can consistently with their duty ignore the company's liability.

Occasionally a clause as follows has been inserted in articles: "The auditors shall be at liberty to accept the certificate in writing of the managing director

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that a gratuitous payment for the benefit of the company has been made as sufficient evidence that the payment referred to in such certificate has in fact been duly made for the benefit of the company, and shall not require production of any further voucher for such payment." But such a clause, though it may meet the difficulty as to vouchers, does not meet the more formidable difficulty of illegality, which no sanction of the shareholders through the articles can condone.

To establish
reserve fund.

- (17.) Before recommending any dividend, to set aside, out of the profits of the coy, such sums as they think proper as a reserve fund to meet contingencies, or for equalising dividends, or for special dividends, or for repairing, improving, and maintaining any of the ppty of the coy, and for such other purposes as the directors shall in their absolute discretion think conducive to the interests of the coy; and to invest the several sums so set aside upon such investments (other than shares of the coy) as they may think fit, and from time to time to deal with and vary such investments, and dispose of all or any part thof for the benefit of the coy, and to divide the reserve fund into such special funds as they think fit [with full power to employ the assets constituting the reserve fund in the business of the coy, and that without being bound to keep the same separate from the other assets].

"Dividend" as here first used includes fixed cumulative dividends on preference shares. *Bond v. Barrow Hematite Steel Co.*, (1902) 1 Ch. 353, 352.

There is nothing to compel a company to divide the whole of its profits, though the regulations might be so framed. *Stringer's case*, 4 Ch. 494; *Burland v. Earle*, (1902) A. C. 83; *Bond v. Barrow Hematite Co.*, (1902) 1 Ch. 353.

Prima facie a company may form a reserve fund and the reserve fund may, subject to the control of a general meeting, be invested in such securities as the directors may select. *Burland v. Earle*, (1902) A. C. 83.

Where the articles do not provide for the retention of any part of the profits by way of reserve, the articles can no doubt be altered so as to give the power. *Binney v. Ince Hall Co.*, 35 L. J. Ch. 363.

Where the articles appropriate the reserve fund to specific purposes, they can be altered. *Walker v. London Tramways Co.*, 12 C. D. 705. And they must be altered before the reserve fund is applied in a way inconsistent with them. *Eastern and Australian Steamship Co., Limited and Reduced*, 68 L. T. 321.

The words in brackets are desirable, seeing that reserve funds are very commonly so employed.

A reserve fund accumulated out of profits preserves its character of undivided profits unless and until something is done effectually to convert it into capital. *Bouch v. Sproule*, 12 App. Cas. 385; *Sugden v. Alsbury*, W. N. (1890) 112; 45 C. D. 237; *Re Armitage*, (1893) 3 Ch. 337; *Decido Pier Co.*, (1891) 2 Ch. 354. And can be applied, where the memorandum and articles authorize such a proceeding, in paying off preference or other shareholders, but the sanction of the Court is required. See *United States Debenture Corp.*, *Times*, Aug. 2, 1905.

As to issuing paid-up shares in respect of the reserve, see *Eastern and Aus. Co.*, *ubi supra*, and *infra*, Form 474.

As to the rights of classes of shareholders on the distribution of a reserve fund, see *Bridgeport Navigation Co.*, before North, J., (1891) 1 Ch. 155; (1891) 2 Ch. 317; 84 L. T. 576, C. A.; *Odeum Waterworks Co.*, (1901) 2 Ch. 190, n.; *Partick, &c. Gas Co. v. Taylor*, 18 C. of S. Cas. 1017, Sc.; *Crickton's Oil Co.*, (1902) 2 Ch. 86; *Bond v. Burrow Hamatite Steel Co.*, *supra*; *W. J. Hall & Co.*, (1909) 1 Ch. 521; *Re Microscope and Biograph Syndicate*, (1899) 1 Ch. 896.

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A company can, without carrying to reserve, carry forward any profit. *Barnard v. Earle*, (1902) A. C. 94.

If a company reducing its capital has a reserve fund, there is no obligation to apply in the first instance the whole of such reserve fund to replace the capital account, and if the reserve has been used in the business and not separately invested, and a loss occurs, the company is at liberty to apportion the loss as between the reserve and the paid-up capital, and treat a proportionate part of the loss as on reserve account. *Hoare & Co.*, (1901) 2 Ch. 208.

As to providing for a secret reserve, see dicta in *Newton v. Birmingham Small Arms Co.*, (1906) 2 Ch. 378. These dicta are not reconcilable with the audit provisions of the Act of 1908.

See further dicta in *Young v. Brownlee & Co.*, (1911) S. C. 677 (Ct. of Sess.), where directors undervalued assets in balance sheet.

- (18.) From time to time to make, vary, and repeal bye-laws for the regulation of the business of the coy, its officers and servants. May make bye-laws.

Persons dealing with a company are deemed to have notice of the memorandum and articles of association (*supra*, p. 77), but not of bye-laws made by the directors. *Royal Bank of India's case*, 4 Ch. 252.

As to determining the reasonableness of bye-laws, see *Krupp v. Johnson*, (1898) 2 Q. B. 91.

(Until recently it was customary to add to the above clause the words "or the members of the company or any section thereof," but of late the registrar, acting, it is said, on the instructions of the Board of Trade, has objected to these words, and, to the infinite annoyance of the commercial world, who commonly insert the words, has required them to be struck out of articles tendered for registration, or else to be qualified by the addition of the words "Provided that no bye-law or regulation shall be made under this power which would amount to such an addition to or alteration of these articles as could only legally be made by special resolution passed and confirmed in accordance with sects. 13 and 69 of the Companies Act, 1908.")

The proviso is no doubt well meant—to prevent alteration of the articles under cover of a bye-law without a special resolution, but it ignores the fact that the articles are subject to the Act, and the Act indicates as clearly as can be (in sect. 13) that the articles can only be added to or altered by special resolution, and the directors and members are presumed to have read and understood the Act, so that there is no need to warn them; again, the clause does not purport to give power to make articles, but merely bye-laws which must obviously be regarded as rules of a subordinate character; further, if such a proviso as this is required here, why did not the Legislature add some such proviso to the latter part of clause 71 of Table A., which enables the company in general meeting to make regulations as to the exercise of the directors' powers? The absurdity of this official practice is emphasized by the fact that in the past many thousands of companies have been registered with the now prohibited words in their articles without any such proviso, and that no known mischief has resulted, and

Form 251. that the Board of Trade have repeatedly passed articles under sect. 23 of the Companies Act, 1867 (now replaced by sect. 20 of the Companies Act, 1908), containing power to make bye-laws without any such proviso, *e.g.*, the London Chamber of Commerce and most of the other chambers of commerce and law societies, and that articles containing the prohibited words without the proviso have been repeatedly passed by eminent judges, past and present, whilst at the Bar and on the Bench. However, in most cases, the words in question are not of any great importance; where they are considered important they can, after registration of the company, be inserted by special resolution without the proviso. There are, however, many cases in which it is an essential part of the company's scheme that there shall be power to make bye-laws, *e.g.*, in a mutual insurance society, or in a club company, and in such cases, so long as the present official view is persisted in, there must be inserted words on the lines of the proviso.

May make contracts, &c.

(19.) To enter into all such negotiations and contracts, and rescind and vary all such contracts, and execute and do all such acts, deeds, and things in the name and on behalf of the company as they may consider expedient for or in relation to any of the matters aforesaid, or otherwise for the purposes of the company.

There can be little doubt that such a clause as above is a sufficient authority to the directors to vary contracts expressly adopted by the articles. See and consider *Sahlgreen and Carrall's case*, 3 Ch. 323, 329; and *Lord Bell's case*, 3 D. J. & S. 41; *Dixon v. Evans*, L. R. 5 H. L. 696; and pp. 333-334 as to contracts by companies.

LOCAL MANAGEMENT.

Where the company is going to carry on business abroad, the following clauses should be inserted; they have been found extremely useful.

The following provisions shall have effect:

Local management. 114a.—(1) The directors may from time to time provide for the management of the affairs of the company abroad [or in any special locality in the United Kingdom] in such manner as they shall think fit, and the provisions contained in the six next following paragraphs shall be without prejudice to the general powers conferred by this paragraph.

Local board. (2) The directors from time to time, and at any time, may establish any local boards or agencies for managing any of the affairs of the company abroad [or in any specified locality in the United Kingdom], and may appoint any persons to be members of such local board, or any managers or agents, and may fix their remuneration.

Delegation. (3) The directors from time to time, and at any time, may delegate to any person so appointed any of the powers, authorities, and discretions for the time being vested in the directors, and may authorize the members for the time being of any such local board, or any of them to fill up any vacancies therein, and to act notwithstanding vacancies

and any such appointment or delegation may be made on such terms and subject to such conditions as the directors may think fit, and the directors may at any time remove any person so appointed, and may annul or vary any such delegation. **Form 251.**

(4) The directors may at any time, and from time to time, by power of attorney under the seal, appoint any persons to be the attorneys of the coy for such purposes and with such powers, authorities and discretions (not exceeding those vested in or exercisable by the directors under these presents), and for such period and subject to such conditions as the directors may from time to time think fit; and any such appointment may (if the directors think fit) be made in favour of the members or any of the members of any local board established as afd, or in favour of any coy, or of the members, directors, nominees, or managers of any coy or firm, or otherwise in favour of any fluctuating body of persons, whether nominated directly or indirectly by the directors; and any such power of attorney may contain such provisions for the protection or convenience of persons dealing with such attorneys as the directors think fit. **Powers of attorney.**

In carrying on business abroad it is generally found that a wide power of attorney under the company's common seal is requisite, and hence the importance of providing accordingly. The same instrument can authorize the attorneys to exercise the powers of the Acts below mentioned, and to exercise any other powers which it may seem desirable to delegate to them. See sect. 78 of the Act of 1908, and sect. 8 of the Conv. Act, 1882 (45 & 46 Vict. c. 39).

See also Chap. XV., *infra*.

(5) Any such delegates or attorneys as afd may be authorized by the directors to sub-delegate all or any of the powers, authorities, and discretions for the time being vested in them. **Sub-delegation.**

(6) The coy may exercise the powers conferred by sect. 79 of the Cos Act, 1908, and such powers shall accordingly be vested in the directors. And the coy may cause to be kept in any colony in which it transacts business a branch register of members resident in such colony, and the word "colony" in this clause shall have the meaning assigned thereto by the Cos Act, 1908, s. 34 (3); and the directors may from time to time make such provisions as they may think fit respecting the keeping of any such branch register. **Seals abroad and branch registers.**

The following is a more elaborate form than (6):

1. The company may cause to be kept in Queensland, or in any other colony in Australasia in which it transacts business, a branch register or registers of members resident in Queensland, or in such other colony as the case may be. And the directors may from time to time appoint an authority in Queensland, or in any other colony in which a branch register is kept, to approve of or reject transfers, and to direct the registration of approved transfers in the branch register of such colony; and every such authority may, in respect of

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transfers or other entries proposed to be registered in the branch register for which such authority is appointed, exercise all the powers of the directors in the same manner and to the same extent and effect as if the directors themselves were actually present in the colony and exercised the same.

2. Subject to the provisions of the Companies (Consolidation) Act, 1908, s. 34, and to the foregoing provisions, the directors may from time to time make such provisions as they may think fit respecting the keeping of such branch register or registers.

As to establishing a colonial register, see sect. 34 of the Act of 1908.

Local laws.

(7) The directors may comply with the requirements of any local law which in their opinion it shall in the interests of the company be necessary or expedient to comply with.

Sometimes the regulations contain special provisions pointing to some particular colonial Act, e.g.: "The company shall duly comply with the requirements of the New Zealand Act, known as the Mining Act Amendment Act, 1897, and the directors may do all such acts and things and execute all such powers of attorney and instruments as they may deem necessary or proper in order to carry into effect, provide, perform, and observe the provisions of the Mining Act, 1891, the Mining Act Amendment Act, 1897, the said Act of 1895, and any other Acts of the New Zealand Legislature. A certificate issued in respect of shares in any register kept pursuant to either of the two preceding clauses shall be under the official seal of the company, and any transfer of shares in either of the said registers may be deposited at the office where such registers are kept in New Zealand, and in applying clauses 14 and 15, and 32 to 38 inclusive, to shares on either of the said local registers, such clauses shall be read as if they were modified as follows, that is to say

"(a) In clause 11 the words 'New Zealand' shall be deemed to be inserted before the word 'seal.'

"(b) In clause 34 the words 'New Zealand' shall be deemed to be inserted before the word 'office.'

"(c) Throughout the clauses the words 'New Zealand authority' shall be deemed to be substituted for the word 'directors.'"

First solicitor.**SOLICITORS.**

[114b. Messrs. ---, of ---, shall be the solors of the coy.]

This requires a word of caution. The article does not constitute a contract between the company and the solicitor. In *Eley v. Positive Ass. Soc.*, 1 Ex. Div. 20; *S. C.*, on appeal, 88, the articles of a company provided that "Mr. A. B., of ---, shall be the solicitor of the company, and shall transact all the legal business of the company, including parliamentary business, for the usual and accustomed fees and charges, and shall not be removed from his office unless for misconduct." Mr. A. B. was employed by the company after its incorporation, but there was no evidence of any agreement to employ him on the terms mentioned in the articles. He was not a subscriber to the articles, but he was a member of the company. It was held that the articles did not constitute a contract between the company and Mr. A. B., and that he could not sue the company for refusal to employ him. *Baring-Gould v. Shipington Pick and Shore Co.*, (1899) 2 Ch. 80; *Re Rotherham Alum Co.*, 25 Ch. D. 103;

Re Dale and Plant, 61 L. T. 207; *National Motor Mail Coach Co.*, (1908) 2 Ch. 515 (C. A.), overruling *English and Colonial Produce Co.*, (1906) 2 Ch. 433; and see *supra*, p. 633.

Where a solicitor is to be a director, say: "Messrs. A. and B. shall be the solicitors of the company, and shall be entitled to remuneration notwithstanding that a member of the firm is a director of the company."

As to an article giving a solicitor an annual retaining fee, see *Rhodesian Properties*, W. N. (1901), June 22.

SECRETARY.

114c. The first secretary of the coy shall be Mr. A. B. of &c., clerk First
secretary
or whatever he may be].

Having regard to the fact that the secretary of the company is frequently mentioned in the Companies Act, 1908, it seems desirable to name him in the articles. See sect. 17, sub-sect. 2 (especially), also sect. 83, sect. 65, sub-sect. 3 (d), sect. 99 of the Companies Act, 1908. In the case of a club certain statutory requirements are made on the secretary. See Licensing Act, 1902, ss. 24 *et seq.*

As to the secretary of a company not being entitled to a lien, see *Barnton Hotel Co. v. Cook* (1899), 36 Sc. L. R. 938.

A secretary as such has no power to convene a general meeting (*State of Wyoming Syndicate*, (1901) 2 Ch. 431), though the directors may ratify the notice; *Hooper v. Kerr, Stuart & Co.*, 83 L. T. 729, or to strike a name off the register of members (*Wheatcroft's case*, 29 L. T. 326), or to pass and register a transfer not approved by the directors. *Chida Mines, Ltd. v. Anderson*, 22 T. L. R. 27.

Representations by a secretary as such are not binding on the company. *Barnett v. South London Tramways Co.*, 18 Q. B. D. 815; *George Whitechurch, Ltd.*, (1902) A. C. 117-124; *Chida Mines, Ltd. v. Anderson*, 22 T. L. R. 27; and see p. 676. Even where a secretary is held out as a person to answer certain inquiries, the company incurs no liability for untrue answers if made by the secretary for his own private ends. *British Mutual Bank v. Charnwood Forest Railway*, 18 Q. B. D. 714; and see *Ruben v. Great Fingall Consolidated*, (1906) A. C. 439.

As to cheques to a company indorsed by the secretary and, without authority, paid into his private account, see *Hannan's Lake View Central v. Armstrong*, 16 T. L. R. 236.

As to cheques with forged signatures of directors, see *Kepitiqalla Rubber Estates v. National Bank of India*, 25 T. L. R. 402.

Where a man acts as secretary of two companies, it is not true as a general proposition that a fact which comes to his knowledge as secretary of one company is notice to him as secretary of the other company from the mere existence of the common relationship. In order to make it notice, it must be shown that it was his duty to the first company to communicate his knowledge to the second company. *Fenwick, Stobart & Co.*, (1902) 1 Ch. 507.

A secretary is liable to heavy punishment for falsifying any books or documents of the company; see sect. 216 of the Act. He is also liable for misfeasance if he receives an improper commission. *Barrow's case*, 14 C. D. 433; *McKay's case*, 2 Ch. D. 1. But a secretary is in a very different position to a director, and is not to be fixed personally with liability for a misapplication of the company's funds though he may have known all about it. *Joint-Stock Discount Co. v. Brown* (1869), 8 Eq. 396.

Form 251. A secretary sued for negligence may set up the Statute of Limitations. *Municipal Freehold Land Co. v. Pollington* (1890), 63 L. T. 243. As to dismissal, see *supra*, p. 444.

Substitute. [114d. The directors may appoint a temporary substitute for the secretary, who shall, for the purposes of these presents, be deemed to be the secretary.]

THE SEAL.

Custody of seal. [115. The directors shall provide for the safe custody of the seal, and the seal shall never be used except by the authority of the directors, or a committee of the directors, previously given, and in the presence of two directors at the least, who shall sign every instrument to which the seal is affixed, and every such instrument shall be countersigned by the secretary or some other person appointed by the directors.]

A clause as above is sometimes inserted, and everyone dealing with the company is bound to take notice of it, but is not bound to ascertain that *de facto* directors have been duly appointed. *County Life Assurance Co.*, 5 Ch. 288; *Mahoney v. East Holyford Mining Co.*, L. R. 7 H. L. 859. Or that the seal has been affixed with the authority of a meeting duly constituted. *County of Gloucester Bank v. Rudry, &c. Co.*, (1895) 1 Ch. 629; *Davies v. Bolton & Co.*, (1894) 3 Ch. 678. And see *Owen & Ashworth's Claim*, (1901) 1 Ch. 115. But the rule does not apply where the seal has been fraudulently affixed and the signatures are forged. *Ruben v. Great Fingall Consolidated*, (1906) A. C. 430.

See further, *supra*, p. 79.

AUTHENTICATION OF DEEDS AND DOCUMENTS.

Deeds. 115a. The following provisions shall have effect:—

1. All deeds executed on behalf of the coy may be in such form, and contain such powers, provisoes, conditions, covenants, clauses, and agreemts as the directors shall think fit, and, in addition to being sealed with the seal of the coy, shall be signed by two directors, and countersigned by the secretary or such other officer as the directors from time to time appoint.

Bills. 2. All bills of exchange, promissory notes, or other negotiable instruments shall be accepted, made, drawn, or indorsed for and on behalf of the coy by two directors, and countersigned by the secretary or such other officer as afsd, and all cheques or orders for payment shall be signed by two directors, and countersigned by the secretary or such other officer as afsd.

Cheques. 3. Cheques or other negotiable instruments paid to the coy's banker for collection, and requiring the indorsement of the coy, may be indorsed on its behalf by the secretary or such other officer as afsd.

All moneys belonging to the coy shall be pd to such bankers as the directors shall from time to time in writing or by resolution of the directors appoint; and all receipts for money pd to the coy shall be signed by the secretary or such other officer as afd; and such receipt shall be an effectual discharge for the money therein stated to be received.

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Receipts.

The above clauses are occasionally inserted, but there is no need for them. See note to the following clause.

115b. Any instrument bearing the common seal of the coy and issued for valuable consen shall be binding on the coy, notwithstanding any irregularity touching the authority of the directors to issue the same.

What securities under seal to be deemed valid.

The above clause is occasionally inserted. *Patent File Co.*, 6 Ch. 85; *Davies v. R. Bolton & Co.*, (1894) 3 Ch. 678. But it would seem to be merely the expression of the rule settled in a series of cases, of which *Royal British Bank v. Turquand*, 6 E. & B. 248, is a leading one. The rule is, that where a company is regulated by an Act of Parliament, general or special, or by deed of settlement, or memorandum and articles of association, registered in some public office, persons dealing with the directors are bound to read the Act and registered public documents of the company (*supra*, p. 79), and to see that the proposed dealing is not inconsistent therewith, but that is all: they need not inquire into the regularity of the internal proceedings. They may assume that all matters of "indoor management" have been done regularly. Thus, where the articles give power to borrow with the sanction of an ordinary resolution of a general meeting, a lender need not inquire whether the resolution has been passed. *Royal British Bank v. Turquand*, *ubi supra*; *Agor v. Athenaeum Society*, 3 C. B. N. S. 725. And see *Ex parte Eagle Co.*, 4 K. & J. 549, as to execution of policies. In *Land Credit of Ireland*, 4 Ch. 460, it was held that as the company had power to accept bills, certain acceptances could not be impeached on the ground that they were irregularly issued. So, also, it has been held that the public is entitled to assume that a person acting *de facto* as the company's agent or director has been duly appointed. *Smith v. Hull Glass Co.*, 11 C. B. 897; *County Life*, 5 Ch. 288; *Mahoney v. East Holyford Co.*, 1. R. 7 H. L. 869. It may also assume that an instrument bearing the seal of the company was sealed pursuant to a resolution of a board meeting. *County of Gloucester Bank v. Rudry*, (1895) 1 Ch. 629; but see as to the limits of this rule, *Ruben v. Great Fingall Consolidated*, (1906) A. C. 430; overruling *Slaw v. Port Philip, &c. Co.*, 13 Q. B. D. 103; also *supra*, p. 81. A person cannot avail himself of the presumption if he knows of the irregularity. *Howard v. Patent Ivory Co.*, 38 Ch. D. 156, and it would seem that a person is not entitled to assume that a special resolution has been passed, for he can find out whether it has been passed or not by reference to the register. *Irvine v. Union Bank*, 2 App. Cas. 379.

Occasionally express provisions as to the execution of documents are inserted; but as a general rule it is better not to insert such provisions.

Form 251.**ANNUAL RETURNS.****Annual
returns.**

115c. The coy shall make the requisite annual returns in accordance with sect. 26 of the Cos (Consolidation) Act, 1908.

It may be well to insert the above clause as a reminder, for the penalties for default are onerous.

Sect. 26 of the Companies (Consolidation) Act, 1908, is as follows:—

26.—(1) Every company having a share capital shall once at least in every year make a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return, or (in the case of the first return) of the incorporation of the company.

(2) The list must state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return, or (in the case of the first return) of the incorporation of the company by persons who are still members and have ceased to be members respectively, and the dates of registration of the transfers, and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

- (a) The amount of the share capital of the company, and the number of the shares into which it is divided;
- (b) The number of shares taken from the commencement of the company up to the date of the return;
- (c) The amount called up on each share;
- (d) The total amount of calls received;
- (e) The total amount of calls unpaid;
- (f) The total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount in respect of any debentures, since the date of the last return;
- (g) The total number of shares forfeited;
- (h) The total amount of share or stock for which share warrants are outstanding at the date of the return;
- (i) The total amount of share warrants issued and surrendered respectively since the date of the last return;
- (k) The number of shares or amount of stock comprised in each share warrant;
- (l) The names and addresses of the persons who at the date of the return are the directors of the company, or occupy the position of directors, by whatever name called; and
- (m) The total amount of debt due from the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar of companies under this Act, or which would have been required so to be registered if created after the first day of July nineteen hundred and eight.

(3) The summary must also (except where the company is a private company) include a statement, made up to such date as may be specified in the statement, in the form of a balance-sheet, audited by the company's auditors, and con-

taining a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets have been arrived at, but the balance-sheet need not include a statement of profit and loss.

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(4) The above list and summary must be contained in a separate part of the register of members, and must be completed within seven days after the fourteenth day aforesaid, and the company must forthwith forward to the registrar of companies a copy signed by the manager or by the secretary of the company.

(5) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding five pounds for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

"Default" in forwarding the required return to the registrar under this section means a wilful continued neglect to do the act, and does not, it seems, apply to a case where the default cannot be remedied. *Dorté v. South African Super-aeration, Limited*, 20 T. L. R. 425.

The obligation to forward the list and summary is independent of whether the ordinary general meeting is held in the year or not. Hence the directors cannot set up in self-defence that a meeting had not been held. *Park v. Lawton*, 1911 1 K. B. 588.

Default renders the company and its directors and managers liable to the statutory penalties. See *Gibson v. Barton*, L. R. 10 Q. B. 329; *Edmunds v. Foster*, 45 L. J. M. C. 41; *Reg. v. Newton*, 48 L. J. M. C. 77; and *Reg. v. Tyler*, (1891) 2 Q. B. 588. The company's penalty is 5l. per day. *Reg. v. Catholic, &c. Co.*, 48 L. T. 675. Proceedings to enforce the penalty are taken before a magistrate, who may inquire into the sufficiency and accuracy of the return. *Briton Medical*, 37 W. R. 52. To comply with sect. 26 the general meeting, referred to in sect. 64 of the Act of 1908, as to which see note to clause 57, must be held at latest on 17th December.

See form of return, *supra*, p. 622.

DIVIDENDS.

116. Subject as aforesaid, the profits of the company shall be divisible among the members [holding ordinary shares] in proportion to the capital paid up on the [ordinary] shares held by them respectively.

"Subject as aforesaid." These words refer to any clause defining the rights of the preference shareholders (if any) and to any clause as to increase of capital and as to reserve; but sometimes it is considered expedient to provide more clearly as to the appropriation of profits, e.g.

116a. Subject as aforesaid, the profits of the company which it shall from time to time be determined to divide in respect of any year or other period shall be applied first in paying the fixed cumulative preferential dividend on the capital paid up on the preference shares to the close of such year or other period, and, secondly, in paying a dividend for such year or other period at the rate of --- p.c.p.a. on the capital paid up on the ordinary shares, and, thirdly, the surplus shall be applied to the payment of a dividend on the deferred shares in proportion to the capital paid up thereon.]

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Or,

[116b. Subject, &c., shall be applied first in paying a dividend for such year or other period at the rate of — p.c.p.a. on the capital pd up on the preference shares, and, secondly, in paying a dividend for such year or other period at the rate, &c. on the capital pd up on the ordinary shares, and, thirdly, as to 20 p.c. of the surplus in paying a further dividend for such year or other period on the preference shares, and as to the residue in paying a further dividend for such year on the ordinary shares asfd.]

Or,

[116c. Subject, &c., shall be applied in paying the cumulative dividend on the preference shares to the close of such year or other period; secondly, in paying a dividend for such year or other period at the rate of 10 p.c. on the capital pd up on the ordinary shares; and, thirdly, in paying further dividends to the members in proportion to the shares held by them resply of whatever class.]

Capital paid
up in advance.

116d. Where capital is pd up in advance of calls upon the footing that the same shall carry interest, such capital shall not, whilst carrying interest, confer a right to participate in profits.

Clause 72 of the Table A. of the Act of 1862 provided that dividends were to be paid to members in proportion to their shares, but clause 98 of Table A (1908) now provides that "all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid up on any of the shares in the company dividends may be declared and paid according to the amounts of the shares."

In the absence of such a provision as that above or in Table A. dividend must be paid in proportion to the nominal amount of the capital held by each shareholder, and not in proportion to the amount paid up. *Oakbank Oil Co. v. Crum*, 8 App. Cas. 65; *Wilkinson v. Cummings*, 11 Hare, 37; *Bloch v. Cropper*, 11 App. Cas. 525.

Accordingly, a 10l. share with 1l. paid up will take as much as a 10l. fully paid-up share. But many persons consider such a mode of division inequitable, and insist on a provision as above (clause 116). This clause again, however, does not appear altogether fair, for it must be borne in mind that the company trades to some extent on the credit of its uncalled capital, and why should the shareholder who supply that credit get no reward?—especially as, in the event of the company being wound up, they will, unless the articles otherwise provide, be liable to contribute to the losses in proportion to the nominal amount of the shares held by them. *Maude's case*, 6 Ch. 51; and see the judgments in *Oakbank Oil Co. v. Crum*, *ubi supra*.

Accordingly, it is occasionally provided that "the profits of the company in each year shall be applicable to the payment of dividend at the rate of 5 per cent. per annum on the paid-up capital, and the surplus shall be divided among the members in proportion to their shares." This approximates to ideal justice. See *supra*.

Where there are different classes of shares in the original capital the clause will be modified accordingly. See Forms 261 to 268a (inclusive), *infra* **Form 251.**

117. The coy in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits, and may fix the time for payment. **Declaration of dividends.**

Very commonly it is provided that "the directors may, with the sanction of the company in general meeting," declare dividends, but the general practice is for the directors to recommend and the meeting to declare the dividend, and it therefore seems better to frame the clause as above. See *Re Denham & Co.*, 25 Ch. D. 763.

The declaration of a dividend gives to each shareholder the right to sue the company for the amount. *Dalton v. Midland Rail. Co.*, 13 C. B. 478; *Lindley on Companies*, 6th ed. p. 609; *Severn Rail. Co.*, (1896) 1 Ch. 559; *Bond v. Harrow Hematite Steel Co.*, (1902) 1 Ch. 353, 362; but see as to the right of withdrawal, *Lagunas Nitrate Co. v. Schroeder*, 85 L. T. 29. Till declared, a dividend is not a debt, and it is doubtful whether a right to sue for a dividend without declaration can be given. In the case last mentioned the right to preferential dividend was given in emphatic terms, but it was held that a clause as above was impliedly made applicable.

Where the articles provide for the application of the profits for the time being "available for the dividend," these words impliedly exclude profits carried to reserve. *Fisher v. Black and White Publishing Co.*, (1901) 1 Ch. 174.

In ascertaining profits, it is not allowable to take a particular asset and to treat the profit arising from the realization thereof as profit of the company without regard to the general result of the company's operations, whether in the shape of profit or loss for the current financial year. *Foster v. New Trinidad Lake Asphalt Co.*, (1901) 1 Ch. 208. See also *Lubbock v. British Bank of South America*, (1892) 2 Ch. 198.

Under such a clause, read in conjunction with clauses 58, 63, North, J., held that a company could only declare a dividend at the ordinary general meeting. *Nicholson v. Rhodesia Co.*, (1897) 1 Ch. 434. This decision can, if desired, be overridden by introducing the words "ordinary or extraordinary" after the word "meeting," but it is scarcely worth making this alteration, for there is nothing to prevent the directors from calling an extraordinary general meeting to consider and, if thought fit, to approve of the payment by the directors (under clause 121) of an interim dividend, and then the directors can declare such dividend. Directors, though they cannot delegate their special powers to the members, may properly, if they think fit, consult a general meeting as to the exercise of their powers. *Harrison v. Price's Patent Co.*, 45 L. J. Ch. 437.

A dividend "free of income tax" may be declared on ordinary shares where the profits to be applied in paying the same have already paid tax, for the company is not bound in such case to deduct the tax (*supra*, p. 101); but a dividend "free of income tax" on preference shares is objectionable as giving the holders more than their rights (*Att.-Gen. v. Ashton Gas Co.*, (1901) 2 Ch. 621), and a provision in the articles that their dividend shall be so paid is void. Sect. 103, Income Tax Act, 1842.

As to payment of interest out of capital during construction, see *Companies Act*, 1908, s. 91, and p. 871.

[118. No larger dividend shall be declared than is recommended by the directors (but the coy in general meeting may declare a smaller dividend).] **Restriction on amount of dividend.**

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The above clause is commonly used, sometimes with, sometimes without, the words in brackets. Profits may be carried forward. *Prima facie* there is no obligation to divide. *Bond v. Barrow Hematite*, (1902) 1 Ch. 352; *Burland v. Earle*, (1902) A. C. 83.

Dividend out of profit only, and not carry interest.

Points to be observed in declaring dividends:

Profits, not capital, available;

ultra vires if payment out of capital;

even if authorized by memorandum or articles:

or by general meeting.

Criminal liability of directors as to payment out of capital.

Modern decided cases militating against above rule.

119. No dividend shall be payable except out of the profits of the coy, and no dividend shall carry interest as against the coy.

As to what are profits, see *infra*, pp. 857 *et seq.*

In declaring dividends certain important points have to be borne in mind, viz.:—

1. Dividends are only to be paid out of profits, not out of capital. *Oxford Benefit Building Society*, 35 C. D. 592; *National Funds Assurance Co.*, 10 C. D. 126; *Flitcroft's case*, 21 C. D. 519; *Alexandra Palace Co.*, 21 C. D. 149; *Leeds Estate v. Shepherd*, 36 C. D. 807; *Sharpe*, (1892) 1 Ch. 154; *Foster v. New Trinidad Lake Asphalt Co.*, (1901) 1 Ch. 208; *Fisher v. Black and White Publishing Co.*, (1901) 1 Ch. 174. As to decisions in derogation of this rule, see *infra*, p. 895.
2. Payment out of capital is *ultra vires*, for it amounts to a reduction of the paid-up capital, and no such reduction is allowable, unless sanctioned by the Court under sects. 46—56 of the Companies Act, 1908, or on unproductive capital under sect. 90 of the Act.
3. Even if such payment is expressly authorized by the memorandum of association, or by the articles of association, or by special resolution, it is equally *ultra vires*, for these documents cannot repeal the Act. *Trevor v. Whitworth*, 12 App. Cas. 409.
4. Much less can the sanction of a general meeting justify it. *Flitcroft's case*, 21 C. D. 519.
5. Directors who are parties to the payment of a fictitious dividend, in order to raise the price of the company's shares, may be criminally liable for a conspiracy. See per Lord Campbell, L. C., *Burnes v. Pennell* (1849), 2 H. L. C. 525; and *Regina v. Esdaile* (1858), 1 F. & F. 213.

This fundamental rule prohibiting payment of dividend out of capital as not only contrary to the Act, but commercially unsound, was at one time in serious danger of being relaxed or explained away by certain unfortunate decisions, of which the following are the most noteworthy:—*Lee v. Neuchatel Co.*, 41 C. D. 1; *Ferner v. General Commercial Trust*, (1894) 2 Ch. 263; *Wilmer v. Macnair*, (1895) 2 Ch. 245; *Bosanquet, &c. v. St. John del Rey* (1897), 77 L. T. 207; *National Bank of Wales*, *supra*.

See further, *infra*, pp. 857 *et seq.*

But the House of Lords, in the appeal in the case last mentioned *sub nom. Dorey v. Cory*, (1901) A. C. 477, threw so much doubt on their decisions as to effectually neutralize the mischief they threatened to do, and *Bond v. Barrow Hematite*, (1902) 1 Ch. 352, has still further minimized their operation. See further, *infra*, p. 866 *et seq.*

What to be deemed net profits.

[120. The declaration of the directors as to the amount of the net profits of the coy shall be conclusive.]

This clause is common, and is found useful; it precludes controversy over many difficult questions of management and account, but it does not enable the directors to declare profits where in reality there are none.

121. The directors may from time to time pay to the members such interim dividends as in their judgment the position of the company justifies. **Form 251.**
Interim dividends

The above clause is very commonly inserted.

Before declaring even an interim dividend, the directors must satisfy themselves that there are profits to divide. *Towers v. African Tug Co.*, (1904) 1 Ch. 358; *Lucas v. Fitzgerald*, 20 T. L. R. 16. But, as stated by Lord Alverstone, C. J., in the last case, "the declaration of interim dividends depends much more upon estimates and opinions than the declaration of a final dividend, which is made upon the information contained in a formal balance-sheet."

Sometimes the clause says, "An interim dividend on account of the next final dividend," or some such words, but such provisions often lead to dispute. For instance, where further shares are issued between the interim dividend and the declaration of the final dividend, are the holders of these shares, on the final dividend being declared, entitled to insist on the other shareholders bringing the interim dividend into account? In some cases it would seem that they are: but the point can be provided for in the terms of allotment of the interim issue.

The directors' paramount duty is not to pay dividends out of capital, and accordingly, if after declaring an interim dividend and before payment the directors ascertain that it will, if paid, have to be paid out of capital, they may properly refuse to pay it. *Lagunas Nitrate Co. v. J. H. Schroeder & Co.*, (1901), 17 T. L. R. 625; 85 L. T. 22.

122. The directors may retain any dividends on which the company has a lien, and may apply the same in or towards satisfaction of the debts, liabilities, or engagements in respect of which the lien exists. Debts may be deducted.

[123. Any general meeting declaring a dividend may make a call on the members of such amount as the meeting fixes, but so that the call on each member shall not exceed the dividend payable to him, and so that the call be made payable at the same time as the dividend, and the dividend may, if so arranged between the company and the member, be set off against the call. The making of a call under this clause shall be deemed ordinary business of an ordinary general meeting which declares a dividend.] Dividend and call together.

Set-off allowed.

A clause as above is not uncommonly inserted. But the London Stock Exchange object to it. It is clear that, in the absence of such a clause, a shareholder may authorize a company to retain any money due to him for dividends or otherwise, as to pay up his shares therewith, and that such payment would be equivalent to cash. See *Rance's case*, 6 Ch. 104, where a dividend paid by crediting the amount on the shares was treated as equivalent to cash. See also *Bouch v. Sproule*, 12 App. Cas. 385; *Re Oppenheimer*, (1907) 1 Ch. 399.

This clause and the following clause are used where it is desirable to capitalize profits, instead of paying them out in cash dividends.

123a. Any general meeting declaring a dividend may direct payment of such dividend wholly or in part by the distribution of specific assets, and in particular of paid-up shares, debentures, or debenture stock of the company, or paid-up shares, debentures, or debentures. Dividend in specie.

Form 261. ture stock of any other coy. or in any one or more of such ways, and the directors shall give effect to such resolution; and, where any difficulty arises in regard to the distribution, they may settle the same as they think expedient, and in particular may issue fractional certificates, and may fix the value for distribution of such specific assets, or any part thereof, and may determine that cash payments shall be made to any members upon the footing of the value so fixed, in order to adjust the rights of all parties, and may vest any such specific assets in trustees upon trusts for the persons entitl to the dividend as may seem expedient to the directors. Where requisite, a proper contract shall be filed in accordance with sect. 88 of the Cos (Consolidation) Act, 1908, and the directors may appoint any person to sign such contract on behalf of the persons entitl to the dividend, and such appointment shall be effective.

In the absence of express authority, dividends cannot be paid in shares or debentures but only in cash. *Wood v. Glenna Waterworks Co.*, 42 C. D. 645; *Hale v. Gr. W. Rail. Co.*, 3 Ch. 262.

As to the allotment of paid-up shares in respect of reserve and the danger attending it, see *Eastern and Aus. Co.*, 41 W. R. 373.

Effect of transfer.

124. A transfer of shares shall not pass the right to any dividend declared thereon before the registration of the transfer.

This is implied; the declaration vests a right of action. As to apportionment: as between a seller and buyer, the buyer is entitled to all dividends declared after his contract, unless otherwise agreed. *Black v. Homersham*, 4 Ex. D. 24. As between tenant for life and remainderman, the tenant for life takes all dividends and bonuses declared in his lifetime. *Price v. Anderson*, 15 Sim. 473; *Hopkins' Trusts*, 18 Eq. 696; *Armitage v. Garnett*, (1893) 3 Ch. 337; *Malan v. Hitchens*, (1894) 3 Ch. 578. The Apportionment Act, 1870 (33 & 34 Vict. c. 35), may give his representatives a further right.

A company registered under the Companies (Consolidation) Act, 1908, is a public company within the meaning of sect. 5 of the Apportionment Act. *Re Lysaght*, (1898) 1 Ch. 115; but a declaration in a will that a share bequeathed "shall carry the dividend accruing at any death" is an "express stipulation" within sect. 7 of the Apportionment Act, that no apportionment shall take place. *Ibid.* And so also is a declaration in a will that "the whole of the income derived" from shares shall be paid to a person during his life. *Meredith*, 67 L. J. Ch. 409; 78 L. T. 492. Where after the death of the tenant for life shares are sold "cum dividend," and after sale a dividend is declared and received by the purchaser, out of profits part of which are earned before the death, the executor is not entitled to anything out of the dividend. *Bathelot v. Stephens*, (1896) 2 Ch. 241.

The Apportionment Act only applies to sums which are accruing but have not accrued due when the apportionment is said to be required. *Ellis v. Rowbotham*, (1900) 1 Q. B. 740.

But where dividend is paid in shares it may be regarded as being capitalized, in which case the tenant for life cannot claim it as income. *Barton's Trusts*, 5 Eq. 238; *Houch v. Sproule*, 12 App. Cas. 385; *Re Oppenheimer*, (1907) 1 Ch. 399.

In some cases a part of a dividend paid in shares or partly in shares may be held to be capital. *Malam v. Hitchens*, (1894) 3 Ch. 578; *Ellis v. Barfield*, W. N. (1891) 84. See *Hume Nisbet's Settlement*, 27 T. L. R. 461.

In some cases a dividend in the shape of paid-up shares will go to the tenant for life. *Palmer v. Casel*, 56 B. J. 363.

As to relation back of the title to dividends which are forfeited by bankruptcy, see *Montefiore v. Guedalla*, (1901) 1 Ch. 435; *Re Heather*, (1906) 2 Ch. 230.

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125 The directors may retain the dividends payable upon shares in respect of which any person is under the transmission clause [clause 38] entitled to become a member, or which any person under that clause is entitled to transfer, until such person shall become a member in respect thereof or shall duly transfer the same.

Retention in certain cases.

126 Any one of several persons who are registered as the joint holders of any share may give effectual receipts for all dividends and payments on account of dividends in respect of such share.

Dividend to joint holders.

127 Unless otherwise directed any dividend may be paid by cheque or warrant sent through the post to the registered address of the member entitled, or, in the case of joint holders, to the registered address of that one whose name stands first on the register in respect of the joint holding; and every cheque or warrant so sent shall be made payable to the order of the person to whom it is sent.

Payment by post.

The above clause is commonly inserted, and expressly sanctions what is the ordinary practice, namely, to pay dividends by cheque or warrant sent through the post.

Apart from such a clause, if the dividend warrant is lost in the post the loss falls on the stock or share holder. *Thainwall v. Gt. Northern Rail. Co.*, (1910) 2 K. B. 509.

The clause allows the shareholder to give special directions, e.g., to pay all dividends to his bankers, viz.:

To the — Coy, Limtd.

I direct that until further notice all dividends from time to time becoming payable on any shares in [or stock of] the above-named coy for the time being standing in my name be paid to Messrs. —, of [for my account], and their receipt shall be a good discharge.

Date —

Signature

Address —

Or,

I direct that all warrants for dividends at any time hereafter becoming payable on any shares in the above-named coy for the time being standing in my name, be sent by post to —, of —, at my risk.

Date —

Signature —

Address —

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In the absence of such a direction payment to one of two joint holders would seem to be good against the other, for "the old rule of common law that payment to one of two joint creditors is a good discharge of the joint debt, still remains good." Per Farwell, J., in *Parrell v. Benthurst*, (1901) 2 Ch. 160, 161.

Such directions are not liable to stamp duty. See Stamp Act, 1891, Schedule under Letter of Attorney, exemptions (3). Where, pursuant to the articles or at the request or with the consent of the shareholder, a cheque or dividend is sent through the post, it is at his risk. *Warwick v. Nokes*, Peake, 67; *Hawkins v. Rutt*, *ibid.* 186; Leake, 897; *Thornwall v. Gl. Northern Ry. Co.* (1910) 2 K. B. 309.

The following clause is occasionally used:

Notice of dividend.

[127a. Notice of the declaration of any dividend, whether interim or otherwise, shall be given (by advertisement, and also) to the holders of registered shares and registered stock in manner herein provided.]

Unclaimed dividends.

128. All dividends unclaimed for one year after having been declared may be invested or otherwise made use of by the directors for the benefit of the coy until claimed (and all dividends unclaimed for five years after having been declared may be forfeited by the directors for the benefit of the coy).

The Committee of the Stock Exchange object to the above clause in so far as it provides for the forfeiture of dividends unclaimed for five years, and accordingly, if a quotation is desired, it should be modified or omitted.

As to when dividends are barred by lapse of time:—In *Barton v. North Street Ry. Co.*, 38 Ch. D. 463, Kay, J., appeared to consider that a shareholder might be regarded as a partner, and would not lose his rights by non-claim whilst the partnership continued. See *Peana v. Pickwick*, 16 Beav. 246. But partnership rules should not be imported. The company is a separate body, and upon the declaration of the dividend the shareholder has a right of action (see p. 765), and if this is not upon a specialty it is barred by non-claim for six years under 21 Jac. 1, c. 16 (*Serren, & Co.*, (1895) 1 Ch. 531), whereas if it is upon a specialty, it requires twenty years to bar the claim. *Cornwall Mortgage Co.*, (1897) 2 Ch. 74; 3 & 4 Will. 4, c. 27, s. 3.

In *Artizans' Land and Mortgage Co.*, (1904) 1 Ch. 796, it was held by Byrne, J., that where the share certificates in the usual form are under the common seal, dividends in respect thereof are specialty debts; but this view requires reconsideration, for the right to the share and to dividend is independent of the certificate, and the certificate is not a deed, nor is it a contract. As to specialty debts, see *Holland v. Holland*, 4 Ch. 449; *Telbot v. Earl of Shaftesbury*, 16 Eq. 28.

ACCOUNTS.**Accounts to be kept.**

129. The directors shall cause true accounts to be kept of the sums of money received and expended by the coy, and the matters in respect of which such receipt and expenditure takes place, and of the assets, credits, and liabilities of the coy.

keeping proper accounts is one of the first duties of directors in their capacities of agents and trustees. *White v. Lincoln* (1803), 8 Ves. 363; and *Seeley v. Foulie*, 3 Nev. 40; *Ferriman v. Green*, 1 J. & W. 135, 140.

Under 25 & 26 Viet. c. 96, s. 84, directors keeping fraudulent accounts or publishing fraudulent statements incur criminal liability. As to falsification of books and papers in winding-up, see sect. 216 of the Act. As to false returns, see sect. 281.

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100. The books of account shall be kept at the office or at such other place or places as the directors think fit. Where to be kept.

A clause in the articles providing that the books shall be kept at a particular place like the registered office may prevent the creation of a lien on the books. *Capital Fire Association*, 24 C. Div. 408; 49 L. T. 697; 32 W. R. 260; as to which, see *Hawkes, Atkinson v. Lockhart*, (1898) 2 Ch. 1.

131. The directors shall from time to time determine whether and to what extent, and at what times and places, and under what conditions or regulations, the accounts and books of the coy, or any of them, shall be open to the inspection of the members; and no member shall have any right of inspecting any account or book or document of the coy, except as conferred by statute or authorized by the directors, or by the coy in general meeting. Inspection by members.

Clause 105 of Table A. is a copy of the above clause.

The above clause is commonly used. Few companies allow members free access to the books. But the clause does not qualify the statutory right of a shareholder to inspect the register of members and the register of mortgages (Companies Act, 1908, ss. 30, 100, 101, 102).

As to the common law right to inspect, see *Ree v. Merchant Taylors' Co.*, 2 B. & Ad. 115. As to a partner's right, see *Trego v. Hunt*, (1895) 1 Ch. 462; and as to a *cestui que trust's* right to information, see *Tillot*, (1892) 1 Ch. 86.

In an action by a shareholder against the company, the company may, notwithstanding the clause, be ordered to produce letters between the directors and their legal advisers before action brought. *Gouand v. Edison*, 59 L. T. 813; W. N. (1888) 194.

Where a right of inspection is given as regards "the books wherein the proceedings of the company are recorded," a member has no right to inspect the minute book of proceedings of directors. *Rey. v. Marquitta, & Co.*, 1 E. & E. 289. And it is not advisable to allow it, for it may be used for all sorts of purposes hostile to the company. See *Burn v. London & S. Wales Coal Co.*, W. N. (1890) 209; 7 T. L. R. 118.

A right to inspect usually gives a right to take copies (*Mutter v. Eastern, & Co.*, 38 C. D. 92), so held in regard to the register of mortgages (*Nelson v. Anglo-American Land Mortgage Agency Co.*, (1897) 1 Ch. 130), without being required to give any reason (*Holland v. Dickson*, 37 C. D. 669); and in regard to the registry of members; but the right to take extracts is impliedly negatived where the Act gives a right to have copies on payment. *Balaghut Mining Co.*, (1901) 2 K. B. 665, C. A., overruling *Boord v. African Consolidated Co.*, (1898) 1 Ch. 596.

See also *Metropolitan, & Co. Bank, Ex par*

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A director is entitled *virtute officii* to inspect. *Burn v. London & South Wales Coal Co.*, W. N. (1890) 200.

A right of inspection given by the articles ceases when the voluntary winding-up begins. *Yorkshire, &c. Co.*, 9 Eq. 650; 18 W. R. 541, approved by C. A. in *Kent Coalfields Syndicate*, (1898) 1 Q. B. 754.

On a winding-up, whether compulsorily or under supervision, the power to order inspection, under sect. 30 or sects. 100, 101, ceases. *Kent Coalfields Syndicate, supra*; *Somerset v. Land Securities*, W. N. (1897) 29. But under sect. 221 the Court has express power to permit inspection by creditors or contributories (see *North Brazilian Sugar*, 37 C. Div. 83).

Table A. of 1862, clause 78, provides as follows:

"The books of account shall be kept at the registered office of the company, and, subject to any reasonable restrictions as to time and manner of inspecting the same that may be imposed by the company in general meeting, shall be open to the inspection of the members during the hours of business."

See also clause 104 of Table A., 1908.

By sect. 114 of the Act of 1908, "Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance-sheets of the company, and the reports of the auditors, and other reports as is possessed by the holders of ordinary shares in the company." This does not apply to a private company, *ibid.*

Annual
account and
balance-sheet.

132. At the ordinary meeting in the year — and in each subsequent year, the directors shall lay before the coy a profit and loss account, and a balance-sheet, containing a summary of the ppty and liabilities of the coy, made up to a date not more than four months before the meeting, from the time when the last preceding account and balance-sheet were made up, or, in the case of the first account and balance-sheet, from the incorporation of the coy.

Annual report
of directors.

133. Every such balance-sheet shall be accompanied by a report of the directors as to the state and condition of the coy, and as to the amount which they recommend to be pd out of the profits by way of dividend or bonus to the members, and the amount (if any) which they propose to carry to the reserve fund, according to the provisions in that behalf hnbefore contained; and the account, report, and balance-sheet shall be signed by two directors and counter-signed by the secretary.

By 24 & 25 Vict. c. 96, sect. 84, directors keeping fraudulent accounts, or publishing fraudulent statements, are guilty of a misdemeanour.

Where a report contains false statements and is adopted by the company in general meeting and industriously circulated, the company may be liable to persons acting on those statements. *National Exchange Co. v. Drew*, 2 Macq. 103; *New Brunswick Co. v. Conybrave*, 9 H. L. C. 711.

Copy to be
sent to
members.

134. A printed copy of such account, balance-sheet, and report shall, seven days previously to the meeting, be served on the registered holders of shares, in the manner in which notices are hnbfr

directed to be served, [and two copies of these documents shall at the same time be forwarded to the secretary of the Share and Loan Department, Stock Exchange, London.] **Form 251.**

Sometimes it is provided, instead of this, that the balance-sheet shall lie for inspection at the office. In private companies this clause is commonly omitted.

Where the number of members is very large, as in a co-operative store, it is sometimes provided that a copy of the balance-sheet shall only be sent to those members who hold more than a specified number of shares, but that "any other member shall be entitled to a copy on application at the office within such seven days, and during the same period a copy thereof shall lie for inspection by members at the office."

Where quotation on the London Stock Exchange is wanted, the words in brackets must be used.

Sometimes the words "the accidental omission to send any such documents to a member shall not invalidate the proceedings at the meeting" are added to the above clause, and occasionally clauses are inserted to the effect that the balance-sheet is *not* to be laid before a general meeting. See Form 300a, *infra*.

AUDIT.

135. Once at least in every year [except the year --] the accounts of the coy shall be examined, and the correctness of the profit and loss account and balance-sheet ascertained by one or more auditor or auditors. Accounts to be audited annually.

The auditors are agents of the company, but constructive notice of facts coming to their knowledge is not imputed to the shareholders. *Spackman v. Evans*, L. R. 3 H. L. 171, 196, 236.

The regulations dealing with audit are now contained in sects. 112 and 113 of the Act of 1908.

136. The coy at each ordinary general meeting shall appoint an auditor or auditors to hold office until the next ordinary general meeting, and the following provisions shall have effect, that is to say: Audit provisions.

- (1) If an appointment of auditors is not made at an ordinary general meeting, the Board of Trade may, on the application of any member of the coy, appoint an auditor for the current year and fix the remuneration to be pd to him by the coy for his services.
- (2) A director or other officer of the coy shall not be capable of being appointed auditor of the coy.

An auditor is in a fiduciary position and should not have any conflicting interest or duty.

- (3) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an ordinary general meeting

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unless notice of an intention to nominate that person to the office of auditor has been given by a shareholder to the coy not less than fourteen days before the meeting, and the coy shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to the shareholders, either by advertisement or in any other mode allowed by the articles, not less than seven days before the meeting.

Provided that if, after notice of the intention to nominate an auditor has been ~~so~~ given, an ordinary general meeting is called for a date fourteen days or less after the notice has been given, the notice, though not given within the time required by this provision, shall be deemed to have been properly given for the purposes thereof, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this provision, be sent or given at the same time as the notice of the ordinary general meeting.

- (4) The first auditors of the coy may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first ordinary general meeting unless previously removed by a resolution of the shareholders in general meeting, in which case the shareholders at that meeting may appoint auditors.
- (5) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors (if any) may act.

The above clause follows closely the provisions of sect. 112 of the Companies Act, 1908. Audit clauses are usually inserted in articles, and it would be inconvenient if the articles made one set of provisions in regard to the matter whilst the statute made other provisions. No doubt the articles might be silent about audit, thus causing the statute to operate; but it has been customary to insert audit clauses, and it is convenient to set them out.

If preferred, clauses 136, 137, and 138 can be omitted and the following words can be substituted:

"The provisions of the Companies Act, 1908, as to auditors shall apply."

As to auditor's lien for his fees, see *Findlay v. Waddell*, (1910) S. C. 670 (Ct. of SESS.).

Remuneration of auditors.

137. The remuneration of the auditors shall be fixed by the coy in general meeting, except that the remuneration of any auditors appointed before the statutory meeting or to fill any casual vacancy may be fixed by the directors.

This clause follows sect. 112 of the Act of 1908. Sometimes auditors perform extra work as accountants, men of business, experts, but as they stand in a fiduciary position, there is a difficulty in their being remunerated, unless with the sanction of a general meeting.

Rights and duties of auditors.

138.—(1) Every auditor of the coy shall have a right of access at all times to the books and accounts and vouchers of the coy, and shall

be entitl to require from the directors and officers of the coy such **Form 251.**
information and explanation as may be necessary for the performance
of the duties of the auditors.

2) The auditors shall make a report to the shareholders on the
accounts examined by them, and on every balance-sheet laid before
the coy in general meeting during their tenure of office, and the report
shall state—

- (a) Whether or not they have obtained all the information and
explanations they have required; and
- (b) Whether in their opinion the balance-sheet referred to in the
report is properly drawn up so as to exhibit a true and
correct view of the state of the coy's affairs according to the
best of their information and the explanations given to them
and as shown by the books of the coy.

(c) The balance-sheet shall be signed on behalf of the board by
two of the directors of the coy, or, if there is only one director, by
that director, and the auditors' report shall be attached to the balance-
sheet, or there shall be inserted at the foot of the balance-sheet a
reference to the report, and the report shall be read before the coy in
general meeting, and shall be open to inspection by any shareholder.

Any shareholder shall be entitled to be furnished with a copy of
the balance-sheet and auditors' report at a charge not exceeding
sixpence for every hundred words.

This clause follows sect. 113 of the Act of 1908, except as to sub-sects. (4)
and (5), which are set out at p. 777, *infra*, and relate to penalties and banking
company.

An auditor who accepts office pursuant to the regulations of a company is
bound to conform to the terms of these regulations. "Auditors," said Lindley,
L. J., in *Kingston Cotton Co.* (No. 2), (1896) 2 Ch. 284 (C. A.), "are, in
my opinion, bound to see what exceptional duties, if any, are cast upon them
by the articles of the company whose accounts they are called upon to audit.
Ignorance of the articles and of exceptional duties imposed by them would not
afford any legal justification for not observing them." And *à fortiori* he is
bound to perform the duties imposed on him by the Acts.

"It is no part of an auditor's duty," as Lindley, L. J., said in another lead-
ing case on the subject (*London and General Bank*, (1895) 2 Ch. 673), "to
give advice either to directors or shareholders as to what they ought to do."

"An auditor has nothing to do with the prudence or imprudence of making
loans with or without security. It is nothing to him whether the business of a
company is being conducted prudently or imprudently, profitably or unprofit-
ably. It is nothing to him whether dividends are properly or improperly
declared, provided he discharges his own duty to the shareholders. His business
is to ascertain and state the true financial position of the company at the time
of the audit, and his duty is confined to that. But then comes the question:
How is he to ascertain that position? The answer is: By examining the books
of the company. But he does not discharge his duty by doing this without
inquiry and without taking any trouble to see that the books themselves show
the company's true position. He must take reasonable care to ascertain that
they do so. Unless he does this, his audit would be worse than idle farce.
Assuming the books to be so kept as to show the true position of a company, the

Form 251. auditor has to frame a balance-sheet showing that position according to the books, and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company. This is quite in accordance with the decision of Stirling, J., in *Leeds Estate Building and Investment Co. v. Shepherd*, 36 Ch. D. 787. An auditor, however," goes on Lord Lindley, "is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly show the true position of the company's affairs; he does not even guarantee that his balance-sheet is accurate according to the books of the company. If he did, he would be responsible for an error on his part, even if he were himself deceived without any want of reasonable care on his part—say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such is to be the duty of the auditor; he must be honest—i.e., he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion, very little inquiry will be reasonably sufficient, and, in practice, I believe, business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused, more care is obviously necessary; but still an auditor is not bound to exercise more than reasonable care and skill even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required." And Lopes, L. J., in *Kingston Cotton Mills Co. (No. 2)*, *supra*, at p. 775, added: "Auditors must not be made liable for not tracking out ingenious and carefully-laid schemes of fraud when there is nothing to arouse their suspicion, and when those frauds are perpetrated by tried servants of the company and are undetected for years by the directors. So to hold would make the position of an auditor intolerable. The appeal will be allowed." An auditor should not be satisfied merely by vouchers, apparently formal and regular, but should, by fair and reasonable examination of them, see that they are not for payments in any way unauthorized, or illegal or improper. Per Lord Russell, C. J., in *Thomas v. Deconport Corporation*, (1900) 1 Q. B. 16, 21. In accordance with these principles, it was held in the above case that auditors who, without any ground for suspicion, had accepted and acted on the certificate of the manager of the company as to the amount and value of the company's stock, such manager having been long in the service of the company, and being a man of high character and unquestioned competence and trusted by every one who knew him, were not under any liability, though the valuation proved to have been false to the knowledge of the manager. "The question," said Lindley, L. J., in *Kingston Cotton Mills Co. (No. 2)*, *supra*, at p. 287 of the report, "is whether, no suspicion of anything wrong being entertained, there was a want of reasonable care on the part of the auditors in relying on the returns made by a competent and trusted expert relating to matters on which information from such a person was essential. I cannot think there was. The manager had no apparent conflict between his interest and his duty. His position was not similar to that of a cashier who has to account for the cash which he receives, and whose own account of his receipts and payments could not reasonably be taken by an auditor without further inquiry."

This is the correct view of an auditor's position. *Squire Cash Chemist, Ltd. v. Ball* (1911), 27 T. L. R. 269; affirmed 28 T. L. R. 81.

An auditor—it has been laid down—who is appointed to investigate the condition of a business is bound to make a reasonable and proper investigation of

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the account and stock sheets, and if, as a reasonably prudent man, he ought to conclude on the investigation that something is wrong, it is his duty to call his employer's attention to the fact. In making his investigation an auditor is entitled to rely on documents vouched by servants of the business, unless he has reason to believe those servants to be dishonest. Though it is not his duty to consider whether the business is prudently or imprudently conducted, he must consider and report to the shareholders whether the balance-sheet exhibits a correct view of the state of the company's affairs and its true financial position at the date of the audit: this must be ascertained by examining the books and, as a rule, the necessary information as to the financial position, and not merely the means of acquiring it, must be placed before the shareholders. *London and General Bank* (No. 3), (1895) 2 Ch. 673.

An auditor who commits a breach of his duty may be sued by the company in an action (*Leeds Estate, &c. Co. v. Shepherd*, 36 Ch. D. 787), or may be proceeded against in a winding-up for misfeasance under sect. 215 of the Act. *London and General Bank*, (1895) 2 Ch. 166 (C. A.); *Kingston Cotton Mills Co.* (No. 2), (1896) 2 Ch. 279 (C. A.). But to be open to attack under sect. 215 an auditor must be an officer of the company. An accountant who is merely called in to audit the accounts *pro hac vice* is not an officer. *Western Counties Steam Bakeries*, (1897) 1 Ch. 617 (C. A.). An auditor may set up the Statute of Limitations. *Leeds Estate Building Co. v. Shepherd*, *supra*.

A director is entitled to assume that the auditors perform their duty, and is not bound to supervise or test the accuracy of their work. *Dorey v. Cory*, (1901) A. C. 477.

An auditor cannot obtain an interim injunction to restrain the directors from interfering with the performance of his duties. *Coff v. London and County Land*, (1912) 1 Ch. 440.

Sub-sects. (4), (5) of the Act of 1908 are as follows:

(4) If any copy of a balance-sheet which has not been signed as required by this section is issued, circulated, or published, or if any copy of a balance-sheet is issued, circulated, or published without either having a copy of the auditors' report attached thereto or containing such reference to that report as is required by this section, the company, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds.

(5) In the case of a banking company registered after the fifteenth day of August eighteen hundred and seventy-nine—

- (a) if the company has branch banks beyond the limits of Europe, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in the United Kingdom; and
- (b) the balance-sheet must be signed by the secretary or manager (if any), and where there are more than three directors of the company by at least three of those directors, and where there are not more than three directors by all the directors.

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When
accounts to be
deemed finally
settled.

139. Every account of the directors, when audited and approved by a general meeting, shall be conclusive, except as regards any error discovered therein within three months next after the approval thereof. Whenever any such error is discovered within that period, the account shall forthwith be corrected, and thenceforth shall be conclusive.

Approved by Bacon, V.-C., in *London Financial Co. v. Kelk*, 26 C. D. 151.

NOTICES.

How notices
to be served
on members.

140. A notice may be served by the company upon any member, either personally or by sending it through the post in a prepaid envelope or wrapper, addressed to such member at his registered place of address.

How notices
to be given to
company.

The register of members, to be kept pursuant to sect. 25 of the Act, is to contain (*inter alia*) the addresses of the members.

As to notices to the company, the Act provides:

Sect. 116.—A document may be served on a company by leaving it or sending it by post to the registered office of the company.

"Document" includes summons, notice, order and other legal process and registers. Sect. 285.

This includes a writ of summons. *White v. Land, &c. Co.*, W. N. (1883) 174; Sup. Ct. Rules, Order IX. r. 8, An. Pr., latest edition.

"Where an Act passed after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post." Interpretation Act, 1889, s. 26.

Authentica-
tion of notices
by company.

Sect. 117.—A document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorized officer of the company, and need not be under its common seal. See also sect. 63 of the Act.

The above sects. 116, 117, so far as they relate to notices, are sometimes inserted as clauses in the articles.

Sect. 20 of the Interpretation Act, 1889, provides as follows:—

20. In this Act and in every other Act whether passed before or after the commencement of this Act expressions referring to writing shall unless the contrary intention appears be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form.

A verbal notice given in the absence of the secretary to a clerk of the company, at the company's office during office hours, has been held to be a notice to the company under certain circumstances. *Teulon's case*, (1894) 3 Ch. 272.

Notice to a managing director, in that character, on a matter affecting the business of the company under his management, is notice to the company. *Jaegen, &c. Co. v. Fallen*, 77 L. T. R. 180; but knowledge of a fact by a single director is not necessarily notice to the company. *Hampshire Land Co.*, (1896) 2 Ch. 743; *Marseilles, &c. Co.*, L. R. 7 Ch. 161; *David Payne & Co.*, (1904) 2 Ch. 608.

If a member is known to be dead, it is enough, whilst his name remains on the register, to send a notice to his registered address. *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656. **Form 251.**

141. Each holder of registered shares, whose registered place of address is not in the United Kingdom, may from time to time notify in writing to the coy an address in the United Kingdom, which shall be deemed his registered place of address within the meaning of the last preceding clause. **Members resident abroad.**

It is generally deemed expedient to make special provision for the service of notices on members resident abroad.

It does not follow that they are, in the absence of such a provision, entitled to notice.

By clause 111 of Table A.: "If a member has no registered address in the United Kingdom and has not supplied to the company an address within the United Kingdom for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears." The necessity of some such provision is obvious. It was long since held by *Mulins, V.-C.*, in *Union Hill Silver Co.*, 22 L. T. 400, that it is not necessary to serve notice on shareholders who have chosen to reside outside the United Kingdom. And this rule, being entirely consistent with common sense and common convenience, has been acted on ever since. See also *Halifax Sugar Co. v. Franklyn*, 62 L. T. 564, and *Small v. Bailey*, 2 H. L. C. 789. In the many cases, however, in which the regulations provide as below that the notice is to be deemed to be served on the day following that on which it is posted the difficulty is entirely removed.

142. As regards those members who have no registered place of address, a notice posted up in the office shall be deemed to be well served on them at the expiration of twenty-four hours after it is so posted up. **Notices where no address.**

Sometimes it is provided that in such case a member shall not be entitled to any notice.

143. The holder of a share warrant shall not, unless otherwise expressed therein, be entitled in respect thereof to notice of any general meeting of the coy. **No notice to holders of share warrants.**

The holder of a share warrant is generally deprived of the right to notice of general meetings. Sometimes he is permitted to appoint an address for service, but the objection is, that the company will have no means of ascertaining when the share warrant has been parted with, and may, unknowingly, continue to send notices to a person who has ceased to be a member. If the holder of a share warrant is to be entitled to notice, the usual plan is to provide that it shall be given by advertisement. In such case, the following clause will be inserted, instead of the above:—

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"Any notice required to be given by the company to the holder of share warrants shall be given by advertising the same once in a London daily newspaper."

The objection to the general adoption of the plan is the publicity which attends it; companies do not like to publish notice of their private affairs.

The following clause is sometimes adopted, and is not open to the same objection:

"The holder of a share warrant may from time to time notify in writing to the company some place in England to be called his address for service, and notice of any general meeting convened within the six months next following such notification shall (unless the meeting is convened by advertisement) be served on the holder of such share warrant by sending it through the post in a prepaid letter addressed to him at his address for service. But, save as aforesaid, the holder of a share warrant shall not be entitled to notice of any general meeting."

When notice may be given by advertisement.

144. Any notice required to be given by the coy to the members, or any of them, and not expressly provided for by these presents, shall be sufficiently given if given by advertisement.

How to be advertised.

145. Any notice required to be, or which may be given by advertisement, shall be advertised once in two [London] daily newspapers.

Notice to joint holders.

146. All notices shall, with respect to any registered shares to which persons are jointly entld, be given to whichever of such persons is named first in the register, and notice so given shall be sufficient notice to all the holders of such shares.

When notice by post deemed to be served.

147. Any notice sent by post shall be deemed to have been served on the day following that on which the envelope or wrapper containing the same is posted, and in proving such service it shall be sufficient to prove that the envelope or wrapper containing the notice was properly addressed and put into the post-office. And a certificate in writing signed by any manager, secretary, or other officer of the coy. that the envelope or wrapper containing the notice was so addressed and posted shall be conclusive evidence thereof.

It is not necessary to follow literally the address on the register, provided that a substantially accurate designation of the place of abode is given. *Liverpool, &c. Co. v. Haughton*, 23 W. R. 93.

Handing to a postman outside a post-office or pillar-box is not "posting." *London and Northern Bank*, (1900) 1 Ch. 220.

Even in the absence of express provision notice may be sent by post, where the circumstances show that the parties contemplated that the post might be used as a means of communication. *Brumer v. Moore*, (1904) 1 Ch. 305; *Homehold Fire Insurance Co. v. Grant*, 4 Ex. D. 216; *Henthorn v. Fraser*, (1892) 2 Ch. 27; *James v. Institute of Auditors* (1908), 98 L. T. 228, 230.

Transferees, &c., bound by prior notices.

[148. Every person who, by operation of law, transfer, or other means whatsoever, shall become entld to any share, shall be bound by every notice in respect of such share or stock which, previously to

his name and address being entered on the register, shall be duly given to the person from whom he derives his title to such share or stock.) **Form 251.**

The above clause is not uncommon, but it is not by any means essential, and may be omitted if brevity is desired. It does not appear in Table A., or in the Companies Clauses Consolidation Act, 1845.

[149. Any notice or document delivered or sent by post to, or left at the registered address of, any member, in pursuance of those presents, shall, notwithstanding such member be then deceased, and whether or not the coy have notice of his decease, be deemed to have been duly served in respect of any registered shares, whether held solely or jointly with other persons by such member, until some other person be registered in his stead as the holder or joint holder thereof, and such service shall for all purposes of those presents be deemed a sufficient service of such notice or document on his or her heirs, exors, or admors, and all persons, if any, jointly interested with him or her in any such share.] **Notice valid, though member deceased.**

Where the articles contained no provision as to notice to deceased members, it was held that a notice of a call by letter to the registered address of a deceased member was valid, the company not having notice of his death. *New Zealand Gold Extraction Co.*, (1894) 1 Q. B. 622, C. A.

The above clause carries the matter further, and is very generally used; its validity was recognized in *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656.

[150. The signature to any notice to be given by the coy may be written or printed.] **How notice to be signed.**

The above is occasionally inserted.

A person may sign by stamping a fac-simile of his autograph. *Bennett v. Bromfit*, L. R. 3 C. P. 28.

150a Where a given number of days' notice, or notice extending over any other period, is required to be given, the day of service shall, unless it is otherwise provided, be counted in such number of days or other period. **How time to be counted.**

Where the regulations, as in clause 60, provide for so many clear days' notice, this clause does not apply, for it is otherwise provided. See *Railway Sleepers Supply Co.*, 29 C. D. 204; *Parilion Newcastle-upon-Tyne*, W. N. (1911) 235.

150b. In the event of a winding-up of the coy in England, every member of the coy who is not for the time being in England shall be **Service of process.**

Form 361. bound, within fourteen days after the passing of an effective resolution to wind up the coy voluntarily, or the making of an order for the winding-up of the coy, to serve notice in writing on the coy appointing some householder in London upon whom all summonses, notices, process orders and judgments in relation to or under the winding-up of the coy may be served, and in default of such nomination the liqr of the coy shall be at liberty on behalf of such member to appoint some such person, and service upon any such appointee, whether appointed by the member or the liqr, shall be deemed to be good personal service on such member for all purposes, and, where the liqr makes any such appointment, he shall with all convenient speed give notice thof to such member by advertisement in the *Times* newspaper, or by a registered letter sent through the post and addressed to such member at his address as mentioned in the register of members of the coy, and such notice shall be deemed to be served on the day following that on which the advertisement appears or the letter is posted.

In an action, service out of the jurisdiction may in certain cases be ordered under R. S. C. Ord. XI., *supra*, p. 85; but the Court has a discretion, and it has been laid down that the power is only given by statute so as to be binding on British subjects, and not on others. Per Lindley, L. J., *Anglo-African Co.*, 32 C. D. 350. Accordingly, it is desirable to make provision for the matter in the articles. Such a provision does not provide for service out of the jurisdiction, but for service within, upon an agent of the shareholders. This is valid. *Copin v. Adamson*, 1 Ex. Div. 17; *Tharvis Sulphur Co. v. Société des Métaux*, 58 L. J. Q. B. 435; *Montgomery v. Liebenthal*, (1898) 1 Q. B. 487. To provide for service out of the jurisdiction, in cases not covered by Ord. XI., would be ineffective and *ultra vires*. *British Wagon Co. v. Gray*, (1896) 1 Q. B. 35; see *supra*, p. 363.

SECRECY CLAUSES.

Secrecy
clause.

[151. Every director, manager, auditor, tree, member of a committee, officer, servant, agent, accountant, or other person employed in the business of the coy, shall, before entering upon his duties, sign a declaration pledging himself to observe a strict secrecy respecting all transactions of the coy with the customers and the state of accounts with individuals, and in matters relating thereto, and shall by such declaration pledge himself not to reveal any of the matters which may come to his knowledge in the discharge of his duties, except when required so to do by the directors or by any meeting, or by a court of law, or by the person to whom such matters relate, and except so far as may be necessary in order to comply with any of the provisions in these presents contained.

The above is usually inserted in the case of a bank.

As to the effect of a winding-up on such a clause, see *Birmingham Banking Co.*, 36 L. J. Ch. 150.

[151a. No member shall be entitled to require discovery of or any information respecting any detail of the company's trading, or any matter which is or may be in the nature of a trade secret, mystery of trade, or secret process which may relate to the conduct of the business of the company, and which, in the opinion of the directors, it will be inexpedient in the interest of the members of the company to communicate to the public.] **Form 251.** Member not entitled to information.

The above clause is sometimes inserted in the case of a manufacturing company, but an individual member has not in fact any right to information, or to inspect. The directors are the servants of the body corporate, not of the shareholders, and if, as guardians of the company's interests, in their discretion they think fit to refuse to give to an individual member information as to the company's business, he has no cause for complaint. He cannot interfere with the discretion delegated to the directors by the company in general meeting.

WINDING-UP

If desired that losses shall be borne and surplus assets taken by the members in proportion to paid-up capital, insert the following:— **Distribution of assets.**

152. If the company shall be wound up, and the assets available for distribution among the members as such shall be insufficient to repay the whole of the paid-up capital, such assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, at the commencement of the winding-up, on the shares held by them respectively. And if in a winding-up the assets available for distribution among the members shall be more than sufficient to repay the whole of the capital paid up at the commencement of the winding-up, the excess shall be distributed amongst the members in proportion to the capital at the commencement of the winding-up paid up or which ought to have been paid up on the shares held by them respectively. But this clause is to be without prejudice to the rights of the holders of shares issued upon special terms and conditions.]

In the absence of special provision, the assets available for distribution among the members, including capital uncalled at the commencement of the winding-up (*Birch v. Cropper*, 14 App. Cas. 525; *Welton v. Saffery*, (1897) A. C. 299; *Es parte Lowenthal*, 70 L. T. 3), are distributable so as to throw any loss of capital on the members in proportion to the nominal amount of the capital held by them. Thus, suppose 10,000*l.* of paid-up 10*l.* shares are issued in consideration of a patent, and 10,000*l.* of shares are taken by the public and paid up to the extent of 5*l.* per share equal 5,000*l.*, and that this sum is lost in experiments, and that the company is wound up and the patent sold for 100*l.*, and that, after paying off the debts, nothing remains but the 5,000*l.* uncalled capital. Of that sum of 5,000*l.*, 2,500*l.*, being 2*l.* 10*s.* per share, must be called up and handed over to the holders of the vendors' shares, so that the loss (equal to 7*l.* 10*s.* per share) may be borne in the proper proportions. *Maude's case*, 6 Ch. 51; *Wakefield Rolling Stock Co.*, (1892) 3 Ch. 165; *Exchange Drapery Co.*, 38 C. D. 171. This, however, is not always considered expedient, especially

Form 251. when the profits are made distributable in proportion to the capital paid up. See pp. 763, 764, *supra*. Accordingly, it is not unusual to qualify, as in clause 152, the rule laid down in *Mander's case*. The effect of that clause is that capital called up in the winding-up will be paid off before capital previously paid up.

Preference shares.

Where the initial capital is divided into preference and ordinary shares, it is not unusual in the memorandum or articles to assign a preferential right in winding-up to the preference shares. See Forms 210, 213, 214, 215, 218 *et seq.*, p. 578 *et seq.* In the absence of some such provision, preference shares do not confer a preferential right to return of capital in a winding-up. *London India Rubber Co.*, 5 Eq. 519.

Gains.

In some cases it is deemed expedient to provide not only how losses shall be borne, but how a surplus shall be dealt with, inasmuch as companies go into liquidation occasionally when they are not only solvent but prosperous. In these cases there is often a contest as to how the profit is to be divided. In *Mutoscop and Biograph Syndicate*, (1899) 1 Ch. 896, the capital was divided into shares of 1*l.* each, some of which were fully paid at the commencement of the winding-up, while on others only 10*s.* per share had been paid. The articles of the company provided that if upon the winding-up the surplus assets should be more than sufficient to repay the whole paid-up capital, the excess should be distributed among the members in proportion to the capital paid, on which ought to have been paid, on the shares held by them respectively at the commencement of the winding-up. There was an excess in the winding-up after paying debts and expenses and repaying all the paid-up capital, and Wright, J. held that the excess was distributable in proportion to the capital actually paid up, distinguishing *Anglo-Continental Corporation of Western Australia*, (1898) 1 Ch. 327, where there was insufficient to repay the paid-up capital, but some shares were fully and others partly paid, and on an article somewhat like the first part of the above clause, it was held that there must be a call on the latter shares sufficient to pay enough to the former to make the amount paid up uniform, and that the other assets in hand must then be distributed *pro rata*.

If in a winding-up the surplus is sufficient to pay off all the paid-up capital it must, in the absence of express or implied provision to the contrary, be applied first in paying off the paid-up capital, and the residue, if any, namely, the profit, must be distributed among the members in proportion to the nominal amount of the capital held by them respectively. *Birch v. Cropper* (*The Bridgewater Navigation Co.'s case*), 14 App. Cas. 525, reversing the decision of the Court of Appeal, which was commented on in the fourth edition of this book. For in the absence of special agreement, the members of a company, having a nominal capital divided into shares, are interested in the company in proportion to their shares. *Wilkinson v. Cuninghame*, 11 H.L. 201; *Guinness v. Land Corp.*, 22 C. D. 349; *Oakbank Co. v. Burns*, 4 App. Cas. 411; *Maude's case*, *ubi supra*; *Bridgewater Navigation Co.*, *ubi supra*.

Undivided profits in a winding-up are *prima facie* part of the distributable as such (*Crickton's Oil Co.*, (1902) 2 Ch. 86), but if the special provisions in the memorandum or articles they may have been differently dealt with. Thus, in *Bridgewater Co.*, (1899) 2 Ch. 411, the ordinary shareholders were held entitled to undivided profits standing in credit of reserve; but there the articles stated that the surplus for the year "shall belong" to the holders of the ordinary shares, and *Bishop v. Smyrna Rail. Co.*, (1895) 2 Ch. 265, undivided profits were held applicable to the payment of arrears of dividend on preference shares by the memorandum to a preferential dividend, but there again the memorandum was in special terms; but in *Crickton's Oil Co.*, (1901) 2 Ch.

Old Waterworks Co. (in note to case last cited), preferred shares were held not so entitled, their right to division depending on declaration. These cases were followed by *Byrne, J.*, in *South African Supply and Cold Storage Co.*, 17 Feb. 1904; and see *Spanish Properties Co., Ltd.*, p. 868.

The clause for distribution, instead of using the expression "assets available for distribution among the members," sometimes uses the expression "surplus assets." This expression is not a technical one, and may mean the surplus after paying off debts and liabilities and the costs of winding up, or surplus after paying off those items and repaying the paid-up capital. *Prima facie* the latter is the meaning of the expression. See *Van der Merwe v. Transvaal Co.*, (1896) 2 Ch. 750; *Paddy Mining Co., W. N.*, (1897) 170; *Gold Syndicate*, (1911) 1 Ch. 749.

In the last case *Neville, J.*, held that the term "surplus assets" meant *prima facie* assets remaining after recouping capital as well as discharging debts and costs of liquidation.

Surplus assets includes *prima facie* invested capital. *Re Lowenthal*, 70 L. J. 1.

And see *Driffield Gas Light Co.*, (1898) 1 Ch. 451; *Welsh Whisky Distillery Co., Ltd.*, (1900) 59; 16 T. L. R. 2; *E. Hall & Co.*, (1909) 1 Ch. 521.

Contributors to a bankrupt holder, in respect of the uncalled liability, if any has proved and received a dividend, are not entitled to rank as preferred shares on distribution of surplus. See *Roué's Trustees v. Roué & Co.*, (1905) 1 Ch. 597; and, in C. A., (1906) 1 Ch. 1.

In a case of interest on such shares, see *Wakefield v. Wakefield*, (1903) 3 Ch. 165.

153. (1) The co-owners of the property shall be wound up, whether voluntarily or otherwise, the liquidators may, with the sanction of an extraordinary resolution, divide among the contributors, in specie or kind, any part of the assets of the co-owners, and may, with the like sanction, vest any part of the assets of the co-owners in trustees for the benefit of the contributors, or any of them, as the liquidators, with the like sanction, may think fit.

It might be expedient any such division may be otherwise than in accordance with the legal rights of the contributors (except where otherwise fixed by the memorandum of association), and in particular any part may be given preferential or special rights, or may be excluded wholly or in part; but in case any division otherwise than in accordance with the legal rights of the contributors shall be made, any contributor who would be prejudiced thereby shall have a right to dissent and ancillary rights as if such determination were a special resolution passed pursuant to sect. 192 of the Companies Act, 1908.

(3.) In case any shares to be divided as aforesaid involve a liability to calls or otherwise, any person entitled under such division to any of the said shares may, within ten days after the passing of the extraordinary resolution, by notice in writing, direct the liquidators to sell his proportion and pay him the net proceeds, and the liquidators shall, if practicable, act accordingly.

Form 251.

As to para. (1) of the above clauses, the power to distribute in specie or kind is in many cases found extremely convenient, for where the assets or the greater part of them consist of shares or other interests in or securities of another company, it may be impracticable to sell except to the serious detriment of the contributories. The Court has power to direct division in specie or kind (*English and Foreign Credit Co.*, 1 T. L. R. 1), but it is generally considered that the liquidator in a voluntary winding-up has no such power in the absence of some clause as above; and although this view, long acted on, may be unsound (see sect. 186 (1) of the Act of 1908, replacing sect. 133 (1) of the Act of 1862, which does not in terms require a sale), it is desirable to provide for the contingency, and in numerous cases the power has been exercised with satisfactory results. See, for example, *South African Supply and Cold Storage Co.*, (1904) 2 Ch. 268.

As to para. (2) of the clause, this is inserted to meet a practical difficulty which often arises. Under sect. 186 (1) of the Act of 1908, replacing sect. 133 (1) of the Act of 1862, the property of the company which is being wound up voluntarily is to be applied in satisfaction of its liabilities *pari passu*, and "subject thereto shall, unless the articles otherwise provide, be distributed amongst the members according to their rights and interests in the company." Hence, in the absence of special provision in the articles, there is no power to distribute otherwise than in strict accordance with the rights and interests of the members. Now where there are several classes of shares this want of power may be very inconvenient, especially where the undertaking has been sold with a view to reconstruction or amalgamation, whether under a power of sale in the memorandum (*supra*, p. 510) or under sect. 192 of the Act of 1908, replacing sect. 161 of the Act of 1862. Thus, if there are preference and ordinary shares in the selling company (both ranking *pari passu* in a winding-up), and it is desired to give to the former preference shares and to the latter ordinary shares in the purchasing company, this cannot be done in the absence of some such clause or of an arrangement under sect. 120 of the Act, sanctioned by the Court. Even sect. 192 of the Companies Act, 1908, does not allow of such a thing. *Griffith v. Paget*, 5 C. D. 894; 6 C. D. 514. But under para. (2) of the above clause, such a scheme and many other advantageous schemes are allowable.

As to para. (3), it seems well to preclude the suggestion that a man may, under this clause, be compelled to take partly paid shares.

Formerly it was customary to insert here a clause depriving dissentients, under sect. 161 of the Act of 1862, now sect. 192 of the Act of 1908, of the right to be paid out in cash. The clause first came under consideration in *Fox's case*, 6 Ch. 183, where it was inserted just before liquidation; but it seems to be conceded that, even if inserted in the original articles, it is ineffective. *Peveril Gold Mines*, (1898) 1 Ch. 122 (C. A.); *Baring-Gould v. Sharpington*, (1899) 2 Ch. 80; *Payne v. Cork Co.*, (1900) 1 Ch. 308; *Bisgood v. Henderson's Transvaal Estates Co.*, (1908) 1 Ch. 743.

First, *Peveril Gold Mines*, (1898) 1 Ch. 122 (C. A.), to say the least, throw grave doubt on the validity of the clause.

And in *Baring-Gould v. Sharpington, &o. Syndicate*, (1899) 2 Ch. 80—where the articles contained a provision that "If at any time a sale or arrangement shall be made or proposed in pursuance of sect. 161 of the Companies Act, 1862, the purchase-money to be paid for the interest of any dissentient member shall be such sum of money as the liquidator can obtain by selling the shares, stock, or other property to which such dissentient member would have been entitled upon the completion of the sale or arrangement had he not expressed his dissent"—the Court of Appeal held that it was ineffective.

And Stirling, J., in *Payne v. Cork Co.*, (1900) 1 Ch. 308, held that articles of

association were *ultra vires* and inoperative so far as they purported to deprive dissentient shareholders of the rights conferred upon them by sect. 161 of the Act of 1862 (s. 192 of Act of 1908). **Form 251.**

Notwithstanding these cases, it may be doubted whether sufficient force has been given to the words of sect. 133 (1) of 1862 (sect. 186 of Act of 1908), for sect. 161 of 1862 and sect. 192 of 1908 are undoubtedly to be read as regards distribution in conjunction with sect. 133 (1) of 1862 or sect. 186 of 1908 (*Guthrie v. Paget*, 5 C. D. 894, 899), and those sections provide for distribution among the members according to their rights and interests, "unless the articles otherwise provide." These words clearly subordinate to the statutory right any special agreement in the articles. Further, it may be urged with some force that the principle embodied in the maxim "*Quilibet potest renunciare juri pro se introducto*," is applicable. No doubt an individual cannot waive a matter in which the public have an interest, but surely the right of dissent is peculiarly a matter for the individual, not for the public.

INDEMNITY.

154. Every director, manager, [auditor,] secretary, and other officer or servant of the coy shall be indemnified by the coy against, and it shall be the duty of the directors out of the funds of the coy to pay all costs, losses, and expenses which any such officer or servant may incur or become liable to by reason of any contract entered into, or act or thing done by him as such officer or servant, or in any way in the discharge of his duties, including travelling expenses: and the amount for which such indemnity is provided shall immediately attach as a lien on the ppty of the coy, and have priority as between the members over all other claims]. **Indemnity.**

The above clause is occasionally inserted. See, as to the right to indemnity of directors and other agents, *German Mining Co.*, 4 De G. M. & G. 19; *Norwich Yarn Co.*, 22 Beav. 143; *James v. May*, L. R. 6 H. L. 328; *Benett v. Wyndham*, 4 De G. F. & J. 259; *Walters v. Woodbridge*, 7 C. D. 504; *Hunt's Claim*, W. N. (1872) 53; *Financial Corporation*, 28 W. R. 760; W. N. (1880) 88; *Wilson v. Lord Bury*, 5 Q. B. D. 518; *Smith v. Duke of Manchester*, 24 C. D. 611; 32 W. R. 83; *Pyle Works* (No. 2), (1901) 1 Ch. 173; *Young v. Naval, &c. Society*, (1905) 1 K. B. 687; *Hardoon v. Belilos*, (1901) A. C. 118.

There can be no right to indemnity in respect of an *ultra vires* or fraudulent transaction. *Smith v. Duke of Manchester*, 24 Ch. D. 611; *Re Branksea Island Co.* (No. 1), 1 Mog. C. R. 12.

Directors who pay a dividend representing that it is paid out of profits cannot claim indemnity; but where directors pay a dividend to members who know that it is paid out of capital, they may have a right to indemnity as against such members. *Mozham v. Grant*, (1900) 1 Q. B. 88; but the directors will be primarily ordered to make good the amount to the company. *Alexandra Palace Co.*, 21 Ch. D. 149; *National Funds*, 10 Ch. D. 118. It is not, however, competent to shareholders who have received a dividend with knowledge that it has been paid out of capital to maintain an action to have the money replaced by the directors. *Towers v. African Tug Co.*, (1904) 1 Ch. 558.

As to indemnity where the name of a person is improperly inserted as director, see Companies (Consolidation) Act, 1908, s. 84 (3), replacing the Directors' Liability Act, 1890, s. 3 (4).

Form 251.

In the absence of clear provision, directors who are paid for their services are not entitled to indemnity in respect of travelling expenses of attending board meetings. *Young v. Naval, &c. Society, supra*; *Marmor, Ltd. v. Alexander*, S. C. 78 Ct. of Sess. If it be desired to give such indemnity, insert after the words "travelling expenses" the words "of and incident to attending at and returning from board meetings."

The words in brackets are sometimes objected to by the London Stock Exchange where a quotation is wanted.

As to giving security to the directors, see *Pyle Works* (No. 2), (1891) 1 Ch. 184.

Individual responsibility of directors

155. No director [auditor] or other officer of the coy shall be liable for the acts, receipts, neglects, or defaults of any other director or officer, or for joining in any receipt or other act for conformity, or for any loss or expense happening to the coy through the insufficiency or deficiency of title to any ppty acquired by order of the directors for or on behalf of the coy, or for the insufficiency or deficiency of any security in or upon which any of the moneys of the coy shall be invested, or for any loss or damage arising from the bankruptcy, insolvency, or tortious act of any person with whom any moneys, securities, or effects shall be deposited, or for any loss occasioned by any error of judgment, omission, default, or oversight on his part, or for any other loss, damage, or misfortune whatever which shall happen in relation to the execution of the duties of his office or in relation thereto, unless the same happen through his own dishonesty.

The above clause is sometimes inserted. As to liability of directors for acts of each other, *Cargill v. Bower*, 10 C. D. 502; *Land Credit Co. of Ireland v. Lord Fermoy*, L. R. 5 Ch. 772; *Re Charles Denham & Co.*, 25 Ch. D. 752. See also *Weir v. Hill*, 3 Ex. Div. 238; *Cullerns v. London and Suburban Society*, 25 Q. B. D. 485. As to the right to contribution, see Lindley on Companies, 6th ed. 532 *et seq.*; and *Ashurst v. Mason*, 20 Eq. 225, explained in *Jackson v. Dickinson*, (1903) 1 Ch. 947, where two trustees in breach of trust invested trust funds in partly paid shares of a company, and some years after the death of one trustee the survivor, who had made every reasonable effort to dispose of the shares, but without success, paid a call of 800*l.* as a contributory in the liquidation of the company, and Swinfen Eady, J., held that the deceased trustee's representatives, though not liable to the company for the call, were liable to the surviving trustee for contribution.

In *Ashurst v. Mason*, shares of a company had (pursuant to an *ultra vires* resolution of the board) been purchased and transferred into the name of A., a director, in trust for the company. It was held that A. was entitled to contribution from the directors who concurred in the transaction for calls he had paid. See also *Power v. Hoey*, 19 W. R. 916; *Power v. O'Connor*, *ibid.* 923; and *Ramskill v. Edwards*, 31 C. D. 100; *Re Englefield Colliery Co.*, 8 Ch. D. 388; *Re Anglo-French Society*, 21 Ch. D. 501; *Palmer v. Wick, &c. Co.*, (1891) A. C. 313; *Robinson v. Harkin*, (1896) 2 Ch. 415. And see Rules of Supreme Court, Ord. XVI. r. 55, and Annual Practice, 1912.

In *Brazilian Rubber Plantations and Estates, Lim.*, (1911) 1 Ch. 425, a clause in the articles ran thus: "No director shall be liable for any loss, damage or misfortune whatever which shall happen in the execution of the duties of his office, or in relation thereto, unless the same happens through his

own dishonesty," and it was held that the clause was an answer to an action for negligence by the company not alleging any dishonesty. **Form 251.**

Directors charged with negligence or other misfeasance may rely on such a clause.

As to omitting to sue, see *Forest of Dean*, 10 C. D. 452; *Wedgwood Co.*, 47 L. T. 612; *Liverpool Household Stores*, 62 L. T. 873; *Faure Accumulator Co.*, 40 C. D. 150; *Sheffield, &c. Society v. Aizlewood*, 44 C. D. 412. Directors have a discretion as to whether they shall sue the customers or debtors of the company, which trustees have not, *ibid.* As to general position as fiduciary agents, see *Pickering v. Stephenson*, 14 Eq. 322; *Marzetti's case*, 28 W. R. 541; *Wilson v. Lord Bury*, 5 Q. B. Div. 519; *Ferguson v. Wilson*, L. R. 2 Ch. 77; *Joint Stock Discount Co. v. Brown*, 8 Eq. 381.

[The SCHEDULE above referred to.]

Sometimes a schedule is added containing a copy or draft of an agreement. See *supra*, Form 31. If no schedule, strike out the title.

NAMES, ADDRESSES AND DESCRIPTIONS OF SUBSCRIBERS.

[Space for Names.]

See *supra*, p. 491, omitting column of shares.

Dated the — day of —.

Witness to the above signatures.

Articles of Association, adopting in part Table A.

Sect. 11 of the Companies Act, 1908 (replacing sect. 15 of the Act of 1862), provides as follows:—

"11. In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A. in the First Schedule to this Act, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles."

And by sect. 10 (2), where articles of association are registered "they may adopt all or any of the regulations contained in the Table A." in the First Schedule to this Act.

Therefore, in the case of a company limited by shares, it is not absolutely necessary to register articles along with the memorandum of association: and

Articles
partly
adopting
Table A.

if articles are not registered, Table A., so far as it is not modified by the Act of 1908, will apply and constitute the articles of the company; and many companies have been thus registered without articles. But to adopt Table A. *simpliciter* generally leads to difficulties, and accordingly in many cases, when with a view to saving expense the adoption of Table A. is in contemplation, the parties avail themselves of the powers given by sects. 10 and 11 of the Act of registering special articles, as in the Form below, modifying Table A. in a few particulars, and in the result Table A. as so modified will apply. This plan has its advantages; but if the modifications are extensive the saving of expense is trifling, whilst the inconvenience of being obliged to refer to two documents (the one modifying the other) as containing the articles of the company is considerable. Unless, therefore, the preliminary expenses have to be kept at a very low point, the possession of a simple code of articles is well worth the expenditure of a few pounds.

The following afford a specimen of articles adopting Table A. with variations:—

Form 252.

1. Subject as hmftr provided the regulations in Table A. shall apply to this coy.

Table A
to apply

Table A. will be found *infra*, after sect. 296 of the Act. As to the importance of excluding provisions of Table A. in clear and unambiguous language, see *Fisher v. Black and White Publishing Co.*, (1901) 1 Ch. 174.

Agreement.

2. The coy shall forthwith enter into an agreemt. &c. [As in clause 3 of Form 251, p. 643, *supra*. If needs be add any supplemental provisions as at p. 645, *supra*.]

Limit of
number of
members and
no public
issues.

[2a. For a private coy as defined by sect. 121 of the Act, insert clause 307a. p. 959. *infra*, as to limit of number of members and no public issues.]

Allotment
of shares.

3. The shares shall be under the control of the directors, &c. [Clause 5, p. 646, *supra*.]

Instalments.

4. If, by the terms of allotment of any share, &c. [Clause 10, p. 649, *supra*.]

Commissions.

5. The coy may at any time pay a commission, &c. [Clause 8 p. 648, *supra*.]

By sect. 89 of the Act commission may be paid by any company, and this includes a private company. See p. 279, *supra*.

Modification
of clause 3

6. In clause 3 of Table A. the words "extraordinary resolution shall be substituted for the words "special resolution."

To pass a special resolution takes about three weeks, whereas to pass an extraordinary resolution takes about ten days.

Modification
of clause 4

7 In clause 4 of Table A. the words "of the nominal amount" shall be inserted immediately after the expression "three-fourths,"

and the words "two-thirds of the nominal amount" shall be substituted for the expression "one-third." **Form 252.**

[In the case of a private company insert the following clause:—
"7a. Clause 5 of Table A. shall not apply."]

8. Save as herein otherwise provided the coy shall be entld to treat the registered holder, &c. [Clause 12, *supra*, p. 650.] **Trusts not recognized.**

This is in addition to sect. 27 of the Act as to no notices of trusts being entered on the register. Table A. has no similar clause.

9. The clause following shall be substituted for clause 9 of Lien. Table A.: The coy shall have a first and paramount lien, &c. [Clause 29b, p. 662, *supra*.]

10. The proceeds of sale of such shares (instead of being applied as in clause 11 of Table A. provided) shall be applied in payment of such debts, liabilities, and engagements as and when the period for the payment, fulfilment, or discharge thof resply arrives, and any surplus shall be pd to such member, his exors, admors, or assigns. **Proceeds of sale.**

11. In clause 12 of Table A. the words "and not by the terms of issue made payable at fixed times and " shall be inserted immediately after the words "their shares," and the words "time when the last preceding call was made payable" shall be substituted for the words "last call," and the following words shall be added at the end of the same clause, namely, "A call shall be deemed to have been made at the time when the resolution of the directors authorizing such call was passed." **Successive calls.**

[In the case of a private company insert clauses restricting transfer of shares, *infra*, p. 962 *et seq.*; or, at any rate, insert a clause as follows: "In clause 20 of Table A. the words 'not being fully pd-up shares' shall be omitted."]

12. In clause 23 of Table A. the words "where he becomes entld thereto by reason of such bankruptcy" shall be inserted immediately after the words "except that." **Modification of clause 23.**

13. At the end of clause 24 of Table A. the following words shall be inserted, namely, "and all expenses that may have been incurred by the coy by reason of such non-payment." **Modification of clause 24.**

14. In clause 25 of Table A. the words "and the place at which" shall be inserted immediately after the words "on or before which," and the words "and at the place" shall be inserted immediately after the words "before the time." **Modification of clause 25.**

15. At the end of clause 26 of Table A. the following words shall be inserted, namely, "Such forfeiture shall include all dividends declared in respect of the forfeited shares and not actually paid before the forfeiture." **Modification of clause 26.**

- Form 252.** 16. In clause 28 of Table A. the word "presently" and the words "but his liability" and all subsequent words shall be struck out and the following words shall be substituted for the latter words so struck out, namely, "together with interest thereon from the time of forfeiture until payment at the rate of 5 p.c.p.a., and the directors may enforce the payment thereof if they think fit."
- Liability after forfeiture.**
- No share warrants.** 16A. Clauses 35 to 40, inclusive, of Table A. shall not apply.
- This is, of course, only imperative in the case of a private company.
- Modification of clause 41.** 17. In clause 41 of Table A. the words "a general meeting" shall be substituted for the words, "an extraordinary resolution."
- Modification of clause 42.** 18. In clause 42 of Table A. the words "the registered members" shall be substituted for the words, "such persons as at the date of the offer are entitled to receive notices from the company of general meetings."
- Ordinary general meetings.** 19. The following provision shall be substituted for clause 46 of Table A., namely, "Other general meetings shall be held once in the year 19—, and in every subsequent year at such time and place as the directors shall determine."
- Modification of clause 48.** 20. The latter part of clause 48 of Table A., commencing with the words "If at any time," shall not apply.
- The omitted paragraph so commencing is unusual, and seems of doubtful expediency.
- Short notice of general meeting.** 21. With the consent in writing of all the members for the time being, a general notice may be convened on a shorter notice than seven days, and in any manner they think fit, and clause 49 of Table A. shall be modified accordingly.
- Special resolution.** 22. Whenever it is intended to pass a special resolution, &c. [Clause 61, *supra*, p. 696.]
- One notice for two meetings.**
- Modification of clause 49.** 23. In clause 49 of Table A. the words "the registered members" shall be substituted for the words "such persons as are under the regulations of the company entitled to receive such notices from the company," and the words "or accidental omission to give" shall be inserted immediately after the words "non-receipt of" in the same clause.
- Modification of clause 54 of Table A.** 24. In clause 54 of Table A. the words "some other director present, or in default of directors" shall be inserted immediately after the word "choose."
- Modification of clause 55.** 25. In clause 55 of Table A. the words "and shall if so directed by the meeting" shall be omitted, and the word "when" and all the subsequent words of the clause shall be omitted.

26. In clause 56 of Table A. the words "or not carried by a particular majority" shall be inserted immediately after the word "lost."

Form 252.

Modification of clause 56.

27. In clause 57 of Table A. the words "and either at once or after an interval or adjournment or otherwise" shall be inserted immediately after the words "in such manner."

Modification of clause 57.

28. At the end of clause 61 of Table A. the following words shall be added, namely: "The exors or admors of a deceased member," &c. Clause 37, *supra*, p. 677.]

Modification of clause 61.

29. In clause 66 of Table A. the words "or adjourned meeting, as the case may be," shall be inserted immediately before the words "at which the person named."

Modification of clause 66.

30. An instrument appointing a proxy may appoint several persons in the alternative, and clause 67 of Table A. shall be modified accordingly.

Proxies.

31. Clause 68 of Table A. shall not apply, and until otherwise determined by a general meeting the number of directors shall not be less than — nor more than —, and the first directors shall be, &c.

Number of directors, and the first directors.

32. The words "and until otherwise determined shall be at the rate of £— p.a., and such remuneration shall be divided amongst them in such proportions as they may from time to time declare, and in default equally" shall be added at the end of clause 69 of Table A.

Remuneration of directors.

33. In clause 70 of Table A. the words "— shares" shall be substituted for the words "at least one share."

Qualification of directors.

34. A meeting of the directors at which, &c. [Clause 108, *supra*, p. 742.]

Power of meeting.

35. A resolution in writing, signed, &c. [Clause 112, *supra*, p. 744.]

Resolution signed by all directors effective though no meeting.

35a Without prejudice to the general powers conferred by clause 71 of Table A., and so as not in any way to limit or restrict those powers, and without prejudice to the other powers conferred by Table A., and by these presents it is hereby expressly declared that the directors shall have the following powers, that is to say, power—

Special powers for directors.

Here adopt any of the paragraphs of clause 114, *supra*, pp. 748 *et seq.*, as may seem desirable. For brevity, perhaps, only paragraphs (3), (6), (7), (8), (15) and (16) need be used, with the addition of a power of borrowing, *e.g.*, "To borrow or raise or secure the payment of money for the purpose of the coy on such terms and in such manner as they think fit.")

[35b. Insert, if required, provisions for management abroad. *Supra*, p. 756.]

Local management.

Form 252.

Removal
of managing
director.

[35c. In clause 72 of Table A. the words "the directors or" shall be inserted immediately before the words "the company."]

This empowers the directors to remove a managing director, and it may not be desirable in many cases to have such a provision.

Directors
may invest
managing
directors
with certain
powers.

36. The directors may from time to time entrust to and confer upon a managing director for the time being such of the powers exerciseable under these presents by the directors as they think fit, and may confer such powers for such time, and to be exercised for such objects and purposes, and upon such terms and conditions, and with such restrictions as they think expedient, and they may from time to time revoke, withdraw, alter, or vary all or any of such powers.

Clauses 73, 74
and 77 not
to apply.
Directors
vacating
office.

37. Clauses 73, 74 and 77 of Table A. shall not apply.

38. The office of a director shall *ipso facto* be vacated (1) if he become bankrupt or lunatic, (2) if by notice in writing to the company he resigns his office, (3) if he cease to hold his qualification.

Director's
contracts.

39. No director shall be disqualified by his office from contracting with the company, &c. [Clause 92, *supra*, p. 731.]

Such a provision is generally requisite.

Directors
may hold
other offices.

40. A director may hold any other office or place of profit in the company in conjunction with his directorship, and may be appointed thereto upon such terms as to remuneration, tenure of office, and otherwise, as may be arranged by the directors.

Director-
may appoint
others.

41. Clauses 84 and 85 of Table A. shall not apply, but the directors may at any time, &c. [Clause 85, *supra*, p. 717.]

Quorum
at board
meetings.

42. In clause 88 of Table A. the words "when the number of directors exceeds three," shall be omitted.

Perhaps "two" would be the preferable quorum if the maximum number of directors is less than four or five.

Modification
of clause 89.

43. The last five words, "but for no other purpose," shall be omitted from clause 89 of Table A.

Notices to
members.

44. At the end of clause 110 of Table A. the following words shall be inserted, namely, "As regards those members," &c. [Clause 142, *supra*, p. 779.] "Any notice required," &c. [Clauses 144 and 145, *supra*, p. 780.]

When notice
by post to
be deemed
served.

45. Any notice sent by post, &c. [Clause 147, *supra*, p. 780.]

46. Clauses 111 and 114 of Table A. shall not apply.

47. If the coy shall be wound up (whether voluntarily or otherwise), &c. Clause 153, *supra*, p. 785.]

48. The directors shall be indemnified by the coy against, and it shall be the duty of the directors out of the funds of the coy to pay and satisfy, all costs, losses, expenses, and liabilities incurred by any such directors in the course of the coy's business.

Form 252.

Exclusion
of clauses
111 and 114.

Distribution
of assets in
specie in
winding-up.

Indemnity to
directors.

NAMES, ADDRESSES AND DESCRIPTIONS OF SUBSCRIBERS.

[Space for signatures, &c.]

Dated, &c.

Witness to the above signatures.

Companies limited by Guarantee.

The special provisions of the Act of 1908 as to the formation of companies limited by guarantee are set forth in sects. 2, 4, 10 and 21, and provide as follows:—

2. Any seven or more persons (or, where the company to be formed will be a private company within the meaning of this Act, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability (that is to say), either:—

Mode of
forming
incorporated
company.

- (ii) A company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed a company limited by guarantee):

4. In the case of a company limited by guarantee—

(1) The memorandum must state—

- (i) The name of the company, with "Limited" as the last word in its name;
- (ii) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate;
- (iii) The objects of the company;
- (iv) That the liability of the members is limited;
- (v) That each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges, and expenses of winding up, and for adjustment of the

Memorandum
of company
limited by
guarantee.

Form 252.

rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

(2) If the company has a share capital—

(i) The memorandum must also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount;

(ii) No subscriber of the memorandum may take less than one share;

(iii) Each subscriber must write opposite to his name the number of shares he takes.

Registration of articles.

10.—(1) There may, in the case of a company limited by shares, and there shall in the case of a company limited by guarantee or unlimited, be registered with the memorandum articles of association signed by the subscribers to the memorandum and prescribing regulations for the company.

(2) Articles of association may adopt all or any of the regulations contained in Table A. in the First Schedule to this Act.

(3) In the case of an unlimited company or a company limited by guarantee the articles, if the company has a share capital, must state the amount of share capital with which the company proposes to be registered.

(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles must state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration.

Provision as to companies limited by guarantee.

21.—(1) In the case of a company limited by guarantee and not having a share capital, and registered on or after the first day of January, nineteen hundred and one, every provision in the memorandum or articles, or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered on or after the first day of January, nineteen hundred and one, purporting to divide the undertaking of the company into shares or interests shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

Where there is a share capital it can be increased or reduced under sect. 56 of the Act of 1908, which is as follows:—

Increase and reduction of share capital in case of a company limited by guarantee having a share capital.

56. A company limited by guarantee and registered on or after the first day of January nineteen hundred and one, may, if it has a share capital, and is so authorized by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act.

As to the liability of members, see sect. 123 of the Act, sub-sections (i) and (v).

See also sect. 118, which provides that the forms set forth in the Third Schedule to the Act, or forms as near thereto as circumstances admit, shall be used. As to the liability of persons whose agents become members, see *British Marine, &c. Co. v. Jenkins*, (1900) 1 Q. B. 299.

In the case of a company limited by shares there must be a capital of nominal amount, and that capital must be divided into shares of fixed amount, and the holding shares is an essential feature of membership; for a person cannot be a member unless he is a shareholder, and every shareholder is a member. But there are many cases in which persons desire to form an association with limited

liability on lines which cannot be brought within those traced out by the Act for a company limited by shares. It is to meet these cases that the Act of 1862, now replaced by the above sections of the Act of 1908, provided the alternative scheme of incorporation under which it is allowable to form a company limited by guarantee.

Form 252.

In such a company there is much greater elasticity, the utmost freedom. It may have a capital of nominal amount divided into shares like a company limited by shares, but there is no obligation to have any such capital or any capital at all, and therefore the holding of shares is in no sense an essential feature of membership. On the contrary, the terms on which membership may be constituted may be of the most various character, *e.g.*, it may be provided that membership shall be constituted by insuring with the company or by subscribing to it, whether annually or otherwise, or by proposal and election.

A large proportion of the companies limited by guarantee from time to time formed are registered under a licence from the Board of Trade, pursuant to sect. 20 of the Companies Act, 1908, replacing sect. 23 of the Companies Act, 1867, exempting them from the use of the word "limited" as part of their name, and are associations formed for promoting commerce, art, science, religion, charity or other useful object; but many other concerns adopt this mode of incorporation as being better suited to their circumstances than the mode of incorporation adopted in the case of a company limited by shares, and, in particular, companies for insuring against various marine risks, companies for insuring against accidents, companies for indemnifying the members against liability to pay compensation in respect of accidents to employes, companies for trade protection purposes and for mutual information, companies for exploring, testing and realising mines, patents and concessions, companies for the pooling of shares and debentures in other concerns, companies for pooling and realising produce of various kinds.

In the case of companies registered without the word "limited" (*supra*, p. 495), the executive generally consists, not of directors, but of a committee, or of a council, or of a board of management, or of governors, and membership is very commonly constituted by election or by admission on subscription, or by bringing into the pool certain produce, and in some cases there is a president, a vice-president, a patron or patrons, besides subscribers, associates, &c.

Form 255 shows the form of articles which has sometimes been adopted in the case of a syndicate formed for the purpose of gain. It is in the nature of a skeleton form framed with a view to obtaining registration and capable of being subsequently modified by special resolution so as to meet the circumstances of the case. Form 257 shows the modifications which may be adopted by special resolution where the members are to be interested in different proportions.

Form 253 is an example of the regulations adopted by a company formed on the footing that membership is to be constituted by subscription or donation.

Articles of Association of a Company limited by Guarantee, with a Capital divided into Shares.

Prior to the Companies Act, 1900, companies limited by guarantee but with a share capital were occasionally registered, for they were exempt from some of the fetters imposed by the Act of 1862 on companies limited by shares, and in particular they could reduce their capital without the sanction of the Court, and thus it was possible to provide for realising and distributing the capital assets, or for redeeming the shares by drawings or otherwise, or for paying off

Form 252.

capital not required; and all this could be done by special resolution, whereas in the case of a company limited by shares there must be a special resolution, and the sanction of the Court must be obtained and the consent of the creditors. But it seems unlikely that this mode of incorporation will hereafter be adopted, for by sub-sect. 1 of sect. 27 of the Companies Act, 1900 (reproduced in sect. 4 (2) of the Companies Act, 1908 (*see supra*)), the law was altered, and it was required that the capital should be specified in the memorandum of association. Thus the capital becomes a condition of the company's incorporation, and can only be altered if and so far as the Acts allow. Sub-sect. 1 of sect. 27 was curiously expressed, but it seemed that the words "subject to increase or reduction in accordance with the Companies Acts" indicated an intention that the provisions of the Acts of 1862, 1867, and 1877 as to increase and reduction should apply, although those provisions were in terms only applicable to companies limited by shares. It was to be noted that none of the other powers which by the Acts were expressly given to companies limited by shares were by sect. 27 made applicable to companies limited by guarantee and having a share capital, so that such last-mentioned companies, even if their capital had been duly stated in the memorandum of association, would not have power to consolidate their shares, to convert their shares into stock, to subdivide shares, or to issue share warrants. Nor are any of such "other powers" conferred on such companies by the Act of 1908. Sect. 56 of that Act (*supra*, p. 796) only refers to increase and reduction of capital. Accordingly, it can only be in very special circumstances that a company limited by guarantee with a share capital will be required. If in any case it is required to register such a company, the points to be borne in mind are:

- (1.) That the memorandum of association must specify not only the matters required by sect. 4 of the Companies Act, 1908, but also the capital of the company and the number of shares into which it is divided, and the amount of each share.
- (2.) That the capital should also be specified in like manner in the articles of association of the company.

Accordingly, Form 251 or 252 can be adopted, save that the clause in each case (6 or 6) referring to sect. 88 of the Companies Act, 1908, should be omitted, for that section applies only to a company limited by shares; and further, the clause referring to the statutory meeting should be omitted, for sect. 65 of the Companies Act, 1908, only applies to a company limited by shares.

Form 253.**THE — ASSOCIATION.**

**Articles of Association of a Company limited by Guarantee
without Share Capital; Council.**

Interpretation.

1. In these regulations, unless there be something in the subject or context inconsistent therewith—

"The Association" means the above-named asson.

"The Council" means the members for the time being of the council hereby constituted.

"In writing" means written or printed, or partly written or partly printed.

Words importing the singular number only include the plural number and *vice versa*.

Words importing persons include corporations.

2. The subscribers to the memorandum of association of the association and such other persons as shall be admitted to membership in accordance with these regulations, and none others, shall be members of the association, and shall be entered in the register of members accordingly. **Form 253.** **Members**

3. There shall be three classes of members, namely, (1) permanent members, (2) life members, and (3) subscribing members.

4. The qualification of a permanent member shall be the payment at one time to the association of the sum of 100*l.* The qualification of a life member shall be the payment at one time to the association of 20*l.* The qualification of a subscribing member shall be the annual payment to the association of the sum of 2*l.* 2*s.* But the qualification of life members and subscribing members respectively shall be liable to increase or reduction as may from time to time be determined by vote of an extraordinary general meeting of the association. **Qualification**

For the purposes of registration, the number of members of the association is to be taken to be unlimited [or is to be taken to be limited to ...] but the council may from time to time register an increase or decrease of the number. **Number for registration.**

6. No person shall be admitted a member of the association in any class unless he is first approved by the council, and the council shall have full discretion as to the admission of any person to membership in any class. **Approval by council.**

7. Where any person desires to be admitted to membership of the association, he must sign and deliver to the association an application for admission framed in such terms as the council shall require, and such application must be accompanied by the sum of 100*l.*, or 20*l.*, or 2*l.* 2*s.*, according to the class in respect of which he desires to become a member. **Application.**

8. The privileges of a permanent member may be transferred by writing under his hand to any person approved by the council, and on the death of the permanent member his legal personal representative, or one of his legal personal representatives if more than one shall be entitled, subject to the approval of the council, to succeed to his rights of membership, or may transfer the same to some other person approved by the council, and the person so succeeding or taking by transfer shall become a permanent member, with the same rights as the permanent member through whom he claims. **Transfer.**

9. The privileges of a life member shall not be transferable during his life, and shall cease at his death. **Where no transfer.**

10. The privileges of a subscribing member shall not be transferable, and shall cease on his death, or on his failure in any year to pay his annual subscription on or before the 31st day of December in that year.

11. No infant, idiot, lunatic, or married woman shall be registered as a member of the association, nor shall two or more persons be registered as members of the association in respect of any one payment or annual subscription. If by any means the rights of membership become **Infants, &c.**

Form 253. vested in any infant, idiot, lunatic, or married woman, or any two or more persons jointly, they shall be suspended until again vested in some one person under no disability.

Duties of members.

12. Every member, whether a permanent, life, or subscribing member, shall be bound to further to the best of his ability the objects, interests, and influence of the assn, and shall observe all bye-laws of the assn made pursuant to the powers in that behalf hnftr contained.

Exclusion.

12a. Any member who shall fail in observance of any of the regulations or bye-laws of the assn may be excluded from the assn by resolution of a majority of at least three-fourths of the members of the council present, and voting at a special council meeting at which not less than twelve members shall be present. Such member shall have seven clear days' notice sent to him of the council meeting, and he may attend the meeting, but shall not be present at the voting or take part in the proceedings otherwise than as the council allows. A member excluded from the assn by such meeting may, within seven days next after notice of his exclusion, appeal from the decision of the council to a special meeting of the assn which shall thereupon be convened by the council.

Annulling exclusion.

13. A majority of not less than three-fourths of the members present at such last-mentd special meeting shall have power to annul the exclusion, or to annul it subject to the performance of any conditions which the meeting may think fit to impose.

Forfeiture.

14. A member so excluded shall forfeit all claim to a return of the money pd by him to the assn on his admission as a member thof, or by way of annual subscription, as the case may be, and shall cease to be a member of the assn.

Privileges.

15. The following shall be the privileges of the several classes of members, that is to say:—

- (1.) A permanent member shall be entld, &c.
- (2.) A life member shall be entld, &c.
- (3.) A subscribing member shall be entld, &c.

Meetings.

16. The following provisions as to general meetings shall have effect:—

Council.

17. There shall be a council for the management of the affairs of the assn, and the number of members of the council shall not be less than — or more than —, and the first members of the council shall be the following:—

[Add proceedings, powers, and duties of council, minutes, accounts, notices, declaration of secrecy, provision as to distribution of assets in winding-up.]

Articles of Association of Society limited by Guarantee without a Share Capital: Committee of Management. **Form 254.**

1. *[Interpretation clause.]* Interpretation.
2. For the purposes of registration the society is declared to consist of 100 members, but the committee may when they think fit register an increase of members. Number of members.
3. The subscribers to the memorandum of association are the first members of the society. The subscribers.
4. The committee may from time to time determine the terms and conditions on which any further or other persons shall be admitted to the membership of the society. Nevertheless, no person shall be admitted to membership unless and until he shall have signed an application for membership in the terms following, that is to say:—

To the — Society.

I —, of —, desire to become a member of the society, and request you to enter my name in the register of members accordingly, subject to your memorandum and articles of association.

Dated this — day of —.
5. It shall rest with the committee whether any such applicant shall or shall not be admitted to membership. Committee's discretion.
6. Any member may withdraw from the society by giving one month's notice in writing to the society of his intention so to do, and upon the expiration of such notice he shall cease to be a member. Withdrawal
7. The committee may at any time, by notice in writing served as hereafter provided, require a member to withdraw from the society, and the person so required to withdraw shall at the expiration of one month from such notice being given cease to be a member.
8. The rights of a member as such shall be personal and shall not be transferable and shall cease upon his death. Rights personal.
9. The committee may make calls on the members, but so that no call shall exceed — shillings and that the calls in any one year shall not exceed £— per member, and every member shall be liable to pay to the society the calls so made on him. Calls.

[Add provisions for notice of calls and for interest and for forfeiture for non-payment and general meetings.]

Instead of calls, the regulations sometimes provide for entrance fees and annual subscriptions.

Form 254.**COMMITTEE.**General
meetings.

10. There shall be a committee, which shall consist of not less than — and not more than — members, and the following shall be the first members of the committee, that is to say:—

[Powers of the committee, rotation, proceedings, &c., accounts, audit, notices, winding-up.]

Form 255.**Company Limited by Guarantee and not having a Capital divided into Shares.**Company
limited by
guarantee (no
share capital).

Articles of Association of the — Syndicate, Limited.

MEMBERSHIP.Number of
members.

1. For the purpose of registration the number of members of the coy is declared to be one hundred, but the directors may register an increase in the number of members whenever they think fit.

See Table B. in the First Schedule to the Act of 1908. *supra*, p. 486 as to registration fees.

Membership

2. The subscribers hto shall be the first members, and it shall rest with the directors to determine the terms and conditions on which subsequent members shall from time to time be admitted

TRANSFER.Transfer of
interests.

3. Any member may transfer his interest in the coy by instrument in writing, signed both by the transferor and transferee and duly registered with the coy.

GENERAL MEETINGS.General meet-
ings Table A.
modified.

4. Clauses 46 to 59 of Table A. shall apply, subject to the modifications following (that is to say):—

(a) With the consent in writing of all members, a general meeting may be convened on shorter notice than seven days, and in any manner which such members think fit.

(b) The words "by at least three members" in clause 56 of Table A. shall be deemed to be expunged.

(c) Every member shall be entitled to notice of a general meeting.

FORMS.

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Clause 45 refers to meetings called on requisition; but it is necessary to retain **Form 255**.
it, as sect. 68 of the Act of 1908 only applies when the capital of the company
is in shares or stocks.

QUORUM.

The quorum of a general meeting shall be three members pro- Quorum.
sent in person.

VOTES.

6. Until otherwise determined by special resolution, every member One vote per
shall have one vote. member.
7. Clauses 60, 65 and 66 of Table A. shall apply. Table A.
provisions.

DIRECTORS.

8. It shall rest with the signatories hto, or the majority of them, First
by writing under their hands, to appoint the first directors.
9. A resolution signed by all the directors shall be as valid and Signed resolu-
effectual as if it had been passed at a general meeting of the directors tion of all
duly called and constituted. directors
equivalent to
board
meeting.
10. Clause 69 of Table A. shall apply. Clause 69 of
Table A.

POWERS OF DIRECTORS.

11. Clauses 71 and 72 of Table A. shall apply. Powers of
directors.

VACATING OFFICE.

12. Clause 77 of Table A., except paragraph (a) thereof, shall Vacating
and in addition thereto a director shall vacate office if and office.
when he is requested by the coy in general meeting to resign.

ROTATION OF DIRECTORS.

13. Clauses 78 to 86 of Table A. shall apply. Rotation

PROCEEDINGS OF DIRECTORS.

14. Clauses 87 to 94 of Table A. shall apply, but it shall not be
necessary to give notice of a meeting of the directors to a director
who is not within the United Kingdom.

Form 255.**DIVIDENDS.**

15. Clauses 95, 96, 97, 99, 101 and 102 of Table A shall apply, but in clause 99 the reference to shares shall be omitted. Dividends shall be paid to the members equally.

ACCOUNTS AND AUDIT

16. Clauses 103 to 109 of Table A shall apply.

NOTICES.

17. Clauses 110 to 113 of Table A shall apply, save that clauses 112 and 113 the words "interest of a member" shall be substituted for "shares."

NAMES, ADDRESSES AND DESCRIPTIONS OF MEMBERS.

[Space for Signatures.]

Dated the — day of —, 19—.

Witness to all the signatures above given

The above is a specimen of the articles, adopting in part Table A, in a good many cases been adopted by us-syndicate formed for temporary purposes, e.g., for acquiring or testing a patent or mine and re-selling

Form 256. Articles of Association of an Unlimited Company not having a Capital divided into Shares.

Another (division of undertaking into a fixed number of shares of interests of no fixed nominal value).

Interpretation.

Number of members

Division of undertaking into fixed number of shares or interests

1. [Interpretation clause.]

2. For the purpose of registration the number of members of the coy was and is declared to be twenty, but the directors may register an increase in the number of members whenever they think fit

3. In order to determine the proportions in which the members for the time being of the coy are interested in the coy, the undertaking of the coy shall be deemed to be divided into a specified number of shares or interests, and the members shall be deemed to be interested in the coy in proportion to the number of such shares or interests for the time being registered in their respective names as here provided and until otherwise determined by special resolution the undertaking of

the coy shall be deemed to be divided into 1,400 shares or interests numbered 1 to 1,400 inclusive. The members of the coy, at the time when these regulations come into operation, shall be deemed to be entitled to the said 1,400 shares or interests in equal proportions.

1. The number of shares or interests into which the coy is to be deemed to be divided may at any time by special resolution be increased to such extent as may seem expedient, and any additional shares or interests resulting from such increase may be appropriated and dealt with in such manner as the directors think expedient. Any preferential, qualified, or special rights, privileges, or conditions may be attached to any such additional shares or interests. The additional shares shall be numbered 1,401 and onwards.

2. Persons may become members of the coy by original subscription, or by admission or transfer, or by succession. The subscribers to the coy's memorandum of association are members by original subscription. Any person who hereafter desires to become a member by admission, increase his holding in the coy, must apply in writing to the directors for admission to membership or for an increased holding, and state in such application the number of shares or interests, or additional shares or interests, in respect of which he desires to become a member, and if there are any appropriated shares or interests, if any, the directors to accept or reject such application, and in the event of acceptance to determine the number of shares or interests in respect of which the applicant shall be admitted to membership or permitted to increase his holding, and the applicant shall become a member of the coy or additionally interested in accordance with such determination.

3. The register of members of the coy to be kept pursuant to section 25 of the Cos Act, 1908, shall, in addition to stating the names, addresses, and occupations (if any) of the members of the coy, state the number of shares or interests in the coy constituting the interests of such members respectively and the distinguishing numbers of such shares or interests respectively.

4. Any member may be admitted to membership or be permitted to increase his holding on the footing that he is to pay to the coy in respect of the shares or interests constituting his interest, or any of them, a specified sum per share or interest either by instalments when called for by the directors or otherwise, and the registered holder for the time being of any shares or interests in respect of which any money is so made payable shall pay the same as and when the same shall become due; but save as aforesaid, and save as provided by the memorandum of association, membership shall not impose on the member any liability to pay any calls or contributions.

5. If any member fails to pay any instalment call or other sum of money due from him, the directors may serve him with a peremptory notice to pay referring to this clause, and if he fails for fourteen

Form 258.

Present members entitled to all such shares or interests.

Increase in said number of shares or interests.

Modes of becoming members or increasing holdings.

Register of members.

Payment to be called in respect of shares or interests.

- Form 256.** days to comply with such notice, the directors may by notice in writing to such member declare his shares or interests to be forfeited to the coy, and the same shall be forfeited accordingly, and such member shall thereupon cease to be a member.
- Certificates.** 9. Every member shall be entid to a certificate of membership in respect of his shares or interests in the coy, and such certificate shall be under the common seal of the coy.
- Lien of company.** 10. The coy shall have a lien on the shares or interests of each member for the debts and liabilities of such member to the coy, whether alone or jointly with others, and in default of payment or satisfaction thof may sell such shares or interests, and apply the proceeds in or towards such payment or satisfaction.
- Transfers.** 11. The shares or interests of any member in the undertaking of the coy, or any pt thof, may be transferred by instrument in writing in a form approved by the directors and signed by both the transferor and transferee, and the transferor shall be deemed to remain the holder of the shares or interests transferred until the name of the transferee is entered in the register in respect thof. The directors may decline to register any transfer of any shares or interests in the coy upon which the coy has a lien or to a transferee of whom they do not approve.
- Closing of books.** 12. The transfer books and register of members may be closed during such time as the directors think fit, not exceeding in the whole thirty days in each year.
- Transmission.** 13. The exors or admors of a deceased member (not being one of several joint holders) shall be the only persons recognized by the coy as having any title to the shares or interests registered in the name of such member.
- Relinquishment.** 14. A member of the coy may at any time, by notice in writing to the coy, relinquish his shares in the coy, and thereupon his name shall be removed from the register of members, and the shares thus relinquished shall be deemed to be the ppty of the coy, and may be disposed of as the coy thinks fit, and any shareholder may purchase any such shares if sold. The coy shall not be bound to recognize the relinquishment of a fractional part of a share.
- A power to relinquish is one of the characteristic features of a cost-book mining company.
- Validity** 15. A statutory declaration in writing by the directors, or any two or more of them, that a share has been relinquished shall be sufficient evidence of the facts therein stated as against all persons interested in the share; and that declaration and the receipt of the directors to the purchaser of the share for the price thereof, if sold, shall constitute a good title thereto, and the purchaser shall be entered in the

register of members as the holder of the share sold, and thereupon **Form 256**
 he shall be deemed the holder thereof, discharged as against the company from
 all unpaid calls, interest and expenses, due to the company in respect thereof
 accrued before his purchase, and he shall not be bound to see to the
 application of the purchase money, nor shall his title to the share be
 affected by any irregularity in the proceedings in reference to such
 sale.

16. The company in general meeting may from time to time determine **Meetings.**
 the times and places at which ordinary general meetings (hereafter called
 "ordinary meetings") shall be held, and such determination shall
 have continuing effect until otherwise determined, and notice of every
 such determination shall be given to the members, and thereafter
 whilst such determination remains in force no further or other notice
 of any ordinary meeting need be given; but in any other case at least
 seven days' notice of an ordinary meeting shall be given to the mem-
 bers, and such notice shall state the time and place at which the
 meeting is to be held, and in the case of a resolution proposed to be
 passed as an extraordinary or special resolution the terms thereof.

17. In the case of an extraordinary general meeting (hereafter called **Notice**
 an "extraordinary meeting") at least seven days' notice shall be
 given to the members, and such notice shall state the time and place
 at which the meeting is to be held and the general nature of the
 business to be transacted thereat.

18. The directors may, whenever they think fit, convene an extra- **Convention**
 ordinary general meeting; and the directors shall, on the request, &c.
 The usual provisions for requisition of meetings with the assent in
 writing of all the members, &c. Whenever it is intended, &c. The
 accidental omission, &c.

19. An ordinary meeting may exercise all the powers of the company, **Powers of**
 and no notice of the business to be transacted need be given, save **ordinary**
 only as regards business to be dealt with by extraordinary resolution **meeting**
 or by special resolution.

20-40. [*Proceedings at general meetings, directors, &c.*]

41. The directors may, with the sanction of the company in general **Dividends.**
 meeting, at any time declare a dividend to the members in proportion **Payment in**
 to their shares or interests, and may determine when the dividend **cash or in**
 shall be paid, and whether the same shall be wholly or in part a cash **specie.**
 dividend, or wholly or in part a dividend of assets other than cash,
 and where any difficulty arises in regard to the distribution by way of
 dividend of any shares or debentures of any other company or other assets
 of this company, the directors may settle the same as they think just and
 expedient, and in particular by the issue of fractional certificates, and
 may fix their value for distribution of such specific assets or any part

Form 256. thof, and may determine that cash payments shall be made to any members upon the footing of the value so fixed, in order to adjust the rights of parties, and may vest any such specific assets in trustees upon such trusts for the persons entitled to the dividend as may seem expedient to the directors. Any of the assets for the time being of the coy shall be distributable as aforesaid by way of dividend. No larger dividend shall be declared than the directors recommend. The directors may declare such interim dividends as in their opinion the position of the coy justifies.

Accounts. 42—47. [*Accounts, audit, notices.*]

Distribution in winding-up. 48. [*Distribution in specie in winding-up.*]

Notice for winding-up. 49. If at any time at least two-thirds in value of the members according to their shares or interests shall, by notice in writing to the coy, declare that in their opinion the coy should be dissolved, then and in that case the coy is to be dissolved.

Rights of members in winding-up. 50. In the event of a winding-up of the coy, the assets distributable amongst the members shall belong to them in proportion to their shares or interests in the undertaking, but this provision shall be without prejudice to any preferential, qualified or special rights affecting the shares or interests of any of the members.

Unlimited Companies.

Comparatively few companies—as might naturally be expected—have been formed under the Act of 1862 (now replaced by the Companies Act, 1908), as unlimited companies. The principal requirements of the Act of 1908 in regard to the registration thereof are set forth in sects. 2 and 5 of the Act. By sect. 5 the memorandum merely has to give particulars as to name, office, and objects; but it must be accompanied, as required by sect. 10, by articles of association.

Memorandum of unlimited company.

8. In the case of an unlimited company—

(1) The memorandum must state—

- (i) The name of the company;
- (ii) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate;
- (iii) The objects of the company.

(2) If the company has a share capital—

- (i) No subscriber of the memorandum may take less than one share;
- (ii) Each subscriber must write opposite to his name the number of shares he takes.

Form 256.

And these articles may adopt all or any of the provisions in Table A.; and if the company has a capital divided into shares, the articles must state the amount of capital with which the company proposes to be registered, and if it has not a capital divided into shares, then the articles must state the number of members with which the company is to be registered. But there is no obligation to have a capital divided into shares, and, if desired, the company, instead of having a capital divided into shares, can have a common stock of some nominal amount, or the articles may provide that the undertaking shall be deemed to be divided into a specified number of shares of no nominal amount, and that the members shall be entitled to participate in profits in proportion to the shares held by them respectively.

Not long since the last-mentioned form of constitution was adopted by a concern which had been for many years carrying on business upon the cost-book mining system prevalent in Devon and Cornwall, although it was not in fact a mining company. The reason for registration was that the concern desired to obtain the advantages of incorporation and to escape from the inconveniences of the partnership system, and, further, was desirous of being in a position to increase the number of its members to more than twenty without becoming an illegal association (see *supra*, p. 109), and this form of constitution was adopted as approaching most nearly to that of the cost-book mining company.

Where an unlimited company is to have a capital of nominal amount divided into shares, the articles may follow pretty closely those set forth in Form 251, p. 642, but the capital must be specified in the articles of association as required by sect. 10 (3) of the Act of 1908, and clauses 6 and 56 of Form 251 could be omitted, for sects. 88 (Return of Allotments) and 65 (Statutory Meeting) of the Companies Act, 1908, do not apply to an unlimited company.

Where an unlimited company has a capital divided into shares, each subscriber must, as provided by sect. 5 (2) (i) of the Act of 1908, take one share at the least and must write opposite to his name in the memorandum of association the number of shares he takes. Looking to the scheme of the Act, these words "memorandum of association" are probably a mistake for articles of association; and it is to be noted that in Form D. in the Third Schedule to the Companies Act, 1908, no shares are set opposite the signatories' names in the memorandum, whereas in the accompanying articles the number is set opposite each name. However, it seems desirable in the circumstances to set the number of shares opposite the name in both the memorandum and articles, and in the articles, just before the signatures, the words following must be inserted: "We, the several persons whose names and addresses are subscribed, agree to take the number of shares in the capital of the company set opposite our respective names." See Form D. above referred to.

It must be borne in mind that where an association is registered as an unlimited company, it is always open to the members to re-register it as a limited company under the provisions of sect. 57 of the Companies Act, 1908. The fees on registering a company as an unlimited concern are very trifling, and it is only when it comes to be registered or re-registered as a limited concern that the *ultra vires* capital duty becomes payable. This being so, it is in some cases convenient in the first instance to register a concern (e.g., a private company) as an unlimited company, so that its name may for a while remain unchanged, and afterwards, when some death or event occurs rendering it practicable or expedient to obtain limited liability, the concern can, without any dislocation or disturbance, be re-registered as a limited company.

Form 257.

Provision in
articles of an
unlimited
company as to
membership.

The subscribers to the coy's memorandum of association are members of the coy. No other person shall be a member unless he has become a member in manner following, that is to say:—

- (a) He must have applied to the corporation by writing under his hand as follows:—

To the Institute of —.

I request you to admit me to membership, and I request you to place my name on the register of members of the Institute kept pursuant to sect. 25 of the Cos (Consolidation) Act, 1908. As witness my hand this — day of —.

Signature

Address

Description —

- (b) He must by resolution of the council duly notified to him have been admitted to membership pursuant to such application

The council shall have absolute discretion as to the admission of members.

Form 258.

Power for
unlimited
company to
redeem its
shares.

The coy is to be at liberty at any time to give notice in writing to any holder of shares in the coy of its desire to redeem the same at par; that is to say, at a price equal to the capital paid up thereon, and upon payment of the redemption price the holder's name shall be removed from the register of members.

An unlimited company can redeem shares in its capital if its regulations authorize the same. *Borough Commercial, &c. Soc.*, (1893) 2 Ch. 242

MISCELLANEOUS CLAUSES.

For Use in Articles of Association.

The directors may purchase or acquire, upon such terms and under such stipulations as to guarantee or otherwise as may be agreed upon, the business and goodwill of the sd Messrs. . . as the same now stands.

Form 259.

Power to acquire business.

The above was the authority given to the directors of Overend, Gurney & Co., limited. "There is the largest possible power given to these gentlemen to buy this, which was in itself a speculative business, and they are to do it entirely in such manner as they may think expedient." Per Lord Hatherley, *Overend, &c. v. Gurney*, 4 Ch. 715.

It was held that the above power authorized the directors to purchase the business and to undertake the liabilities thereof. "I have no doubt whatever," said Lord Chelmsford, "that the words 'as the same now stands' must mean that the business is to be taken over with its credits and liabilities, that is, as the business appeared in the books of the company." *S. C.*, L. R. 3 H. L. 505. It is usual, however, in empowering directors to acquire a business, expressly to refer to the liabilities.

The directors may purchase, or otherwise acquire, and undertake, upon such terms and conditions as they think fit, the business of a . . . now carried on by Messrs. . . & Co., at . . . and all or any part of the ppty and liabilities of the sd firm in connection with the sd business.

Form 260.

Another power to acquire business.

In nine cases out of ten, where the acquisition of a specified business or property is in contemplation, the articles refer to a particular agreement instead of containing a general power as above. See p. 643.

Classes of Shares.

At times the rights attached to the different classes of shares are set out in the memorandum of association (see Forms 210 *et seq.*); this renders them inalterable (*Ashbury v. Watson*, 30 C. Div. 376), unless the memorandum, whether by reference to the articles or otherwise, gives power to modify. *Walsby & Co. v. Gas Light Co.*, (1904) 1 Ch. 87, *supra*, p. 376; *Underwood v. Union Marine Hall, Ltd.*, (1891) 2 Ch. 309, *infra*, p. 818. The decisions, however, in *Andrews v. Gas Meter Co.*, (1897) 1 Ch. 361, and the above cases, show that rights attached by the articles only may be altered by special resolutions (*supra*, p. 376), and accordingly it is generally thought better to take power by the memorandum to divide the shares into different classes (*supra*, p. 490), and then by proper clauses in the articles to declare the rights of each class.



These clauses, which come into Form 251 at (about) clause 13, are usually intitled "Preference and Ordinary Shares," or "Preferred and Deferred Shares," or as the case may be, and generally commence with a statement as to the capital, *e.g.*, "Of the capital mentioned in the memorandum of association, 10,000 shares shall be called preference shares and 10,000 shall be called deferred shares," and then the clauses proceed to define the rights of the holders. But where the division is effected by the memorandum of association, the clauses defining the rights of the shareholders can be intitled "Appropriation of Profits" and inserted near the beginning of the articles or just before the dividend clauses.

As to the form of the dividend clause where there are preference shares, &c., see *supra*, p. 763, note to clause 116.

In defining the rights of the holders of preference shares in regard to dividends, one of the first questions to be settled is whether the dividend payable to them is to be non-cumulative, *i.e.*, contingent on the profits of each year being sufficient to pay the preference dividend, or cumulative, *i.e.*, so that any deficiency of one year is to be made up out of the profits of subsequent years.

Preference Shareholders.

In determining this question and the rights generally of the holders of preference shares it is necessary to consider what priorities and privileges must be attached to the shares, and at the same time how these priorities and privileges will affect the other classes of the company's shareholders and its interests generally. The following are some of the principal points:—

- (1) Whether the dividend to be attached thereto is to be cumulative or non-cumulative.

The term "cumulative preferential dividend" means a dividend payable out of the profits generally in priority to the subordinate class or classes of shares, so that if the profits of one year are not sufficient to pay the dividend for that year, the deficiency accumulates as against subsequent profits, and has to be cleared off before any dividend can be paid on the subordinate class or classes. On the other hand, a non-cumulative preferential dividend means a dividend payable as regards each year out of the profits of that particular year only in priority to the subordinate class, so that if the profits of the year are insufficient, the deficiency is extinguished instead of being carried forward as against subsequent profits. There is or may be a great difference in point of security between preference shares with a cumulative dividend and preference shares with a non-cumulative dividend: for in regard to the former, if the dividend for any year be passed, there is at any rate the certainty that it will have to be paid before the subordinate shares get any dividend in the future, whereas with a non-cumulative dividend, if any year should happen to be unfortunate, the preferential dividend for that year may be entirely lost, each year being treated as a separate venture.

But the added security of the cumulative preferential dividend carries a corresponding disadvantage, for cases sometimes arise in which, there being a cumulative dividend and a series of bad years, an overwhelming arrear of preference dividend accumulates, and thus postpones for a lengthened period any possibility of dividend on the subordinate shares, the holders of which may see no chance of benefit otherwise than by liquidation, and thus the two classes of shares are brought into conflict.

It is not essential, in defining preferential rights, to use the word "cumulative," for *prima facie*, where one class of shares is to carry dividend at a fixed

rate in preference to another class, the dividend is cumulative, that is, not limited to the particular year, and therefore payable out of the profits whenever accruing. See *Henry v. Great Northern Rail. Co.*, 1 De G. & J. 606; *Matthews v. Great Northern Rail. Co.*, 28 L. J. Ch. 375; *Foster v. Cole*, 22 T. L. R. 555; *Webb v. Earle*, 20 Eq. 557. In the case last mentioned preference shares had been created with a preferential dividend of 10 per cent. per annum payable half-yearly; and it was held that, although the word "cumulative" was not used, the dividend was in point of law cumulative. Of course, when the word "cumulative" is used, the question whether the dividend is or is not cumulative is concluded; and although formerly it was customary not to use the word in the clause or resolution defining the rights of preference shareholders, the word is now generally used, and in some cases regarded as a specially attractive feature. Occasionally, where a dividend is intended to be cumulative, the form adopted is to say that the holders of the shares shall have a right to resort to the profits of subsequent years to make up any deficiency in the dividend of preceding years. But this is only the word "cumulative" "writ large," and whilst it provides for making good the deficiency, it unnecessarily points to the possibility of a deficiency, which is not generally considered politic.

Where the dividend is to be non-cumulative, the clause must either be so framed that there is no room to contend that it is cumulative, *e.g.*, by providing that as regards each year the dividend for that year shall be payable out of the profits of that year only, or it may be expressly provided that there shall be no right in case of deficiency to resort to subsequent profits. See Form 262. It is not usual to frame the clause so as to attach to the shares the right to "a non-cumulative preferential dividend" at the rate of so much per cent., for the words "non-cumulative" do not point to any specific time. They do not indicate whether, if the profits of a month or of six months or a year are insufficient, the deficiency is not to be carried forward. Sometimes the terms in which the rights attached to preference shares are stated are very imperfectly expressed. See *Staples v. Eastman's, & Co.*, (1896) 2 Ch. 303, in which case a dividend was held to be non-cumulative, although the wording of the clause was ambiguous. It is not easy to reconcile this case with *Matthews v. Great Northern Rail. Co.*, *supra*. See also *Miln v. Arizona Copper Co.*, 36 S. L. R. 711.

- (2) Whether the dividend is to be PERMANENTLY attached or is only to be preferential for a term of years or until a particular period shall have arrived.

Prima facie a preferential dividend is permanent, that is to say, will remain preferential as long as the shares exist; but occasionally it is considered expedient to provide that in certain events the dividend shall cease to be preferential, *e.g.*, when a dividend at a specified rate has for a specified term of years been paid on some subordinate class of shares. See Form 266. See also Forms 271 and 273 as to the conversion of preference shares into ordinary shares.

- (3) Whether the dividend is to be paid out of the PROFITS made before carrying anything to reserve, or only out of the profits available after carrying to reserve what may be thought expedient.

This is a very material matter, more especially if the dividend is non-cumulative. Where the dividend is cumulative and profits are carried to reserve, the right to the dividend is only postponed; but where the dividend is non-cumulative and the directors are to be at liberty to carry as much as they think fit to reserve, they are in a position to carry the whole of the profits of any particular year to reserve, and thus to extinguish once for all the preference dividend for that year. However, as a general rule, it is desirable to leave the directors with a free hand to carry what they think fit to reserve. Any derogation from that power must be detrimental to the company. See *Henry v. Great*

Northern Rail. Co., 1 De G. & J. 606; *Burland v. Earle*, (1802) A. C. 83, and *Wemyss Collieries Trust v. Melville*, 8 F. 143, Ct. of Sess. No doubt, in the result, where the dividend is non-cumulative, the position will be more or less precarious; but it is generally assumed that the directors will act fairly in the matter, and if in any particular case special precautions are desired, there is no difficulty in providing that where profits applicable to the payment of the dividend are carried to reserve there shall be a right to resort to subsequent profits to a corresponding extent. As to the mode in which provision should be made for carrying to reserve, this is sometimes done by providing, as in Form 264, that the profits which it shall be from time to time determined to distribute shall be applied in paying preferential dividend, &c., for these words obviously leave the company at liberty to carry to reserve as much as it chooses. Sometimes, too, the provision as to the application of the profits expressly provides that the profits of each year shall be applied first in paying to reserve so much as the directors consider expedient, secondly in the payment of the preferential dividend, and so on. In all cases the question whether the company can carry to reserve in priority to the dividend depends on the construction of the documents. As a general rule, where the provision for reserve empowers the directors, "before recommending any dividend," to set aside out of the profits such sums as they think fit as a reserve fund, those words enable the directors to set aside in priority to a preferential dividend. *Bond v. Barron Hematite Steel Co.*, (1902) 1 Ch. 353. So, too, where there is a provision for reserve, and the articles in some subsequent clause provide that, "subject as aforesaid, the profits of the company shall be divisible" in a certain way—e.g., see *supra*, pp. 763, 764—and there may be other provisions which indicate or emphasize the intention that the reserve fund shall rank before the preference dividend. In a recent case, where the regulations provided that the profits from time to time available for dividend should be dealt with in a particular way, and there was a reserve fund clause providing for the setting aside "before recommending any dividend," it was held that the words "available for dividend" meant the net profits after deducting all sums properly deducted by the directors before arriving at the amount payable to dividend—including, therefore, provision for reserve fund. *Fisher v. Black and White Publishing Co.*, (1901) 1 Ch. 174.

- (4) Whether the preferential rights in regard to dividend are to be fixed and limited to so much per cent. per annum, or whether there is also to be a right to participate in SURPLUS PROFITS, e.g., after paying a dividend at a specified rate on the ordinary shares.

Generally the preferential rights are limited to so much per cent. without any further right to participate, but it is not altogether uncommon to attach to preference shares the right to participate to some extent in surplus profits. In such case the shares are sometimes called "participating preference shares." Whether there is or is not to be such a right depends on the terms of the articles. It is generally assumed that where the preference shares are given a fixed preferential dividend at a specified rate, that impliedly negatives any right to take any further dividend, and probably this assumption is well founded; but where preference shares are given a preference as regards capital, that does not impliedly exclude them from sharing in the surplus assets in winding-up after clearing off the whole of the paid-up capital. *Esparto Lend, & Co.*, (1909) 2 Ch. 187. It is therefore open to contention that the attachment of a preferential dividend does not impliedly exclude the right to participate in surplus profits after paying a like dividend on the subordinate shares. In order, however, to preclude any question on this point, it has for some time past been customary to insert express words negating the right of preference shareholders to participate in further profits. See Form 261.

If preference shares are to get a share of surplus profits, the question arises

whether they shall rank *pari passu* with the subordinate shares after those shares have received a specified dividend, or whether they shall receive an aliquot portion of the surplus profits, *e.g.*, 10 per cent., or whether the dividend on the preference shares shall rise automatically in proportion as the dividend on the ordinary shares rises beyond the specified figure. In a successful company, preference shares which give a right to participate *pari passu* with ordinary shares in surplus profits may be of great value—perhaps of greater value than the ordinary shares—but preference shares which take even an extra one or two per cent. may be largely augmented in value.

- 5) Whether the preferential dividend is to be paid at a rate per cent. calculated on the CAPITAL PAID UP on the preference shares or calculated on the nominal amount thereof.

As a general rule, it is provided or intended that the dividend on preference shares shall be paid at the specified rate on the capital for the time being paid up thereon; but not uncommonly this intention is very imperfectly expressed, and where it is provided merely that the shares shall carry a fixed cumulative preferential dividend at the rate of so much per cent. per annum without saying "on the capital for the time being paid up thereon," grave questions arise as to whether such last-mentioned words can be implied. Certainly the words "dividend on the shares" are perfectly sensible if they are treated as referring to the nominal amount of the shares, and the difficulty is to justify the addition by implication of the words "capital paid up" on the shares. Sometimes the addition may be justified by reference to some other provision in the articles, *e.g.*, one providing that all dividends shall be paid or calculated on the amount of the capital paid up; but where the context affords no such indication it is difficult to avoid the conclusion that the preference dividend ought to be calculated on the shares, not on the amount paid up. In *Crum v. Tankbank Co.*, 8 App. Cas. 65, it was contended that dividend must always be payable in proportion to the capital paid up; but the House of Lords rejected the argument and decided to the contrary, holding that a provision for payment of dividend to the members "in proportion to their shares" meant in proportion to the nominal amount of their shares, and one of the grounds for arriving at this conclusion was that otherwise a shareholder who had paid up nothing on his shares would get no dividend although the company had had the benefit of his liability. See p. 764, *supra*.

- (6) Whether there is to be attached to the preference shares any special right of VOTING, or whether the rights of voting attached thereto are to be restricted or only to be available in certain cases or for certain purposes.

Formerly it was not usual to distinguish between the preference shares and the ordinary shares as regards voting. They were all treated as interested alike in the company and given the same right of voting, but for many years past it has been customary to give only qualified voting rights to preference shares. See *supra*, p. 703. Sometimes preference shareholders are given no right of voting whatsoever at general meetings; but the London Stock Exchange does not generally approve of this. Sometimes the holders are not given any right of voting at general meetings unless on questions specially affecting them—as, for instance, winding-up or sale of the undertaking or reduction of capital. Sometimes preference shares are given rights of voting on a modified scale—for example, one vote for every two preference shares against one vote for every ordinary share. In any case the matter is one of great importance, for if the preference shares have full voting rights they may be able to direct the proceedings of the company in a manner opposed to the interests of the ordinary shareholders; they may be in a position, for instance, to elect directors

and to control their proceedings, and to restrict the development of the business; and they may [unduly] exercise their powers in their own favour and in a selfish spirit, for the interests of the two classes are very commonly more or less in conflict, the interest of the preference shareholders being to preserve the business on a safe basis sufficient to produce their preference dividend, whereas the interest of the ordinary shareholders is to increase it, and for that purpose to incur some risks, if necessary.

- (7) Whether the preference shares are to have any preference as regards RETURN OF CAPITAL in a winding-up or in relation to a reduction of capital.

Unless otherwise provided by the articles, or by the resolution creating the preference shares, preference shares do not confer any capital priority in winding-up. *London India Rubber Co.*, 5 Eq. 519. Thus, if there be both preference shares and ordinary shares, the assets in a winding-up available for distribution amongst the members are *prima facie* applicable to the paying off of the whole of the paid-up capital, and the surplus is to be distributed amongst the members in proportion to the shares held by them of either class. *Birch v. Cropper*, 14 App. Cas. 525. But in many cases it is thought expedient, with a view to placing the preference shares or for other reasons, to give to the preference shares a preference as regards capital, so that in a winding-up the assets available may be applicable first to the payment of the capital paid up on the preference shares. See Forms 261 and 265; and see *Re Bangor Co.*, 20 Eq. 59. Such a preference is expected nowadays, and is regarded as very necessary; for if the profits are insufficient to pay a dividend on the ordinary shares, and the preference shares have no preference in winding-up, the holders of the ordinary shares may be strongly disposed to wind up and reconstruct, so as to extinguish the preferential rights and bring the preference shares down to the level of the ordinary. The preference shareholders having a priority as to capital operates as a deterrent to such a proceeding by the ordinary shareholders. The giving, too, of such a preference is some compensation for cutting down the voting rights and depriving the preference shareholder of the right to participate in surplus assets.

Where preference shares are not given a preference in winding-up, and their right to participate in the surplus is not negatived or restricted, it is settled that the surplus remaining after paying off the preference shares and the capital paid up on the ordinary shares is distributable amongst both classes in proportion to the shares held by them respectively. *Birch v. Cropper*, *supra*. But very commonly it is desired to negative the right of the preference shareholders to participate in such a surplus, and accordingly words are inserted to the effect that the holders shall *not* be entitled to participate any further in the profits or assets (see Form 261), or that the assets in winding-up are to be applied first in paying off the capital paid up on the preference shares and that the balance shall belong and be distributable amongst the ordinary shareholders. See Form 302. Occasionally preference shareholders are given a limited right to participate in surplus assets: *e.g.*, a right to have the surplus assets applied first in paying off the preference capital; secondly, in paying off the ordinary capital; and then, as to not exceeding (say) one-tenth of the surplus, in paying to preference shareholders a bonus of 10 per cent., and the balance to the ordinary shareholders. Sometimes preference shares are given the right, in a winding-up with a view to reconstruction or amalgamation, to a bonus or premium. See Form 264. To give to preference shareholders a right to participate in surplus assets may, if they have large voting rights, constitute a serious danger to the ordinary shareholders.

- (8) Whether arrears of dividend on the preference shares are in a winding-up to have any priority.

Cases sometimes arise in which it is desired to give to the preference shareholders priority in a winding-up not only as to capital, but also "as to arrears of dividend [whether declared or not] up to the commencement of the winding-up." The words in brackets are inserted because a right in winding-up to priority as regards dividend, means declared dividend. *South African Supply and Cold Storage, Byrne, J.*, 17 Feb. 1904.

Prima facie a preference dividend is payable only out of the profits made whilst the company is a going concern, and it wants special provision to give the holders a right to have the arrears paid out of assets in winding-up. *Crichton's Oil Co.*, (1902) 2 Ch. 86.

Where preference shares are given a preference as to arrears of dividend and the words "whether declared or undeclared" are not used, it is sometimes contended that arrears means only dividends declared but not paid. In most cases, however, this contention cannot avail, for a dividend once declared becomes a debt [*supra*, p. 765] and is entitled as such (subject to sect. 123 (1) (vii) of the Act) to payment out of the assets before anything is divisible among the members as such.

Hence, to construe the provisions for payment of arrears of preference dividend as dealing with payment of such a debt would render the provision superfluous.

Then it is said that arrears as applied to a dividend accrued but not declared is a misnomer, but this is not so; the word is commonly used in that sense, see *Buenos Ayres and Ensenada Act, 1884*, *Northern Railway of Buenos Ayres Act, 1885*, *Cordoba Central Railway Company Act, 1897*, *infra*, "Private Acts"; and see *Crichton's Oil Co.*, (1902) 2 Ch. 93, in which Collins, M. R., used the expression "arrears of dividend in former years in which no dividend was declared." However, to preclude controversy it is not uncommon to insert the words "whether declared or undeclared." See *supra*, p. 765.

Where preference shares are given a preference in winding-up as regards dividends, it has been held that in the winding-up the arrears are only payable out of profits. *W. J. Hall & Co.*, (1909) 1 Ch. 521; and *Espuela Land, &c. Co.*, (1909) 2 Ch. 187.

Sometimes when the dividend on preference shares gets into arrear for several years the question arises whether there is any priority as between the several years' arrears. *Prima facie* there is not any right to priority; the arrears are all payable out of a common fund; there is no charge and nothing to give priority. See *Molver's case*, 5 Ch. 424. It rests therefore with the company in declaring or paying a dividend in respect of the arrears to indicate, if it chooses, the particular year or other period in respect of which the payment is made. But, of course, the words used may be sufficient to give priority. *e.g.*, "each year's dividend to rank for payment in priority to subsequently accruing dividends on such shares."

- (9) Whether the rights attached to the preference shares are to be alterable by any means.

In some cases it is desired to render the rights attached to the preference shares unalterable. This can be done on the formation of the company by setting out those rights in the memorandum of association, and providing there in clear terms how the profits shall be applied, and how the assets in winding-up shall be dealt with. See *Ashbury v. Watson*, 30 C. D. 376, in which case the memorandum of association expressly provided how the profits should be dealt with, and the Court of Appeal held that this specification was a "condition" within sect. 12 of the Companies Act, 1862 (Companies Act,

1908, s. 41), and accordingly came within the words of that section that "save as aforesaid no alteration shall be made by any company in the conditions contained in the memorandum of association." See *supra*, p. 430. But very commonly it is not desired to render the rights so attached unalterable, and accordingly a clause is inserted in the memorandum giving power to alter, as in Form 214, and this is effective. *Welsbach Incandescent Co.*, (1904) 1 Ch. 87; and see *Underwood v. London Music Hall, Limtd.*, (1901) 2 Ch. 309. Another plan is to attach the preferential rights by the articles, and insert in the articles a clause (see *supra*, p. 683, clause 50) allowing of the alteration of the rights of classes, subject to consent of separate meetings of the classes. Whether in the absence of any such clause the rights can be altered by special resolution has not yet been settled; but *Andrews v. The Gas Meter Co.*, (1897) 1 Ch. 361, appears to point to the conclusion that they can be so altered (see *supra*, p. 481), or at any rate that by introducing a modification clause, as at p. 685, and afterwards exercising the powers conferred by that clause, it is possible to modify the rights. And see *Bannatyne v. Direct Spanish Telegraph Co.*, 34 Ch. D. 287; and *British Equitable Assurance Co. v. Baily*, (1906) A. C. 35. If anything unfair or oppressive to the preference shareholders were being done by a majority of the other shareholders, no doubt a Court of equity would interfere by injunction. *Menier v. Hooper's Telegraph Co.*, L. R. 9 Ch. 350; *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656. Not uncommonly the memorandum of association contains an express provision that "the rights attached to any preference shares are not to be altered otherwise than in accordance with the provisions of clause — of the accompanying articles of association," that is to say, of the modification clause. *Supra*, p. 685. The object of this provision is to fortify the status of the preference shares and to prevent an alteration of their rights by special resolution, unless with the sanction of a class meeting. Sect. 45 of the Companies Act, 1908, now provides for the reorganization of a company's capital with the sanction of the Court.

- (10) Whether the company is to be at liberty to issue preference shares ranking in PRIORITY to or *pari passu* with the original preference shares.

It has generally been assumed that where a company issues a series of preference shares, it cannot issue any preference shares or any shares ranking in priority to or *pari passu* with them unless on the issue express power so to do has been reserved, as in Form 468. The question whether the company has such a power turns generally on the memorandum and articles of association of the company. Where the memorandum provides unconditionally that the profits of the company of each year shall be applied first in paying the dividend on the preference shares in the original capital, there is, of course, no question that further shares cannot be issued in prejudice to the rights thus given (*Ashbury v. Watson*, 30 C. D. 376); and it may be that if the memorandum creates preference shares and confers on them a right to a fixed preferential dividend, it would be held that this means a preferential dividend in priority to all other shares. But very commonly the memorandum of association, even where it contains such words, contains other words providing for the creation of further shares with preferential rights attached thereto, and these words may be and often are sufficient to show that the preferential rights attached to the original preference shares are not to be incapable of postponement. *Underwood v. London Music Hall*, (1891) 2 Ch. 309; *Welsbach Incandescent Co.*, (1904) 1 Ch. 87. Sometimes, however, the additional words so referred to expressly provide that none of the preferential rights attached to the original capital are to be affected. Where, however, the preferential rights are defined only in the articles of association or by resolution, it is not so easy to be sure in any particular case that the company cannot create pre-preference shares or shares

ranking *pari passu* with original preference shares. No doubt, in *Harper v. Paquet* (infra, Form 741), Jessel, M. R., granted an injunction restraining the issue of *pari passu* preference shares; but that was only an interlocutory injunction, and *Hutton v. Scarborough Cliff Hotel Co.* had not been then overruled by *Indraes v. The Gas Meter Co.*, (1897) 1 Ch. 361. Certainly the last-mentioned case points to the conclusion that preferential rights may in some cases be altered by special resolution. See, however, some *dicta* of Romer, J., in *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656.

Second Preference and Preferred Ordinary Shares.

Sometimes a class of shares called "second preference" or "preferred ordinary" or "B" shares is created. These shares usually rank as regards dividend and the preference shares and before the ordinary shares. In all be the rights attached thereto, many of the questions regard to preference shares have to be taken into account, and in the questions whether the dividend is to be cumulative, or non-cumulative, whether there is to be any special right of voting, and whether the shares as regards capital are to rank before the ordinary shares or *pari passu* with them.

Ordinary Shares.

Usually very little has to be said in regard to the rights of the ordinary shareholders. They take whatever is left, regard being had to the rights of the prior classes of shares; and accordingly, if there are not any founders' shares or other shares to interfere with their rights, the position is clear enough. Nevertheless the question whether they are to participate in profits in proportion to the capital paid up thereon, or in proportion to the nominal amount of the shares, is one which has to be considered, for, unless otherwise provided, they rank for dividend in proportion to the shares held. Again, it is sometimes material to consider whether it is desirable to depart from the ordinary rule as to the distribution of assets in winding-up. According to that rule, as appears above, where different amounts are paid up on the shares the excess is in the first place to be paid off, and the balance of assets is distributed *pari passu*; but this is not always considered just. See clause 152, p. 783. As regards the right of voting, it is usual to provide for this in express terms. Unless otherwise provided, every member of the company has one vote. See sect. 67 (iv) of the Act of 1908.

Founders' Shares and Deferred Shares.

At times the capital of the company consists in part of founders' shares or deferred shares. They usually give to the holders a right to a share of the surplus profits of each year which remain after paying the preference dividend and a fixed dividend on the ordinary shares, and also the right to share in the surplus assets in winding-up. Sometimes the share of profits thus given is 10 per cent., sometimes 20 per cent., sometimes 50 per cent., and sometimes the whole of the surplus profits is given. Where the rights are large it is generally thought expedient to attach them by provisions in the memorandum of association, so as to fortify to the utmost the position of the holders; at other times it is thought expedient to embody them in the articles of association, so as to facilitate alterations in the rights attached if it becomes desirable to make such alterations, and in order to secure the position it is easy to insert a clause

in the memorandum providing that alterations shall not be made without the sanction of a meeting of the holders of shares of the class. Various questions of importance arise in regard to defining what shall be the rights attached to founders' and deferred shares, and in particular whether the share of profits to be assigned to them shall be a share of the surplus remaining after paying the fixed dividends, e.g., 10 per cent. of such surplus, or whether it shall be a share of the profits of the year payable out of the surplus profits after paying the fixed dividends for the year. Again, the important question as to whether the founders are to get a share of the surplus after carrying to reserve or before carrying to reserve has to be considered, and whether, if funds are carried to reserve which might otherwise be applied in payment of dividend, the founders are still to retain an interest in the reserve.

Sometimes founders' shares are given a right to participate in profits *pari passu* with the ordinary shares. This is more especially adopted where the founders' shares are given to vendors. In such case it may be provided that the founders shall take a certain proportion of the profits of each year, the ordinary shares to take the balance (see Form 219), or that each 1/100 founders' share shall rank for dividend as if it were a 10/100 ordinary share fully paid up. And see pp. 581, 587 *et seq.*, *supra*.

The number of founders' or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company must be stated in any prospectus issued by the company. Companies (Consolidation) Act, 1908, s. 81 (1) (a).

Form 261.

Capital divided into cumulative preference shares and ordinary shares. (Simple form.)

The initial capital shall be divided into — preference shares of £— each and — ordinary shares of £— each, and the said preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of — p.c.p.a. on the capital for the time being paid up thereon, and the right in a winding-up to payment off of capital [and arrears of dividend, whether declared or undeclared, up to the commencement of the winding-up] in priority to all other shares [or to the ordinary shares], but shall not confer any further right to participate in profits or assets.

In the above case the dividend is cumulative, and there are words sufficient to exclude the holder's right to participate in surplus profits and in any surplus assets, which in a winding-up may remain after paying off the whole of the paid-up capital. See *supra*, p. 814. As to giving a further right in a winding-up for the purpose of reconstruction or amalgamation, see *supra*, p. 816.

For resolutions creating preference shares of various kinds, see *infra*, p. 821 *et seq.*

Form 262.

Non-cumulative dividend with no right to participate in surplus.

The initial capital of the company shall be divided into — preference shares of £— each and — ordinary shares of £— each, and the said preference shares shall confer the right to a fixed preferential dividend at the rate of £— p.c.p.a. on the capital for the time being paid up thereon, payable as regards each year out of the profits of such year available for dividend, and the right in a winding-up to repayment of capital [with a bonus of £— p.c. thereon] in priority to

all other shares [or to the ordinary shares], but shall not confer any further right to participate in profits or assets. **Form 262.**

(Occasionally a dividend is cumulative but to a limited extent. Thus the clause may provide that "such dividend shall as regards each year be payable out of the profits of that year, and if they shall be insufficient the deficiency shall be payable out of the surplus profits of the next following year which shall remain after paying the preferential dividend for that year, but the deficiency shall not be payable out of any subsequent profits.")

1. Of the shares mentd in the memdum of asson of the coy, 10,000 shall be called preference shares and 10,000 shall be called ordinary shares.

2. The holders of the preference shares shall be entld to receive out of the profits of each year available for dividend a preferential dividend for such year at the rate of 6 p.c.p.a. on the capital for the time being pd up on the preference shares held by them resply.

3. The surplus profits of each year available for dividend shall be applicable to the payment of dividends to the holders of the ordinary shares in proportion to the capital pd up thon.

4. The coy reserves power to pay off the capital pd up on the preference shares out of profits or otherwise and to cancel same subject to the sanction of the Court.

See *Didco Pier Co.*, (1891) 1 C. 354.

Sometimes, where preference shares are to carry a non-cumulative dividend, it is thought better to frame the clause as above rather than expressly to provide that there shall be no claim for arrears in case of deficiency in the profits of any one year.

As to the words "available for dividend," see *supra*, p. 814.

The sd preferred ordinary shares shall, subject as hnfr provided, confer on the holders the rights and privileges following, that is to say:—

- (1) The right to a fixed cumulative preferential dividend at the rate of 7 p.c.p.a. on the capital for the time being pd up thon.
- (2) The right, whenever in respect of any year a dividend at the rate of 10 p.c. is pd on the capital pd up on the ordinary shares, to a further dividend for such year out of surplus profits at the rate of 3 p.c. on the capital pd up on the sd preferred ordinary shares.
- (3) The right in a winding-up to have the capital pd up on such preferred ordinary shares, and all arrears of dividend, whether declared or not up to the commencement of the winding-up, pd off in priority to any payment off of capital

Form 263.

Preference and ordinary shares.

(Non-cumulative preference shares.)

Form 264.

Preferred and ordinary shares.

Form 284.

on the ordinary shares, but without any further right to participate in profits or assets, save that if the winding-up is with a view to reconstruction or amalgamation the preferred ordinary shares shall also confer on the holders the right to be paid a premium on the then preferred ordinary shares at the rate of 5s. per share, with the like priority as regards such premium.

Form 285.

Preference
shares with
further rights.

Of the 50,000 shares of 5l. each in the initial capital of the coy. 20,000 shall be preference shares and 30,000 shall be ordinary shares. The said preference shares shall confer the right to a fixed cumulative preference dividend at the rate of 7 p.c.p.a. on the capital paid up thereon and the right, whenever the surplus profits of any year (available for dividend) remaining after payment of such dividend to the close of that year shall be more than sufficient to pay a dividend for that year at the rate of — p.c. on the capital paid up on the ordinary shares, to participate in the surplus profits of the year available for dividend rateably with the holders of the ordinary shares in proportion to the capital paid up on such shares, whether preference or ordinary, and [the right, in a winding-up, to payment off of capital and any arrears of dividend, whether declared or not, up to the commencement of the winding-up, in priority to the ordinary shares, and to participate in any surplus assets which may remain after paying off the remainder of the capital *pari passu* with the ordinary shares, in proportion to the amount held].

Form 285a.

Preference
shares with
limited extra
rights.

The said preference shares shall confer on the holders the right to a fixed cumulative preferential dividend at the rate of 5 p.c.p.a. on the capital for the time being paid up on the said shares, and the right to an extra 1 per cent. on such paid up capital for every 1 per cent. of dividend on the capital paid up on the ordinary shares in excess of 5 p.c.p.a., but not exceeding for any year an extra 3 p.c.p.a. on the said preference shares.

Form 286.

Preference
dividend and
quarter
surplus
reducible.

The capital, &c. The said preference shares shall confer on the holders the right to a fixed dividend at the rate of 6 p.c.p.a. on the capital for the time being paid up thereon, and the right to one-fourth of the surplus profits of each year available for dividend; but until the whole of the said preference shares shall have been issued, the said one-fourth shall be reduced to a sum bearing the same ratio to the full amount as the amount of the issued preference shares bears to the full amount of the said preference shares.

1. The holders of the guaranteed preference shares shall be entitled to a cumulative preferential dividend of 8 p.c.p.a. on the nominal amount of the preference shares held by them respectively.

2. Subject to the rights of the holders of the guaranteed preference shares, the holders of the ordinary shares shall be entitled to be paid out of the surplus profits of each year available for dividend a dividend at the rate of 10 p.c.p.a. for that year on the amount credited as paid up on the ordinary shares held by them respectively.

3. The residue of the surplus profits of each year available for dividend shall belong to and be divided among the members in proportion to the shares held by them respectively.

4. If at any time before the — day of —, 19—, the dividend paid to the holders of the guaranteed preference shares in respect thereof shall amount in the aggregate to 80 p.c. on the nominal amount, then and in such case the preference hereby given to such shares shall cease to exist, and thenceforth the guaranteed preference and ordinary shares shall rank *pari passu* in dividend.

Form 267.

Guaranteed
preference
and ordinary
shares.

It is by no means unusual to insert such a clause as above.

As already mentioned (*supra*, p. 764), the provisions as to payment of preferential dividends are sometimes inserted in a clause introduced in that part of the articles which relates to the payment of dividends. Such provisions are also desirable where the memorandum sets out the rights attached to one or more classes, but the provisions must, of course, accord with the memorandum.

Contingent
termination
of preference.

1. The profits of the company made during the financial year, or other period comprised in the accounts submitted to the ordinary general meeting in each year and available for dividend, with any profits carried forward from past years, shall be applicable in order of priority and manner following:—

First. To the payment of a cumulative preferential dividend at the rate of 6 p.c.p.a. on the capital paid up on the A. shares to the close of such period.

Secondly. To the payment of a dividend for such period at the like rate on the capital paid up on the B. shares.

Thirdly. The residue shall be applicable to the payment of a further dividend on the paid-up capital, or may be carried to reserve, or otherwise dealt with as the company in general meeting determines.

Form 268.

Clause providing for
appropriation
of profits.

First. To the payment of a dividend at the rate of 6 p.c.p.a. for such period on the capital paid up on the preference shares.

Secondly. Of the surplus, such part (not exceeding 10 p.c.) as the directors determine may be carried to the reserve fund to be established pursuant to clause — of the memorandum.

Form 269.

Another form.

Form 269. Thirdly. The balance, or a competent pt thof, shall be applicable to the payment of a dividend for such period on the capital pd up on the deferred shares at the rate of 5 p.c.p.a.

Fourthly. What remains shall be applicable [as in Form 268].

Form 270. First. To the payment of a preferential dividend for such period at the rate of 10 p.c.p.a. on the capital pd up on the shares (other than the founders' shares).

Another.

Secondly. Of the surplus, four-fifths shall be applicable to the payment of a further dividend on such pd-up capital.

Thirdly. The residue shall be divided rateably among the holders of the founders' shares.

Form 271. First and secondly [as in Form 268].

Percentage to directors, &c.

Thirdly. Of the surplus, 10 p.c. shall be pd to the directors as further remuneration for their services; 20 p.c. shall be carried to the redemption fund to be established as afsd; and 70 p.c. [as in Form 268 *et seq.*].

See *Peruvian Co.*, (1894) 3 Ch. 690, where directors were held entitled to their percentage on the profits which had been reasonably and *bona fide* ascertained, although the assets representing the same had subsequently become depreciated.

Form 272. The profits, &c., as in Form 268.

Special form.

1. In paying to the members a dividend for such year or other period at the rate of 6 p.c.p.a. on the pd-up capital

2. Of the residue, three-fourths shall be divided among such of the members holding not less than five shares each as shall have contributed to the coy's business during such year or other period rateably in proportion to the amount of the freight contributed by them resply.

3. What remains shall be divided among the members in proportion to the nominal amount of the shares held by them resply.

Occasionally profits are divided so as to give members an inducement to deal with the company. This plan has sometimes been adopted with great success.

Form 273. Any registered holder of preference shares afsd may, subject to the approval of the directors, elect to have his preference shares, or any of them, converted into ordinary shares ranking in all respects *pari passu* with the 10,000 original ordinary shares afsd. Such election shall be declared by notice in writing to the coy, signed by

Conversion of preference into ordinary shares.

such holder and accompanied by the certificate relating to the shares to be converted; and if the directors approve of such conversion they shall resolve that such conversion be approved and have effect, and the same shall have effect accordingly, and thereupon the certificate aforesaid shall be cancelled, and the requisite alterations shall be made in the company's register of members. **Form 273.**

In the above case the directors are given a discretion, but sometimes the shareholder is empowered to convert, and it is provided that upon service of the notice the share shall *ipso facto* be converted.

If the holders of two-thirds of the shares numbered 2,001 to 3,000, inclusive, in the original capital (hereafter referred to as "the irredeemable shares") at any time within five years from the date of incorporation of the company notify in writing to the company their desire that the shares numbered 1 to 2,000, inclusive, in the company's capital (hereafter referred to as "the redeemable shares") shall be converted into preference shares, then and in that case such shares shall thereupon *ipso facto* be converted into preference shares with the following special rights attached thereto, that is to say, the said preference shares shall carry a fixed cumulative preferential dividend at the rate of 5 p.c.p.a. on the capital for the time being paid up thereon respectively, but no further dividend, and shall rank, both as regards capital and dividend, in priority to the irredeemable shares; and notice of such conversion shall be given to the holders thereof, and they shall be bound to give up their certificates for indorsement or in exchange for fresh certificates, and until this has been done shall not be entitled to receive any of the rights of membership incident to such shares. The said shares after conversion shall continue to bear the same numbers as before. **Form 273a.**

Power to holders of certain shares to convert others into preference shares.

(1) Any holder of preference shares for the time being in the initial capital may convert his preference shares, or any of them, into ordinary shares, and any holder of ordinary shares in the initial capital may convert his ordinary shares, or any of them, into preference shares, and the following provisions shall apply to such conversion, that is to say:— **Form 274.**

Conversion of preference and ordinary shares.

- (a) The holder who desires so to convert must give to the company notice in writing of his desire, and such notice must specify by number the shares he desires to convert, and must be accompanied by the certificate relating thereto.
- (b) Upon the receipt of such notice and certificate, the company shall record the conversion in its register of members, and thereupon the conversion shall take effect, and a fresh certificate

Form 274.

or certificates shall be issued in respect of such of the shares so converted.

(1) Preference shares resulting from such conversion shall rank in all respects as preference shares in the initial capital.

(2) The holders for the time being of two-thirds of the preference shares for the time being in the capital of the coy may at any time notify in writing to the coy their desire that all the preference shares in the coy's capital shall be converted into ordinary shares, and upon the receipt of such notice the coy shall record the same in its register of members, and thereupon all the preference shares shall *ipso facto* become ordinary shares, and the holders of certificates relating to the preference shares so converted shall forthwith surrender to the coy the certificates relating thereto, and in place thereof the coy shall issue fresh certificates; and after a general conversion under this clause the provisions of the last preceding clause shall cease to operate, and thenceforth all the shares in the initial capital shall be ordinary shares.

Where there is a government subsidy or guarantee, provisions for securing British control are sometimes required, *e.g.*, as follows:—

Form 274a.

Provision for
securing
British
control.

1.—(1.) It is to be regarded as a cardinal principle of the coy that it is to be and remain under British control, and accordingly.

(a) No foreigner shall be qualified to hold office as a director of the coy or to be employed as one of the ppal officers of the coy.

(b) No share in the coy shall be held by, or in trust for, or be in any way under the control of any foreigner or foreign corporation or any corporation under foreign control.

(2.) In this clause the expression "foreigner" means any person who is not a British subject, and the expression "foreign corporation" means any corporation other than a corporation established under and subject to the laws of some part of his Majesty's dominions, and having its ppal place of business in those dominions.

The expression "corporation under foreign control" includes

(a) A corporation of which the majority of the directors or persons occupying the position of directors by whatever name called, are foreigners;

(b) A corporation, shareholders in which holding shares or stock conferring a majority of the votes are foreigners or foreign corporations, or persons who hold directly or indirectly for foreigners or foreign corporations;

(c) A corporation which is by any other means, whether of a like or of a different character, in fact under the control of foreigners or foreign corporations;

(d) A corporation, the executive whereof is a corporation within (a), (b), or (c).

And the expression "ppal officers" of the coy shall be deemed to mean and include persons holding the following or any analogous positions: **Form 274a.**

- (i) General manager;
- (ii) Assistant general manager;
- (iii) Secretary;
- (iv) Assistant secretary;
- (v) General superintendent;
- (vi) Assistant general superintendent;
- (vii) Marine superintendent;
- (viii) Assistant marine superintendent;
- (ix) Superintendent engineer;
- (x) Assistant superintendent engineer;
- (xi) Masters and officers and engineers in charge of a watch on board any of the coy's ocean steamships.

(3.) Whenever a majority of the directors certify in writing that there is, in their opinion, reason to believe that any share in the company is, in violation of sub-paragraph (b) of paragraph (1) of this clause, held by or in trust for, or in any case under the control of, a foreigner or foreign corporation or any corporation under foreign control, the directors shall call on the holder of such share to prove to their satisfaction that the share in question is not so held, and unless within three weeks thereafter such proof is given, the directors shall serve such holder with a requisition in writing to transfer such share to some properly qualified person approved by them, and unless such transfer is duly made and delivered to the coy within three days after the service of such requisition the directors shall sell the share at the market price to any properly qualified person approved by them, and may authorize any officer of the coy to execute on behalf of the holder a transfer of such share to the purchaser, and a transfer executed under such authority shall be valid and effective, and the purchase-money shall be paid to the coy, whose receipt shall be a good discharge, and shall be paid over by the coy to the late holder on his application.

(4.) As from the time when any such certificate as aforesaid is signed up to the time when such proof of aforesaid is given, or such transfer is registered, the share referred to in such certificate shall not confer on the holder or owner any right to vote.

(5.) The prohibition in sub-paragraph (b) of paragraph (1) of this clause shall not apply where the holding by, or in trust for, or under the control of, a foreigner or foreign corporation, or a corporation under foreign control, existed at the time when this clause came into operation, and so long as such holding exists, and paragraph (2) of this clause shall be qualified accordingly.

Form 274a. 2. Every transfer of any share must contain a declaration as follows, namely:—

- (a) Where the transfer is not to a corporation a declaration by the transferee (1) that he is a natural-born British subject, and has never taken the oath of allegiance to any foreign sovereign or state, or has otherwise become a citizen or subject of any foreign state; or (2) that he is a person naturalized by or in pursuance of an Act or ordinance of the proper legislative authority in a British possession, and has taken the oath of allegiance to his Majesty, and is a British subject, and, in either case, that there is not any arrangement under which he will hold the said shares or any of them in trust for, or in any way under the control of, any foreigner or foreign corporation, or any corporation under foreign control, in contravention of the provisions of clause 1 of; or
- (b) Where the transfer is to a corporation a declaration by some official officer of such corporation, duly authorized by such corporation to make the same, that such corporation is not a foreign corporation, or a corporation under foreign control, within the meaning of clause 1 of, and that to the best of his knowledge there is no arrangement under which the transferee is to hold such shares or any of them in trust for, or in any way under the control of, any foreigner or foreign corporation, or any corporation under foreign control, within the meaning of clause 1 of.

And where the directors think fit they may, before passing any such transfer, require such further evidence in support of any such declaration, whether by statutory declaration or otherwise, as they think fit.

3. Before registering any person as a member under either of the last preceding clauses of the directors shall require the person proposed to be registered to provide a declaration as follows:—

- (a) Where the person to be registered is not a corporation, a declaration by such person to the effect set forth in paragraph (a) of clause 2 of;
- (b) Where such a person is a corporation, a declaration in writing by some official officer of such corporation, duly authorized by such corporation to make the same, to the effect set forth in paragraph (b) of clause 2 of.

And where the directors think fit they may, before registering, require such further evidence in support of any such declaration, whether by statutory declaration or otherwise, as they think fit.

Form 274b. The rights of a member as such shall be personal, and accordingly shall not, without the consent in writing of all the members, be transferable except as hereinafter provided, and accordingly, if

Shares to be
transferred to
company's

any member shall die or become bankrupt or be found lunatic, his shares shall be transferred to such person or persons, whether a member of the company or not, as shall by writing served on the company be nominated by the other members for the time being of the company, and upon receiving such nomination the directors shall by resolution appoint some person to transfer the shares to such nominee or nominees, and a transfer by such person shall be effective, and the transferee or transferees shall be registered as the holder or holders of the shares and as against the former registered holder, and all persons claiming through him shall be absolutely entitled to the same, and after such registration the regularity of the proceedings shall not be questioned. **Form 274b.**

In this case it is supposed that the company is a benevolent or quasi-charitable company.

Management of one Company by another Company.

Clauses to this effect are sometimes substituted for the director clauses. See an alternative in Form 276.

A limited company may be a director or the sole director of another company if it has the requisite power. *Bulawayo Market Co.*, (1907) 2 Ch. 458.

1. The A. Coy. Limtd (hereafter called the A. Coy), shall be the first managers of the coy.

2. When the A. Coy cease to be managers, this coy in general meeting may appoint any other persons or coy to be managers, and a general meeting shall forthwith be convened for the purpose by the A. Coy, or if that coy does not convene the same within seven days after they cease to be managers, then the meeting shall be convened by the holders of more than half of the issued capital for the time being of this coy.

3. The managers shall be entld to charge and retain out of the assets of the coy the sum of £— p.a. as remuneration, and shall, in addition, out of the assets of the coy pay all outgoings for clerks, agents, offices, travelling and other expenses in relation to the business of the coy.

4. The managers may regulate and conduct their proceedings as such in such manner as they may from time to time determine, and may delegate all or any of their powers, authorities, and discretions as managers to such persons, and on such terms and conditions, as they think fit, and may revoke or vary any such delegation, and until otherwise determined by the managers they shall be deemed to have delegated all the powers, authorities, and discretions vested in them by the regulations of the time being of this coy to the directors for the time being of the A. Coy, who shall accordingly be deemed deputy managers of this coy.

5. Inasmuch as this coy may have dealings with the A. Coy, it is expressly declared that this coy may make any contract with that coy

Form 275.

A. company
made
managers.
Subsequent
managers.

Remunera-
tion.

Proceedings-

Contracts
with
managers.

Form 275. which may seem expedient on such terms as the deputy managers may from time to time consider expedient, and that the A. Coy shall be in nowise liable to account for any profits realised by any such contract.

Form 275a. 1. Until otherwise determined by the coy in general meeting in accordance with clause — hof, the directors for the time being and from time to time of the A. B. Syndicate, Limtd, shall be the directors of this coy, and such determination is huftr referred to as the termination of the interim management.

Another.

2. The coy, by resolution passed at an ordinary general meeting held in the year 1912, or in any subsequent year, may determine that the management provided for in clause — shall cease, but such determination shall not come into operation until a board of at least three directors shall have been duly elected, and with a view to such election the meeting at which such resolution is passed shall stand adjourned for three weeks, to be held at the same time and place, and notice of the resolution shall be given to the members, and at the adjourned meeting it shall be allowable to elect directors. A resolution for such determination as afsd shall be valid whether the notice convening the meeting at which it was passed did or did not specify the intention to propose such resolution.

3. After the termination of the interim management, the number of the directors shall, unless the coy in general meeting otherwise determine, be not less than three nor more than seven.

4. After the termination of the interim management, the directors shall have power, &c.

In the clause providing as to notice of general meeting, it was mentioned that amongst the ordinary business was the determination of the interim management.

Form 276. The sd A., B., C. and D. [*i.e.*, four of the directors named in the articles] shall be deemed to have been appointed by the trees of the trust deed constituting the first debenture stock of the coy, and they, and their successors in office appointed under this clause shall be called the "debenture directors." The debenture directors shall be entld to hold office until requested to retire by the trees or tree for the time being of the sd trust deed, and accordingly they shall not be bound to retire by rotation or be subject to clauses — — and hof. As and whenever a debenture director vacates office, whether upon request as afsd or by death or otherwise, the trees or tree afsd may appoint another director in his place. A debenture director shall not require any qualification. A debenture director may at any time, by notice in writing to the coy, resign his office.

Debenture
directors.

The holders of the debentures of the coy known as "prior lien bonds" shall be entld to have one nominee on the directorate of the coy, and the holders of the debenture stock of the coy shall be entld to have two nominees on the directorate of the coy. The nominee or nominees of each class so entld shall be appointed by a meeting of such class, convened and constituted as hnfr provided, and may be removed at any time by a like meeting of the same class. A meeting of each class afsd may be convened by the coy whenever any nominee for the time being of such class vacates office, and a meeting of either class shall be convened by the coy whenever it is served with a requisition in writing specifying the purpose for which the meeting is required, and signed, where the meeting is for the removal of a nominee, by the holders of at least one-half in value of the class, or in any other case by the holders of at least one-tenth in value of the class; and if the coy fails for seven days after being so served to convene the meeting to be held within twenty-one days of such service, the requisitionists, or the majority in value of them, may themselves convene the meeting. Not less than ten days' notice must be given of every such meeting; but where it is convened by requisitionists, the notice may be given by advertising the same twice in the "Times" newspaper. At any such meeting the holders of one-fifth in value of the class shall constitute a quorum, and the meeting may appoint a chairman. But, subject as afsd, all the provisions hof as to extraordinary general meetings of the coy, including votes, adjournment notices, minutes, and otherwise, shall apply as nearly as may be to such meeting. Notice in writing of any such appointment or removal shall forthwith be given to the coy by such person as the meeting making the same shall authorize in that behalf.

Form 277.

Another.

The trees or tree for the time being of the will of A. B., deceased, may at any time appoint the sd N. B. to be a permanent director of the coy, and in that case he shall be entld to hold office as a permanent director until the determination of the trusts of the will of the sd A. B., or until the sd N. B. resigns or dies, whichever event first happens; and if the sd N. B., or any successor appointed under this clause, resigns or dies before the determination of such trusts, the sd trees or tree may appoint any person to be a director in the place of the sd N. B. or any such successor, and any and every such appointment shall be effective.

Form 278.

Power for trustees of a will of a former owner of the business taken over by company to appoint a permanent director.

1. The holders of the B. shares may from time to time appoint any person to be a director, but so that not more than [two] persons shall at any one time hold office by virtue of appointment under this clause.

Form 279.

Power for class of shareholders to appoint and remove directors.

2. Any such appointee shall hold office subject only to clause —

Form 279. *hof. the disqualification clause 91, supra, p. 728], and may at any time be removed from office by the holders of the B. shares.*

3. Any such appointment or removal shall be in writing served on the coy and signed by the holders of at least two-thirds of the B. issued shares.

Form 280.

Alternate or
substitute
directors.

A director who is abroad or about to go abroad may, with the approval of the directors, appoint any person to be an alternate *or* substitute director during his absence abroad, and such appointment shall have effect, and such appointee whilst he holds office as an alternate director shall be entld to notice of meetings of the directors, and to attend and vote thereat accordingly; but he shall not require any qualification, and he shall *ipso facto* vacate office if and when the appointor returns to the United Kingdom, or vacates office as a director, or removes the appointee from office, and any appointment and removal under this clause shall be effected by notice in writing under the hand of the director making the same.

Such a provision is occasionally used, but the London Stock Exchange generally objects to it.

Form 281.

Assistant
directors.

The directors from time to time and at any time may appoint any other persons to be assistant directors of the coy, and may define, limit and restrict their powers, authorities, and discretions, and may fix and determine their remuneration, duties, immunities, and qualifications, and may remove any director so appointed. Unless otherwise determined by the directors, the qualification of an assistant director shall be the holding of shares or stock of the nominal value of 1,000l. An assistant director may act before acquiring his qualification.

Form 282.

Share of surplus profits to
directors.

There shall be pd to the directors as remuneration for their services the sum of £—— p.a., and also the share of surplus profits specified in clause —— *hof.* [See Form 271.] Such remuneration shall be divided among them in such manner as the directors may from time to time agree *[or in such manner that the chairman's share shall be double that of any other director]*. But the total remuneration in respect of any one year payable to the directors shall not, without the sanction of a general meeting, exceed £

Form 283.

Commission
to directors.

There shall be pd to the directors as remuneration for their services, £—— p.a., and also, in each year in which a dividend is pd to the members exceeding 6 p.c. on the amount pd up on the shares held by them, the sum of [100]l., in respect of every one p.c. of dividend so pd in excess of 6 p.c.

The directors shall receive, by way of remuneration, in each year the sum of £—, and such further sum as may be equal to 5 p.c. of the net profits of the coy in that year, payable out of the surplus remaining after payment of the preferential dividend to the holders of A. shares and of a dividend of 7 p.c.p.a. on the amount pd up on the ordinary shares, so far as such surplus will extend, and all such remuneration shall be divided so that there shall be given to the chairman of the directors — equal parts thof, and to each of the other directors one equal part thof. But the total remuneration in respect of any one year payable to the directors shall not, without the sanction of a general meeting, exceed £—.

Form 294.

Directors to have percentage on profits.

The directors may from time to time appoint a general manager of the business of the coy, and may remove and discharge any such person and appoint a substitute, and the directors shall take such security (if any) for the good conduct and satisfactory discharge of the duties of such general manager as they shall in their discretion think sufficient.

Form 285.

Managers.

A mere power to appoint a manager will not authorize directors to delegate to such manager a power given by the articles expressly to the directors themselves. See *Cartmell's case*, L. R. 9 Ch. 496; and as to taking security, *Evans v. Coventry*, 8 De G. M. & G. 835. For appointment of firm, see Form 289.

A manager may be liable for misfeasance. See Companies Act, 1903, s. 215.

1. The sd — shall be the first manager of the coy, and shall not be removable from office otherwise than by his own resignation or by special resolution, and shall, while holding that office, devote the whole of his time and attention to the business of the coy, and shall exercise and perform the functions and duties prescribed by the directors.

Form 286.

Appointment of first manager.

2. The salary of the sd — as such manager shall be at the rate of £— p.a., payable monthly, on the first day of every month; he shall also while holding such office be entld to a commission equal to 5 p.c. on the net profits of the coy in each year in which the same shall be more than sufficient to pay a dividend at the rate of — p.c. on the pd-up capital of the coy.

3. The declaration of the directors as to the amount of the net profits of the coy in each year shall be conclusive as against the sd —.

1. The directors shall forthwith provide a common seal for the coy, and they shall have power from time to time to destroy the same and substitute a new seal in lieu thof.

Form 287.

Common seal.

Form 287.

2. The common seal of the coy shall be deposited at the office of the coy, and shall never be affixed to any document except in the presence of a director, and in pursuance of a resolution of the directors or a committee of the directors duly authorized by the directors

See County of Gloucester Bank v. Rudry, &c. Co., (1893) 1 Ch. 629; Owen & Ashworth's Claim, (1901) 1 Ch. 113; Ruben v. Great Fingall Consolidated, (1904) 2 K. B. 712.

3. Deeds, bonds and other contracts under seal made on behalf of the coy, sealed with the common seal of the coy, and signed by two directors, and countersigned by the secretary or the person acting as secretary, shall be deemed to be duly executed.

See Davies v. Bolton, &c. Co., (1894) 3 Ch. 678.

Form 288.

Custody of securities.

Unless and until required for some special purpose, all the securities of the coy shall be deposited in the names of the trees with the bankers of the coy, or other place of custody approved by the trees.

The trees shall make such regulations as they may from time to time think expedient for examining the securities so deposited, and certifying the safety thereof, and so that the same shall, once at least in each quarter of a year, be personally inspected by two trees and one of the auditors to be named by the trees for that purpose, who shall certify to the trees the result of their examination.

Form 289.

Appointment of ships' husbands.

The firm of A. and B. (which now consists of the sd A., B., C., D. and E.), and their successors, shall be appointed to, and shall hold, the office of ships' husbands of the coy so long as they are able and willing to act as such, or until they shall be removed by extraordinary resolution; and any firm which, by death or retirement of any partner, or by the admission of any new partner or otherwise, shall from time to time, and at any time hereafter, succeed to the business now carried on by the sd existing firm, shall, for the purposes of this clause, be deemed the successors of the sd existing firm, provided that some member of the sd existing firm is a member of such succeeding firm.

The qualification of the firm for the office aforesaid shall be the holding by members of the firm, or some or one of them, of capital of the coy of the nominal value of £—. The firm may act before acquiring their qualification, but shall vacate office if they do not acquire the same within three months after becoming ships' husbands.

The firm may regulate their proceedings in such manner as they from time to time think fit, and, unless otherwise arranged among themselves, any two members of the firm which shall for the time

being hold the office aforesaid may exercise all the powers, authorities and discretions hereby vested in or assigned to the firm. **Form 289.**

The appointment of the firm to the office aforesaid shall be made by a contract in the terms of the agreement secondly referred to in clause **hof**, and the provisions of such agreement, as regards the powers, authorities, discretions, remunerations, and proceedings and otherwise, shall have effect.

If the firm for the time being entitled under clause **— hof** to hold the office aforesaid shall become disqualified or shall decline to act, the directors may appoint any persons or firm to the office aforesaid upon such terms as may seem expedient.

Inasmuch as the firm, from the nature of their office, will always be under current liability to the company, the shares held by them or any of them in excess of those necessary under clause **— hof**, may be transferred from any lien on the part of the company, and clause **— hof** shall be controlled accordingly.

Managers and Consultative Committee.

1. There shall be managers of the company who shall (save as regards the first managers) be from time to time appointed by extraordinary resolution of the company. The first managers shall be A. and B., of **—**. The managers need not be members of the company. The remuneration of the managers shall from time to time be settled and arranged between them and the company in general meeting. The managers may regulate their proceedings in such manner as they from time to time think fit, and they shall be under no obligation to hold board meetings; and, unless otherwise arranged among themselves, each of the managers may exercise all the powers and discretions hereby vested in the managers collectively. The managers shall not both absent themselves from the United Kingdom at the same time without the sanction of the consultative committee. **Form 290.**

Provisions for
managers and
committee.

2. The management of the business and the control of the company shall be vested in the managers, who, in addition to the powers, authorities, and discretions by these presents expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company, and are not hereby or by statute expressly directed or required to be exercised or done by the company in general meeting.

3. The managers may appoint, and at their discretion remove or suspend, such sub-managers, secretaries, officers, clerks, agents, and servants for permanent, temporary, or special services as they may from time to time think fit, and may invest them with such powers, authorities, and discretions as they may think expedient, and may fix their salaries or emoluments.

Form 290.

4. The managers may from time to time provide for the management of the affairs of the coy abroad in such manner, &c.

5. There shall be a consultative committee, consisting of not less than three or more than seven members of the coy. It shall be for the coy in general meeting to determine who shall be the members for the time being of the consultative committee. The consultative committee may act notwithstanding any vacancy in their body.

6. A member of the consultative committee shall vacate office, &c., &c.

7. No manager shall be disqualified by his office from contracting with the coy, either as vendor or otherwise, or participating in any benefits placed at the disposal of the members.

8. The functions of the consultative committee shall be to advise the managers as to the conduct of the coy's business, and such other functions as may be assigned to them by the coy in general meeting. Where the committee gives any advice to the managers, the managers shall act in accordance with such advice, unless otherwise directed by a general meeting. In this clause, managers shall be deemed to include the persons who shall be appointed to conduct the business of the coy in the absence abroad of the managers.

Sometimes it is provided that various things shall only be done with the approval of the committee, and the committee may be given power to give directions, general or special.

9. The consultative committee may meet together for the transaction of business, adjourn and otherwise regulate their meetings as they think fit. The managers, or any member of the committee, may at any time convene a meeting of the committee. Until otherwise determined, two members of the committee shall be a quorum. Questions arising at any meeting of the committee shall be decided by a majority of votes, and in case of equality of votes the chairman shall have a second or casting vote. A meeting of the committee may elect a chairman. A resolution in writing, signed by the majority of the members of the committee, shall be deemed equivalent to a resolution passed at a meeting of the committee duly convened and held.

Form 291.

Executive
committee.

The directors may from time to time appoint an executive committee, consisting of not less than two and not more than five of the directors, and the following provisions shall apply thto, that is to say:—

(a) The directors may from time to time determine which of their body shall be members of the executive committee, and the

directors may at any time modify, dissolve, or reconstitute the executive committee, and may make such regulation in regard thereto as the directors may think expedient.

Form 291.

- (b) The executive committee shall, subject to any regulations the directors may from time to time make, be competent to exercise all or any of the powers, authorities, and discretions vested in or exercisable by the directors.
- (c) The meetings and proceedings of the executive committee shall be governed by the provisions herein contained for regulating the meetings and proceedings of the directors so far as the same are applicable thereto, and are not superseded by any regulations made by the company as aforesaid.
- (d) The directors may from time to time fix and determine the remuneration to be paid to the executive committee, and such remuneration may be by way of salary, commission on, or participation in, profits or otherwise, or by all or any of those modes, and shall be in addition to any remuneration payable to the members of the committee, as directors or otherwise, under the provisions hereof.

Any debentures issued by the company, and any trust deed for securing the same, may be in such form and contain such provisions as the directors think fit; and in particular any such debentures or trust deed may provide that during such period as any of the debentures remain outstanding, no transfer of shares in the company's capital, other than fully paid-up shares, shall be made, and that the company and its directors shall not perform any specified acts without the sanction of the trustees or trustee for the time being acting on behalf of the holders of such debentures; and that during such period any such trustees or trustee shall have a right to attend all meetings of the directors or of any committee of the directors, and to have previous notice of all such meetings, and to examine all or any of the books and documents of the company; and that during such period the debenture holders, or any of them, shall be entitled to attend and vote at general meetings of the company or general meetings for specified purposes, and shall have such number of votes at such meetings as may be specified; and that the debenture holders, or trustees or trustee of any such deed, shall have power to appoint any one or more director or directors of the company, and to remove any director so appointed; and all such provisions shall have effect and be binding on the company, and its directors and members, for the time being accordingly.

Form 292.

Special provisions as to debentures.

A Club Company.

The directors may from time to time, by instrument under seal, make by-laws in relation to the club, and may at any time in like manner amend or vary any bye-laws so made, and all bye-laws so

Form 293.

Bye-laws for club.

Form 293. made and for the time being in force shall be binding on the members of the club, and shall have full effect accordingly; and it is expressly declared that the following shall be deemed to be bye-laws in relation to the club within the meaning of this clause, that is to say, regulations:—

- (1.) As to the persons eligible for membership of the club.
- (2.) As to the conditions on which persons shall be admitted to membership of the club.
- (3.) As to the cases in which persons shall be entitled to life membership of the club.
- (4.) As to the entrance fees (if any) payable in respect of membership of the club.
- (5.) As to the annual, quarterly, or other subscriptions or payments to be payable by the members of the club.
- (6.) As to honorary members and visitors.
- (7.) As to the manner in which membership of the club, whether for life or otherwise, may be terminated or shall determine.
- (8.) As to the rights and privileges which shall be accorded to the members of the club.
- (9.) As to the qualifications, restrictions, and conditions which shall be attached to members of the club.
- (10.) As to arrangements with any other clubs or associations for reciprocal concession or otherwise.
- (11.) As to committees of members in connection with the management of the club, and as to the appointment, removal, qualification, disqualification, duties, functions, powers, and privileges of members of any such committees.
- (12.) As to suspension of membership.

Sometimes the registrar has required the insertion of a proviso to the effect that no regulation shall be made under this clause which would amount to such an addition or alteration of the articles as could only legally be made by special resolution. See p. 755, *supra*.

Form 294.

Remuneration
of promoter.

In consonance of the great labour, expenses, and risk which A. B., one of the subscribers of the memorandum of association, has incurred and been put to in and relating to the promotion and formation of the company, and in registering the memorandum and articles of association thereof, the company shall, when and so soon as — shares shall have been allotted, pay to the said A. B., out of the assets of the company, the sum of £—

Payment of promotion money out of the company's funds is *ultra vires*, unless authorized by the memorandum or articles. *Re Anglo-French Co-operative Society*, 21 Ch. D. 492. Such an article is an authority to the directors to pay the remuneration, but it does not constitute a contract on which the promoter can sue the company. *Re Hereford Wagon Co.*, 2 Ch. D. 621; *Eley v. Positive Assurance Co.*, 1 Ex. D. 88; *Re Rotherham Alum Co.*, 25 Ch. D. 103. See also *Croskey v. Bank of Wales*, 4 Giff. 317; *Madras Bank v.*

Felly, 7 Eq. 442; *Englefield Colliery Co.*, 8 C. Div. 388; *Gluckstein v. Barnes*, (1900) A. C. 240; *British Seamless Paper Box Co.*, 17 Ch. D. 467; *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392; *Re Sale Botanical Gardens*, 78 L. T. 368; and other cases referred to above, p. 148.

If A. B. is to allow any director or other person in a fiduciary position towards the company to participate, the fact should appear. See *Preston's case*, 16 W. R. 638; *Englefield Colliery Co.*, *ubi supra*.

A promoter can only recover from the company what he has paid in preliminary expenses where he proves a contract. *English Colonial Produce Co.*, (1906) 2 Ch. 435. According to this decision he could recover the registration fees without proving a contract, but this is overruled. See *National Motor Mail Coach*, (1908) 2 Ch. 515 (C. A.), affirming *Swinfen Eady, J.*

Form 294.

Whenever any shareholder in the company while a shareholder shall either obtain any patent for any mechanical or other invention or discovery connected with or likely to be useful in any part of the company's works or business, or shall make or become possessed of any such invention or discovery, he shall in the first instance make to the directors a written offer to sell the same to the company at the fair value, and upon the footing that any difference in regard thereto shall be referred to two arbitrators, one to be appointed by each party in difference, and if the directors shall either decline such offer, or shall for the space of six calendar months next after such offer shall have been made, neglect to accept the same in writing, then and in such case the shareholder making such offer shall be at liberty forthwith to sell or otherwise deal with his said patent, invention, or discovery as he shall think most expedient for his own benefit, and in estimating the value or the price to be paid for the same by the company, the directors and the arbitrators, or any umpire respectively, may take into consideration how far the person making such invention or discovery has derived assistance therein from his being connected with or employed by the company, or from experiments made by or at the expense of the company with reference to such invention or discovery, and may make due allowance for such assistance.

Form 295.

Members' inventions, &c.
Company to have right of pre-emption.

Ascertainment of Profits.

Profits shall be ascertained by means of a balance-sheet specifying on the one side all the debts and liabilities of the company (paid-up capital and reserves being treated for this purpose as liabilities), and on the other side all the assets of the company (except uncalled capital) according to their respective values as determined by the directors with the assistance, when necessary, of expert advice, and the credit balance shall be considered profit, and any debit balance shall be placed to the debit of an subsequent balance-sheet until the same shall have been made good or cancelled.

Form 296.

Single
account.

Form 296.

The above form was inserted where the parties desired the single account system to be adopted, and to preclude any suggestion that the double account system should apply.

The single account system is specially applicable to the case of companies which from time to time sell off part of their land, and to financial companies.

Form 297.

Separate capital and revenue accounts to be kept and dividends payable out of latter.

1. Separate accounts shall be kept as to the capital and revenue of the coy, that is to say, there shall be kept—

(1) A capital account specifying the nature and amount of all investments and securities, and all other assets in the nature of capital for the time being belonging to the coy, and such capital account shall be from time to time debited with all capital expenditure of the coy.

(2) A revenue account stating the resptive amounts of all dividends and income, and other returns in the nature of income, from time to time arising from the investments and securities afsd, and specifying the sources from which such dividends and income resply have been derived, and also stating under convenient heads the resptive amounts and sources of all other returns in the nature of income or revenue, and such revenue account shall be debited with all outgoings and expenditure not being capital expenditure.

2. Upon selling or purcha-ing any investment, or other transaction, the trees shall as nearly as possible adjust the rights as between the capital and revenue, and if, as regards any expenditure or otherwise, any question shall arise as to what pt thof is properly chargeable to capital account and what to revenue account, it shall rest with the trees to determine such question, and their determination shall be conclusive.

3. Without prejudice to clause 100 hof, the net revenue of the coy of each year shall be applicable as follows, that is to say:—

(a) To the payment of a dividend on the capital pd up on the issued shares at such rate as the coy in general meeting, on the recommendation of the directors, shall determine; and

(b) The surplus may be carried forward, or may be placed to reserve, or pt thof may be carried forward and pt may be carried to reserve as the coy, on the recommendation of the directors, shall determine.

The above form is a sample of the form of clauses adopted in one case on the assumption that the dicta in *Lee v. Neuchâtel Co.*, *infra*, p. 890, might be relied on, but, having regard to subsequent cases, it is more than doubtful whether it can safely be adopted, for it provides for distribution of the income of the year notwithstanding past losses. See further, *infra*, p. 895 *et seq.* Form 298 goes further. Looking to *Bond v. Barrow Haematite*, (1902) 1 Ch. 353, it appears at any rate necessary to add to paragraph (2) of clause 1 the words "and with all losses of circulating capital."

Dividend shall only be payable out of the net revenue, and such net revenue for any year, or other specified period, shall be arrived at by an account showing on the one side all the income of the company during such year or other period actually received in respect of dividends, interest, commission, remuneration for services, or otherwise, whether received in cash, shares, debentures, or other assets, and on the other side all outgoings for such year or other period in respect of management expenses, rent, rates and taxes, interest on loans and advances, and commissions and other remuneration in respect of services rendered, and any other ordinary outgoings paid or payable, and also loss of circulating capital, and in so far as such income exceeds such outgoings the surplus shall be deemed to be net revenue of the company and shall be divisible accordingly, notwithstanding any loss or diminution in value of capital assets, and it shall be for the directors to determine what receipts are revenue within the meaning of this clause, and their determination shall be conclusive.

Form 298.

Another.

The above clause was used in the case of a company limited by guarantee, but having a capital divided into shares. Having regard to sects. 4 and 21 of the Companies (Consolidation) Act, 1908, the clause as regards subsequently registered companies can only be relied on if it can be used in the case of a company limited by shares, and this is doubtful.

1. Save as otherwise from time to time determined by a general meeting, the business of the company shall be confined to that of acquiring, holding, and, as occasion may in the opinion of the directors require, disposing of investments and receiving the income thereof, and dealing with the same and such other matters incidental to the promises as are authorized by the memorandum and articles of association of the company.

Form 299.

How profits to be ascertained.

2. The expression "the profits of the company of each year," contained in clause 115, shall be deemed to mean the revenue of the company of each year from dividends and interest less all outgoings of the year for management expenses, interest on loans and advances, legal expenses, rent, rates, taxes, remuneration for services, and insurance, and accordingly, in ascertaining the profits aforesaid, it shall not be necessary to make good any losses or depreciation or diminution in value of any of the assets (except circulating capital). Nevertheless, the directors may, if they think fit, carry any of the profits ascertained as aforesaid to reserve as provided by clause 109 aforesaid. It shall be for the directors to determine any questions that may arise under or in relation to this clause, and their determination shall be conclusive.

The above clauses were adopted by a trust company which desired, as far as possible, to bring itself within the decision in *Verner v. General & Commercial Trust Co.*, *supra* p. 833. See also, however, note to Form 297.

Arbitration.

Form 300.
Differences to
be referred.

Whenever any difference arises between the coy, on the one hand, and any of the members, their exors, admors, or assigns, on the other hand, touching the true intent or construction, or the incidents or consequences of these presents, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these presents, or of the statutes, or touching any breach, or alleged breach, of these presents, or any claim on account of any such breach or alleged breach, or otherwise relating to the premises, or to these presents, or to any statute affecting the coy, or to any of the affairs of the coy, every such difference shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference.

An arbitration clause is sometimes inserted, but, as a general rule, it may be omitted with advantage. See, further, the Arbitration Act, 1889.

That Act applies to submissions as well before as after the Act. *Williams v Stepney*, (1891) 2 Q. B. 257.

Balance-sheet to be kept Private.

Form 300a.
Balance-sheet
not to be
laid before
general
meeting

1. Once at least in every year the directors shall prepare, or cause to be prepared, a balance-sheet made up to a date not more than three months before the annual general meeting, showing the company's financial position. Such balance-sheets shall be signed on behalf of the board by two directors of the company, and the directors shall report to the annual general meeting as to the company's affairs and the amount (if any) which they recommend to be paid by way of dividend, and the amount (if any) which they propose to carry to the reserve fund. The report of the auditors on the accounts examined by them shall be read to the shareholders at the annual general meeting, and such report shall be open to the inspection of any shareholder.

2. The annual balance-sheet aforesaid shall not be laid before the company in general meeting, but it shall, on the three days preceding the annual meeting, be open to inspection at the company's office by any shareholder of the company desiring to see the same. No shareholder shall be entitled to make or obtain a copy of such balance-sheet, nor shall it be issued, circulated, or published.

Winding-up.

The assets of the coy in winding-up available for distribution among the members shall be applied, first, in repaying to the holders of the sd preference shares the amount pd up thereon; then in repaying to the holders of the deferred and other shares the amount pd up on such shares; and the residue (if any) shall be divided among the members in proportion to the nominal amount of the capital held by them resply.

Form 301.

How surplus
assets to be
distributed.

In the absence of special provision, the holders of preference shares stand in a winding-up on a level with the holders of the ordinary shares, that is to say, their preferential dividend ceases at the commencement of the winding-up, and they can claim no preference on the return of capital. *London India Rubber Co.*, 5 Eq. 519; *Griffith v. Paget*, 6 C. D. 511; *Re Barrow Haematite Steel Co.*, 38 Ch. D. 582; *Birch v. Cropper*, 14 App. Cas. 525. See p. 577, *supra*.

Where the company has proved in the bankruptcy of a shareholder for the uncalled liability on his shares, and has received a dividend of less than 20s. in the £, that does not entitle the trustee in bankruptcy to rank as a fully-paid shareholder in a subsequent winding-up. *West Coast Goldfields, Rowe's Trustee's Claim*, (1905) 1 Ch. 597; *affd.* (1906) 1 Ch. 1.

If the coy shall be wound up, the assets available for distribution among the members shall be applied, in the first place, in repaying to the holders of the A. shares the amount pd up thereon, and the residue shall belong to the holders of the B. shares.

Form 302.

Preference to
holders of
A. shares.

In the event of the coy being wound up the assets remaining after the return of the whole of the pd-up capital shall belong, as to nine-tenths, to the holders of the shares other than the founders' shares, and as to the residue to the holders of the founders' shares

Form 303.

Founders'
shares.

In the event of the coy being wound up the assets then available for distribution among the members shall be applied, first, in repaying to the holders of the shares, other than those to be issued pursuant to the sd agreement of the — day of —, the full amount pd up on the shares held by them resply; secondly, in paying to the holders of the shares, to be issued pursuant to the sd agreement, the amount credited as pd up thereon; and the residue (if any) of such assets shall belong to and be divided among the members in proportion to the nominal amount of capital held by them

Form 304.

Special.

MISCELLANEOUS NOTES.**Procedure at General Meetings.**

Procedure at
general
meetings.
The chairman.

The articles generally provide that the chairman (if any) of the board of directors is to take the chair at every general meeting, whether ordinary or extraordinary. See p. 698. But there are certain events in which the articles commonly leave the selection of the chairman to the shareholders present at the meeting.

At the time appointed for the meeting, the person (if any) who is entitled according to the articles to preside should at once take the chair. If there is no such person present, the members, after the lapse of a proper interval, usually fixed by the articles, should elect a chairman. This will be effected by passing a resolution, duly proposed and seconded, "That Mr. — be appointed chairman of this meeting." Some leading shareholder will propose this.

On the chairman taking the chair, the secretary should lay before him an agenda paper.

Quorum.

The chairman, having taken the chair, will ascertain that a proper quorum of members is present. This depends on the articles. Sometimes a specified number forms a quorum, and sometimes a specified number holding a certain amount of the capital. Very commonly the quorum for an ordinary meeting is different from that of an extraordinary meeting. See p. 693, *supra*. In order to ascertain that a quorum is present, it may be necessary to refer to the register of members and share ledger, and accordingly they should be brought to the meeting.

If there is not a quorum present within the time fixed by the articles, the meeting must be dissolved or adjourned, according to the provisions of the articles. See p. 699, *supra*.

Reading of
notice and
minutes.

If, however, it appears that a proper quorum is present, the chairman should announce the fact, and should then call on the secretary to read the notice convening the meeting. This having been done, the secretary, according to the practice of some companies, will be required to read the minutes of the last general meeting; and the chairman will then say, "Gentlemen, with your approval, I propose to sign these minutes as correctly entered." Upon this debate may arise, but the only question should be whether they are a correct record of what passed, and the chairman should keep the discussion to the point. The minutes, if found correct, or when corrected, will

be signed by the chairman. The object of signing is to obtain the benefits conferred by sect. 71 of the Act of 1908. See p. 745, *supra*.

There is no legal necessity thus to read and confirm the minutes. In some companies the chairman of the meeting to which the minutes relate signs them as soon as they are entered up.

After these preliminaries, the meeting will proceed to transact the business for which it was convened.

At an ordinary meeting the first step will be for the chairman to refer to the directors' report, which will probably be taken as read, and make a speech in relation thereto, concluding with a motion, "That the report and accounts be received and adopted." This having been seconded, the chairman will put the question to the meeting as follows:

Ordinary
business,
report, &c

"The question is, That the report and accounts be received and adopted." This is the stage for discussion, and members will probably rise and speak in support of or opposition to the motion. The chairman should name those who rise to address the meeting.

It is not necessary apparently, that every one who wants to speak should be heard, or that any speaker should be heard at an inordinate length. "As to the closure," says Chitty, L. J., in *Wall v. London and Northern Assets Corp.*, (1898) 2 Ch. 469, 483, "I think if we laid it down that the chairman, supported by a majority, could not put a termination to the speeches of those who were desirous of addressing the meeting, we should allow a small minority, or even a member or two, to tyrannize over the majority . . . we should put a weapon into the hands of the minority which might involve the company in all-night sittings. . . . I am not, of course, saying that the majority must not listen to reasonable arguments for a reasonable time."

When the discussion has been brought to a close, the chairman will rise and reply to any criticisms which have been made, and to any relevant questions that have been asked, and will in conclusion finally put the question thus: "The question is, That the report be adopted. Those who are in favour of the motion hold up one hand . . . 30, and the contrary . . . 10. I declare this motion carried" or "negatived".

Putting the
question.

The articles very commonly provide that every question shall be decided in the first instance by a show of hands, and where this is the case a show of hands must be taken; but even if there is no such provision, a show of hands should be taken, for that is the common law mode of taking the sense of a meeting. See p. 699. Upon a show of hands the chairman will look to the number of hands only, and will not take into account the votes which the owner of each represents in person or as proxy. See p. 699. In other words, in the absence of a poll hands only count.

Show of
hands.

Though it is not uncommon to declare the number of hands in

favour of or against a motion, the chairman is not bound to make such declaration.

Poll.

The chairman having declared the result, a poll may be demanded in accordance with the articles, or the Act. As to polls, see further, *supra*, pp. 699—702, and *infra*, p. 850.

A poll may, unless the articles otherwise provide, be taken either at once or at some future day. The articles generally vest in the chairman the right to determine this point—when the poll shall be taken.

Generally speaking, it is more convenient, if the articles allow, to take the poll at once, but there may be cases in which an adjournment is desirable, *e.g.*, where it will require many hours to take the poll.

The poll having been taken, the chairman will state the result, and will declare the fate of the motion accordingly.

Adjournment

When a poll has been granted and the chairman has fixed some future period for taking it, *e.g.*, "Monday next, the —th instant, between the hours of — and —, at the registered office of the company," or "here, so soon as the other business of the meeting shall have been transacted," there is no objection to the meeting transacting in the meantime any other business which it is competent to transact. If there be none such, the meeting will probably be adjourned till after the taking of the poll. If the poll is to be taken at a future day, the meeting will be adjourned to a subsequent day; if it is to be taken at once or after the transaction of the other business the meeting will be adjourned for a short time, but no adjournment is necessary, for the poll is part of the business of the meeting. Where the company is a small one, the taking of the poll may be effected in a very short space of time, and in such case no adjournment may be necessary.

If the meeting is adjourned to hear the result of the poll, the chairman will, at the adjourned meeting, state the result, and declare that the motion has been carried or negatived accordingly.

Where the articles give power to adjourn "with the consent of the meeting" the chairman cannot adjourn, even to take a poll, without that consent. On the other hand the meeting cannot, in such case, adjourn without his consent. See p. 702. But, if the chairman fixes a future day for the poll, the meeting, in contemplation of law, continues until the poll has been taken, whether it be adjourned by resolution or not. See *supra*, p. 702.

Proposing and seconding, whether necessary.

It may here be observed that, although it is usual for motions to be proposed and seconded, and then for the question to be formally put to the meeting, a less formal course of procedure may be perfectly valid unless it be contrary to the articles, *e.g.*, if the chairman puts the question without its having been proposed or seconded by any one, and the meeting votes thereon, this may be valid.

After adopting or rejecting the directors' report, an ordinary meeting usually proceeds to the declaration of a dividend in accordance with the recommendation of the directors. See *supra*, p. 765. And afterwards it elects or re-elects directors and other officers, and transacts any other business which it is competent to transact.

Business of
ordinary
meeting.

A general meeting usually closes with a vote of thanks to the chairman, and, if the company has been prosperous, with similar votes in favour of divers other persons connected with it, *e.g.*, the manager, the secretary, the agents, &c. For example—

Vote of
thanks.

"That the best thanks of this meeting be presented to the directors for their very successful management of the company's business during the past year."

"That the thanks of this meeting be presented to Mr. —, the manager; to Mr. —, the secretary; and to the other officers and *employés* of the company, for their efficient services."

"That the cordial thanks of this meeting be presented to the chairman for his able and courteous conduct in the chair."

The procedure at an extraordinary or special general meeting is much the same as that at an ordinary meeting. After the chair has been taken, the notice read, and the minutes of the last meeting signed, the chairman usually explains the circumstances which have led the directors to convene the meeting, and concludes with a motion, *e.g.*:—

Extraordi-
nary meeting.

"That the directors be authorized to borrow, on behalf of the company, the sum of 10,000*l.*; " or—

"That the capital of the company be increased to £—— by the creation of — new shares of £—— each; " or—

"That the contract, dated, &c., and read to this meeting, be approved, and that the directors be authorized to carry the same into effect."

It should be seen that the motion comes within the terms of the notice. See p. 695. The motion having been seconded, the chairman will put it to the meeting, and the subsequent proceedings will be similar to those above detailed.

Where a meeting has been called pursuant to a requisition of shareholders, one of the requisitionists usually moves the resolution.

If at a general meeting the chairman perceives that the time of the meeting is being wasted by a cantankerous shareholder, and that the meeting wants to vote, he may move or get someone else to move, "That the question be now put," and if this is decided in the affirmative, will act accordingly. A meeting is not bound to hear a member, nor is the chairman bound to get him a hearing.

Motion that
question be
now put.

A chairman should rule a meeting fairly and firmly. His duty is to keep order and see that the business is properly conducted. He should bear in mind that if a majority of the members of the company

are with him, a minority will not be able to upset the proceedings merely because some slight irregularities have occurred at a meeting. See pp. 74, 75.

Amendments.

Amendments to motion.

The time for moving an amendment is after the motion has been moved, seconded, and put by the chairman of the meeting. No amendment can be moved which goes beyond the notice convening the meeting, or, in the case of an ordinary meeting, beyond the scope of the ordinary business which by the regulations may be transacted thereat without special notice; *e.g.*, see clause 50 of Table A., *infra* Appx. And if any member puts forward any irregular amendment, the chairman should point out the irregularity, and should decline to submit the amendment to the meeting. For example, if the meeting is an ordinary one, and a motion is submitted that the reports and accounts be received and adopted, an amendment that all the directors be removed from office, or that the articles of association be altered, would be irregular. But an amendment to the effect that the accounts and balance-sheet be received but not adopted, and that a committee be appointed to look into them and to report, and that the meeting be adjourned, would be within the competency of the meeting. So, too, if the meeting be convened to pass a resolution increasing the capital, an amendment that the directors be authorized to borrow, or that a dividend be declared, would be irregular, for these are not within the notice. An amendment cannot be adopted if the adoption would in effect render the notice convening the meeting misleading. Thus, where a meeting was convened to consider resolutions for reconstruction of the company, and for winding-up in regard thereto, and at the meeting a naked resolution for winding-up was passed, it was held to be invalid as a departure from the notice, which only contemplated a winding-up for the purposes of reconstruction. *Teede and Bishop, Limited*, W. N. (1901) 52. "A shareholder," said Cozens-Hardy, J. [in deciding that case], "receiving the notice might very well say that he would not trouble to attend an ordinary reconstruction meeting, and at the same time might have the strongest objection to an ordinary voluntary winding-up which was something more than a winding-up for the limited purpose of reconstructing the company." This is in accord with what Page-Wood, V.-C., said in *Clinch v. Financial Corporation*, 5 Eq. 461: "How is it possible for the Court to know how many shareholders have abstained from attending the meeting, being satisfied that the arrangement as it was proposed was advantageous to them, and being quite content to exercise no voice about it?"

Where, however, by the articles or the Act, there is general power to deal with certain business at a general meeting without notice of such business, the fact that the notice convening the meeting

specifies a particular resolution for dealing with such business does not limit the powers of the meeting, or preclude an amendment. *Bethell v. Trench Tubeless Co.*, (1901) 1 Ch. 408. In that case it was held that at a meeting to confirm a special resolution for winding-up voluntarily, the company, having without notice a general power under the Act to appoint a liquidator, might appoint B., though the notice stated that A. would be proposed. So, if the notice convening an ordinary meeting states that A. and B. will be proposed as directors, this does not prevent an amendment for the appointment of C. and D., if by the regulations the appointment of directors is part of the business of the meeting, and requires no special notice. See further, *Betts & Co., Ltd. v. Maonaghten*, (1910) 1 Ch. 430, according to which, where a notice has to state the general nature of the special business, any amendment can be passed of a like nature, but it is doubtful whether this is good law. See *supra*, pp. 692—694. At a meeting held to confirm a resolution passed by the requisite majority at a former meeting, so as to make it a special resolution, it is irregular to propose an amendment to that resolution: "because the single purpose of the meeting was to say,—Aye or Nay,—is the original resolution to stand or fall?" *Wall v. London and Northern Assets Corporation*, (1898) 2 Ch. 469, 484, *supra*, p. 845.

Nevertheless, an amendment fairly relevant and *within the notice* or purpose may generally be moved. See further, p. 692. An amendment sometimes purports to modify the original motion; e.g., if the motion is to increase the capital to 10,000*l.*, A. B. may rise and move that the proposed resolution be amended by substituting 5,000*l.* for 10,000*l.*; but more commonly in company meetings an amendment is framed as an alternative motion; e.g., A. B. will say: "I move as an amendment that the capital be increased to 5,000*l.*" If at a meeting an amendment is duly moved and seconded, the debate on the original motion and the amendment will proceed concurrently, some members supporting one and some the other. The debate having concluded, the chairman will put the amendment or amendments to the meeting thus

"The original motion was, That, &c. To this an amendment has been moved, That, &c. Those who are in favour of the amendment hold up one hand. . . . Those who are against the amendment hold up one hand. . . . The amendment is negatived [or carried, as the case may be]."

A poll can then be demanded subject to the regulations.

Where the amendment is negatived the original motion stands, and unless a further amendment be proposed will then be put (p. 845) by the chairman of the meeting. But if the amendment be affirmed,

then the original motion duly amended should again be put to the meeting. The chairman should say: "The motion as amended is that the capital be increased to 3,000*l*. Those who are, &c." This is the regular course. But where an amendment is framed as an alternative motion as above mentioned and is affirmed, it is a very common practice to treat this as a final determination of the question without putting the amended resolution again to the meeting. This course, however, sometimes leads to inconvenience, and it cannot be adopted where there are several amendments. In such a case the amendments should be put by the chairman to the meeting in the order in which they affect the main question, and ultimately the main question in its original form or as finally amended should be put to the meeting. Sometimes a member moves an amendment of an amendment. The chairman should in such case put the sub-amendment, and if it is affirmed he should then put the original amendment as amended, and if that is affirmed he will put the original motion as amended. The chairman should put a regular amendment, but should not allow an amendment which in substance merely amounts to a negation of the original motion. Those who are in favour of such amendment can give effect to their views by voting against the motion. It is desirable for the mover of an amendment to put it in writing, and hand the writing to the chairman, or for the chairman to take down the terms in writing.

Polls.

Polls.

Unless the articles otherwise provide, a poll may be demanded on any question put to the meeting, but the chairman is not bound to grant a poll unless it is demanded in strict accordance with the articles. *E.g.*, if the articles require the demand to be in writing, it must be made in writing; and so, if the persons demanding the poll are required to hold a certain number of shares, the chairman before granting the poll should see that they are duly qualified. In any case it is expedient to make the demand in writing, and it should be handed in as soon as the chairman has taken the sense of the meeting on a show of hands. The demand will be as follows:

The Company, Limited.

We, the undersigned members of the above-named company [holding upwards of — shares in the capital], do hereby demand a poll upon the question now before this meeting.

Dated this — day of —.

It having been ascertained that the persons demanding the poll are duly qualified, the chairman will read out the demand, and will state

that he grants the same, and will fix the time when and the place where the poll will be taken, and if necessary the meeting will be adjourned. When a poll is duly demanded the show of hands goes for nothing, and the poll must be taken, unless indeed the articles give power to withdraw.

The question sometimes arises whether the poll can be taken at once, *i.e.*, without any adjournment. This depends on the articles: if they give express authority, as well-framed articles commonly do, to take the poll "either at once or after an adjournment," the poll can be taken accordingly; and even if there is no such authority, *e.g.*, if the poll as in Table A. (*infra*, Appx.) is to be taken "in such manner as the chairman directs," it seems that where voting by proxy is allowed the poll may be taken at once. See p. 700, *supra*. The decision is convenient.

If the company has many shareholders it is not unusual to appoint a scrutineer or two to take the poll, and some articles of association expressly require such appointment. In a small company the poll is often taken by the chairman. In taking the poll it is usual to cause a list of members to be made out from the register, with six columns headed thus: (1) Names of Voters, (2) Number of Shares, (3) Number of Votes, (4) Observations, (5) Votes given: For—Against.

At the time appointed for taking the poll, the members who vote personally will come up to the voting table and write their names down on sheets of paper headed "For" or "Against" the motion, as the case may be. A member voting as proxy for another will write down his own name and also that of the person whose proxy he is, *e.g.*, "John Smith, by W. Jones, his proxy."

However, sometimes it is arranged that a member signing his own name shall be deemed to vote for himself and for all those whose proxy he is.

The votes having been taken, the chairman or scrutineers will enter them in the list of votes, in the column "For" and "Against," as the case may be. If, on reference to the books or otherwise, a vote tendered is for any reason found to be invalid, *e.g.*, because the voter is in arrear of calls, or because the instrument of proxy is not duly stamped, or was not deposited in time, the chairman or scrutineers will reject the same and put a note in the column of observations stating the reason for rejection.

The poll having been closed, the numbers will be added up and the result ascertained. Where scrutineers have been appointed, they will make a report in writing of the result to the chairman. Thus:—

Scrutineers' report.

The — Company, Limited.

We, the undersigned, being the scrutineers appointed at the general meeting of the above-named company, held at —, on the —th of —, on the motion, "That the report and accounts of the directors be adopted," and having taken a

poll at the company's office on Monday, the -th inst., hereby report to you, as the chairman of the said meeting, that the result of such poll was as follows:—

	Number of Votes.
In favour of the motion	700
Against the motion	327
Majority in favour of the motion	373
Dated this —th day of —.	

Scrutineers

To --, Esquire,
Chairman of the above-mentioned meeting.

If desired, the report may show "the number of personal votes in favour of the motion" and against, and number of votes of members voting by proxy in favour of or against.

The chairman will then state the result to the meeting or adjourned meeting, as the case may be, and declare that the motion has been carried or negatived.

Chairman's
declaration.

As to the effect of the chairman's declaration, see *supra*, p. 700.

Proxies.

A few words as to proxies:

Where a member proposes to vote on a poll as proxy for another, it should be ascertained—

1. That the shareholder appointing him is entitled to vote, *e.g.*, the articles sometimes provide that a member in arrear of calls shall not vote, or that new members shall not vote for three months.

2. That the proxy is competent to act as proxy, *e.g.*, the articles sometimes provide that a shareholder in arrear of calls shall not vote as proxy for another, or that only a shareholder shall be a proxy. But it may be sufficient if the proxy is a shareholder when the instrument is deposited and when he votes, although he was not such when appointed. See *supra*, pp. 705, 706.

3. That the instrument appointing the proxy has been deposited in due time. It would seem that under clause 66 of Table A, a proxy may vote at an adjourned meeting provided the instrument be deposited forty-eight hours before such adjourned meeting; but sometimes the regulations require the deposit to be made before the original meeting. See further, p. 706, *supra*.

4. That the instrument is in proper form, and is duly attested where the regulations require attestation.

5. That the instrument is duly stamped.

6. That notice of revocation has not been given.

As to 1, 2, 3, 4 and 6, there will be little difficulty, but questions of some nicety arise as to five. See *supra*, p. 707.

Unless the articles otherwise provide, a shareholder who is present at a meeting, but abstains from voting on a question put to the meeting, ought not, it would seem, to be counted as voting either way.

But he must be counted at meetings to pass a special or extraordinary resolution (Chap. XII.).

Votes and Proxies.

The number of votes which a member is entitled to depends on the articles of the company. In the absence of anything to the contrary, he is entitled only to one vote. But generally it is provided that a member shall have one vote for each share, or, at any rate, a number of votes varying with the number of his shares. Very commonly it is provided that no member shall have more than a certain number of votes, *e.g.* fifty. Where this is so, a member may distribute some of his shares (by transfers) among his friends as trustees for him, and thus increase his voting power.

Very commonly a member cannot vote unless he has been possessed (*i.e.*, registered in respect) of the shares for three months before the meeting at which he proposes to vote. Unless otherwise provided, it would seem that this does not prevent voting at an adjourned meeting held after, though the original meeting was held within the three months. See p. 706, *supra*.

Unless the articles authorize voting by proxy, votes must be given personally. For usual form of instrument appointing a proxy, see *infra*, Table A., clause 67.

The Stamp Act, 1891, charges every instrument of proxy, "For the sole purpose of appointing or authorizing a proxy to vote at any one meeting at which votes may be given by proxy, whether the number of persons named in such instrument be one or more," with the duty of 1*d.* And see important sections set out at p. 707, *supra*.

Most proxy instruments appoint a proxy for one meeting only, and accordingly require a 1*d.* stamp.

In any other case, *e.g.*, when the proxy is appointed for more than one meeting or for a year, a 10*s.* stamp must be impressed. As a proxy paper bearing a 1*d.* stamp is available for one meeting only, it follows that if there be two meetings held on the same day (see Form 438) there must be two instruments of proxy.

Where an adhesive stamp is used, the common postage and inland revenue stamp is of the right description. An impressed stamp is much to be preferred to an adhesive stamp; for if the former is used, the document has merely to be signed, but if an adhesive stamp is used, there is considerable danger that it will not be properly cancelled, and in such case the instrument is void, and any person attempting to vote under it is liable to a heavy penalty.

In order to cancel the adhesive stamp, the person signing the instrument should write *his name or initials on or across the stamp, and put the true date of signature on the stamp*. The stamp will not avail unless he does this, "or otherwise effectively cancels the stamp, and renders the same incapable of being used for any other

Votes and
proxies.

Stamp duty on
proxy papers.

instrument or for any postal purpose." It is safer, but not essential, to put the initials and date. See *McMullen v. Sir Alfred Hickman Steamship*, 71 L. J. Ch. 755. A mere cross or mark would not render the stamp incapable of being used, *e.g.*, for a receipt.

In many cases the instrument concludes: "As witness my hand this day of —," and the stamp is fixed below and the signature written across it. The case lastly cited shows that this is an effective cancellation. See sect. 8 of the Stamp Act, 1891.

Upon important occasions the directors or some of the members sometimes send out stamped proxy papers to the shareholders for signature. In such case the documents ought to be stamped with impressed stamps if possible, otherwise adhesive stamps should be affixed and precise directions as to the mode of signing the paper and *cancelling the stamp* should be printed in the margin, *e.g.*, "Please sign your name at the foot of the proxy, and also put your initials and the date on the stamp."

The propriety of paying out of the company's funds for stamping and issuing such proxies was for a long time in question,* but in

* The following note appeared in the 9th edition of this work, published in 1906:

"See *Studdert v. Grosvenor*, 33 C. D. 528, in which Kay, J., held that it was *ultra vires* for the directors to apply the money of the company in paying the costs of sending out of duly stamped proxy papers with the names of the directors inserted as proxies, and the views expressed by the learned judge would point to the conclusion that it is *ultra vires* to pay out of the company's funds such expenses in any case, or the expense of sending out circulars explaining the position and urging members to vote in a particular manner. But it seems questionable whether this application of the doctrine of *ultra vires* can be supported. No doubt the Acts do not expressly authorize the payment of such expenses out of the funds of the company, but the doctrine of *ultra vires* is to be reasonably and not unreasonably understood and applied; and whatever may fairly be regarded as incidental or consequential upon those things which the Legislature has authorized ought not (unless expressly prohibited) to be held by judicial constructions to be *ultra vires*. Per Lord Selborne, L. C., *Att.-Gen. v. G. E. Rail. Co.*, 5 App. Cas. 478. It seems to be fairly incidental to the business of a company to take steps to procure the presence at a general meeting of a quorum, and to induce absent shareholders to attend and vote by proxy, at any rate, when the directors acting in good faith consider that it is desirable in the interests of the company, *e.g.*, when they know or have reason to anticipate that some motion adverse to the company's interests is to be brought forward; and shareholders are so supine that in many cases they will not vote if they have to pay the expense of stamping and returning a proxy. It is conceived, too, that it is within the powers of the company, acting by its directors, to present to the shareholders from time to time, by means of circular letters or otherwise, such information as the shareholders may reasonably require to enable them to form a judgment as to how they should vote upon the matters to be submitted either in person or by proxy. The directors are the trusted agents of the company, and it is their duty to conduct the business in the interests of the company, and inasmuch as the control is vested in general meetings, it seems to be an

Peel v. L. & N. W. Rail. Co., (1907) 1 Ch. 5, the Court of Appeal decided (overruling *Studdert v. Grosvenor*, *infra*) that directors acting in good faith in the interests of the company may do what they consider requisite to get the members to vote for or against a particular resolution, and for that purpose may send out stamped proxy forms, and pay for them out of the funds of the company.

A shareholder may appoint several persons alternatively as his proxy, *e.g.*, "A., failing him B., and failing him C."

All proxy papers ought to be preserved by the directors by being pasted in a book with a proper index.

Unless otherwise provided, a shareholder may vote personally at a poll, though he was not present at the meeting at which the poll was demanded. If a shareholder votes personally on any question, any subsequent vote on that question by a proxy is void. A shareholder may revoke the appointment of a proxy at any time; but a vote given by the proxy before the revocation reaches the company or the proxy will be valid. In case of revocation, the shareholder ought before the meeting to write to the company giving notice that he has revoked the appointment. If he attends personally at a meeting, he can hand in notice of the revocation to the chairman. Sometimes the instrument is so framed that personal attendance by the appointor invalidates it, *e.g.*, where it says "*in my absence to attend and vote*," &c. To appoint a second proxy would seem to be an implied revocation of the first.

Adjournment.

The regulations generally empower the chairman to adjourn a general meeting with the sanction thereof, and very commonly provide that no poll shall be demanded upon a question of adjournment, or that if a poll is demanded upon any question of adjournment, it shall be taken at the meeting and without adjournment. In the absence of any such provision it would seem that a poll may be demanded on the question, and should be taken then and there.

Chillington Iron Co., 29 C. D. 159. See p. 702. Unless the articles otherwise provide, no notice need be given of an adjourned meeting, for as regards notice an adjourned meeting is a continuation of the original meeting; but no business can be transacted at an adjourned

important part of that duty to warn shareholders against objectionable schemes, and endeavour to secure, by the issue of proxy forms, that such schemes shall not be carried by a chance majority. Kay, J., appeared to think that the directors should do these things at their own expense, but there are not a few companies with 5,000 or 10,000 shareholders, and it seems unreasonable to impose such a burden on the directors."

The decision in *Peel v. L. & N. W. Rail. Co.*, *supra*, shows that these observations were well founded.

meeting other than the business for which the original meeting was convened. See p. 702. Where a meeting is adjourned, and at the adjourned meeting a poll is demanded, the question sometimes arises whether a clause requiring the deposit of the instrument of proxy before the meeting (see clause 66 of Table A.) is satisfied by the deposit being made before the adjourned meeting. It would seem that it is so satisfied unless the clause expressly provides to the contrary.

DIVIDENDS AND PROFITS.

The following are the principal cases illustrating (historically) the Leading cases. development of the principles governing profits and dividends:—

(1) **Burnes v. Pennell**, 2 H. L. C. 525 (1849).

Held by Lord Campbell, L. C., that dividends are supposed to be paid out of profits only, and that where directors order a dividend to any given amount, without expressly saying so, that impliedly declares to the world that the company has made profits which justify such a dividend. If no such profits have been made, and the dividend is to be paid out of the capital of the concern, a gross fraud has been practised, and the directors are not only civilly liable to those whom they have deceived and injured, but, in my opinion, they are guilty of a conspiracy for which they are liable to be prosecuted and punished.

(2) **Regina v. Esdaile and others**, 1 F. & F. 213 (1858).

In criminal proceedings against the directors of the Royal British Bank, for conspiracy to defraud by false representations of solvency, it was held, that the declaration of a dividend out of pretended profits was fraudulent, and that if the defendants knew that debts hopelessly bad were included in the balance-sheet as assets, without any corresponding reserve, this would be evidence that the balance-sheet was fraudulent: also, that evidence that the defendants knew the true state of affairs would suffice to show that the books, representing otherwise, were false to their knowledge; and that, in that case, though the balance-sheet truly represented the *books*, it would be fraudulent. All the defendants were found guilty, and sentenced.

(3) **Macdougall v. Jersey Imperial Hotel Co.**, 2 H. & M. 528 (1864), in which Page-Wood, V.-C., said:—

"The Bill avers that there are *no profits*, and that interest has been paid, or is about to be paid, out of capital; that the shareholders have paid 4*l.* per share, and are discharged to that extent, and that they are now about to take back sums equal to 5*l.* per cent. of that very capital in the shape of interest. On grounds of public policy, and on every principle not only of honesty as regards the public generally, but of the interests of this company itself, I feel bound to prevent this proceeding. This is not in accordance with the contract entered into with the Legislature on behalf of the public, whereby it was determined that the shareholders should be liable to a certain defined amount, and no more, to the creditors of the company, and not in accordance with the contract between the parties whereby each shareholder was protected against creditors to the extent of the contributive liability of all the others."

(4) **Stringer's case**, 4 Ch. 475 (1869).

In this case the company was engaged in hazardous trade, namely for running the blockade during the civil war in America. A balance-sheet and profit

and-loss account were made out and a dividend paid on the basis of the profits disclosed thereby. It was held that the balance-sheet was not to be regarded as delusive and fraudulent merely because an estimated value was put upon the assets, which were then in jeopardy and were subsequently lost, provided that the facts fairly appeared on the balance-sheet and that the balance-sheet fairly represented profits. "I quite agree," said Selwyn, L. J., in that case, "with the argument which has been addressed to us by the official liquidator to this extent, that the Act which confers on these companies the privilege of limited liability, imposes upon them at the same time certain conditions which they are bound to observe, and which may be considered as the price of that privilege, and if it is made to appear that for the purposes of fraud or for any other improper motive a company has declared and paid a wholly delusive and improper dividend, and has thereby, in effect, taken away from its creditors a portion of the capital which was available for the debts of those creditors, I entertain no doubt that the Court would have full jurisdiction and would exercise it by ordering the repayment of the money so improperly paid."

(5) **Mills v. Northern Railway of Buenos Ayres Company**, 5 Ch. 621 (1870).

In this case it was held that a simple contract creditor of a company was not entitled to restrain the company from dealing with their assets as they pleased, on the ground that they were diminishing the funds for payment of his debt. And see *Carson v. Grant*, (1891) 2 Ch. 78.

(6) **Rance's case**, 6 Ch. 104 (1871).

In this case the directors of a marine insurance company declared a bonus of 10s. per share which was agreed to at a general meeting and paid. The directors in declaring this bonus prepared no profit-and-loss account, but only an account of receipts and payments of the company, which made no allowance for the risks to which the company was liable. A director who was party to this transaction was held liable to repay the bonus paid to him. James, L. J., in this case said: "Was there any attempt to make a balance-sheet or any profit-and-loss account in such a way as any mercantile body and certainly any insurance company ought to have done? To take the money which the company had received to answer risks and to treat it as money capable of being divided as profits without making any estimate of what the risks were in respect of which the money was paid seems to me to be the most extravagant proceeding that I ever heard of. The directors simply had before them the cash balance of the receipts and payments, and without making the slightest provision in that account for anything whatever, they proceed out of that balance to declare this bonus. I quite agree that it would have been different if there had been . . . there ought to have been in the ordinary course of business, a balance-sheet

à fide made out with proper assistance, so as to ascertain the true state of the company. If the directors had followed the directions of the 112th article of their own deed, and if at the first ordinary general meeting they had laid before the company a report comprising a balance-sheet showing as accurately as circumstances would permit the financial position of the company up to that date; if that had been done, I am of opinion that it would not be right for this Court to sit as a Court of Appeal to decide upon such a state of facts so made out. If the directors, by placing unfounded reliance upon the representations of their servants or actuaries, had arrived at the conclusion that they had made a divisible profit, this Court ought not, I say, to sit as a Court of Appeal from that conclusion, although it might afterwards be satisfactorily proved

that there were very great errors in the accounts which would not have occurred if they had been made out with greater strictness or with more scrutinising care. But no such account at all was made out. A mere cash account or balance-sheet in such a company as this, presented in order to determine whether there had been a profit made and for the purpose of declaring a bonus thereon, is to my mind, within the meaning of *Stringer's case* [4], a fraudulent and delusive balance-sheet. It purported to show something, as was said in that case, which any man who applied his mind to the subject would say, afforded no clue whatever to the profit which had been made."

(7) **Re Ebbw Vale Co., 4 C. D. 827 (1877)**

In this case the property of the company consisted of numerous iron and coal mines. The property had been largely depreciated through the great fall which had taken place in the value of iron and coal, and Fry, Q.C. (afterwards L. J.), having advised that the company could not pay any further dividends without writing off the loss, a special resolution was passed reducing the capital by writing down the shares from 32*l.* to 23*l.*, and thus cancelling 9*l.* per share paid-up capital. Jessel, M. R., held, that he had no power under the Companies Act, 1867, to sanction the reduction. Accordingly application was made to Parliament to confer the requisite power, and in due course the Companies Act, 1877, was passed, and shortly afterwards, the company having passed the requisite special resolution, the proposed reduction was again submitted to Jessel, M. R., who made an order, saying, "that this was a matter which was now very properly left in the discretion of the company which might desire to reduce its capital by writing off losses. The power was extremely beneficial, inasmuch as it enabled the company to declare dividends where, but for the power, no dividend would be possible." *Times*, 20th Jan. 1878. But the soundness of the decision of Jessel, M. R., in *Ebbw Vale Co.* has been doubted.

(8) **Re National Funds Assurance Co., 10 C. D. 118 (1878)**

The articles provided that the directors, with the sanction of a general meeting, might pay interest at the rate of 5 per cent. per annum on the paid-up capital of the company, but that no dividend should be paid except out of profits. The company issued share warrants purporting to confer on the holders the right to interest at 5 per cent. per annum. The company never made any profits, and the interest on the warrants was from time to time paid out of capital, with the sanction of general meetings. Held, that the directors were jointly and severally liable to make good the amount.

Jessel, M. R., said, that a limited company trades upon the representation of its being a limited company, with a paid-up capital to meet its liabilities. It is wholly inconsistent with that representation that the company, having its capital paid up, should pay it back to its shareholders and give its creditors nothing at all. See (18).

(9) **Davison v. Gillies, 16 C. D. 347, n. (1880)**

This was a case of a tramway company. The articles provided that no dividend should be paid except out of profits of the company. The company had allowed its lines to get out of repair, so that it would require 80,000*l.* to put them in repair. The company declared a dividend, but it was held by Jessel, M. R., that the dividend was *ultra vires*, inasmuch as there could be no profits until proper provision had been made for the repairs.

(10) **Dent v. London Tramways Co., 16 C. D. 344 (1880).**

This case related to the same company. The company had issued preference shares entitled to dividend out of the profits of each year. It was supposed that the last-mentioned decision precluded it from paying the dividend thereon until the depreciation was made good; but Jessel, M. R., held, that inasmuch as the holders were entitled to be paid their dividend out of the profits of each year, they were entitled to be paid without regard to past depreciation.

(11) **Alexandra Palace Co., 21 C. D. 159 (1882).**

In this case dividends on preference shares had been paid during construction: it was contended "that the dividends were not paid out of capital; and it is quite proper to debit to capital account the interest on capital expended on works, such as buildings, so long as they are unproductive during the period of construction." But Fry, J., referring to this contention, said that counsel "have very ingeniously argued that this was really a payment out of profits (so, at least, I understood his argument), because, he says, you are entitled to compute interest on the money you lay out before it becomes remunerative, and to treat that interest as profit, and divide it accordingly among the shareholders. I cannot yield to that argument." And accordingly the directors were held jointly and severally liable to make good the amount.

Fry, J., referring to the passage from the judgment of Page-Wood, above (3), said: "In my view, that lays down the law with perfect precision, and I think no subterfuge by which it is attempted to return capital to shareholders, and thereby to diminish their liability, ought to be countenanced for one moment by this Court. I confess it was with some surprise that I heard the argument addressed to me at the bar that the directors were at liberty to pay this money out of capital, because otherwise they could not carry on their undertaking." But see now as to payment of interest out of capital during construction, Companies Act, 1908, s. 91.

(12) **Flitcroft's case, 21 C. D. 519 (July, 1882).**

In this case the directors of the company for several years presented to general meetings of shareholders reports and balance-sheets, in which various debts known by the directors to be bad were entered as assets, so that an apparent profit was shown, though in fact there was none. The shareholders, relying on these documents, passed resolutions declaring dividends, which the directors accordingly paid.

Held, in the winding-up, that the directors who paid the dividends were jointly and severally liable for the amount.

Jessel, M. R.

"A limited company, by its memorandum of association, declares that its capital is to be applied for the purposes of the business. It cannot reduce its capital except in the manner and with the safeguards provided by statute, and, looking at the Act, 40 & 41 Vict. c. 26 [the Companies Act, 1877], it clearly is against the intention of the Legislature that any portion of the capital should be returned to the shareholders without the statutory conditions being complied with. A limited company cannot, in any other way, make a return of capital: the sanction of a general meeting can give no validity to such a proceeding, and even the sanction of every shareholder cannot bring within the powers of a company an act which is not within its powers. If, therefore, the shareholders had all been present at the meetings, and had known all the facts, and had all concurred in declaring the dividends, the payment of the dividends would not be effectually sanctioned."

(13) **Guinness v. Land Corporation of Ireland**, 22 C. D. 349
(November, 1882).

The articles of association provided that a portion of the capital should be applied in paying dividend on one class of shares. Held, that this was *ultra vires*.

Chitty, J., in that case said: "The conditions of the memorandum are not mere paper conditions. They are intended to be operative, and it would be a most remarkable thing if the Act of Parliament which allows members to limit their liability by paying a sum of money to form the capital, should allow those same persons the next day to receive back their capital in any shape. . . . It would be a strange construction of the Act of Parliament if by any of the internal regulations of the company it would be competent to the company to return any part of the capital to the shareholders; because the Act of 1867 contains elaborate and carefully-framed provisions under which the capital may be reduced, and it seems to me an extravagant proposition to say that that relates only to the nominal capital, and not to the actually subscribed capital."

The decision was affirmed by the Court of Appeal, Cotton, L. J., saying: Cotton, L. J.
"That which is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member, so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid."

(14) **Re Oxford Building Society**, 35 C. D. 582 (1886).

This concern advanced money to builders on mortgages, payable by instalments, and the directors treated as part of the profits available for dividend the value for the time being, upon estimate made by their surveyor, who was also their secretary, of the instalments of principal and interest, and upon this footing the directors paid dividend for several years. The articles provided that no dividend should be payable except out of realized profits. Held, that realized profits meant profits tangible for the purposes of division as contrasted with estimated profits, and the directors were jointly and severally liable to make good the amounts accordingly.

(15) **Trevor v. Whitworth**, 12 App. Cas. 409.

The articles contained express power for the company to purchase its own shares. Held, by the Court of Appeal to be a valid power free from all objections. Held, by the House of Lords to be *ultra vires*.

Persons dealing with the company have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders. Experience appears to have shown that circumstances might occur in which a reduction would be expedient. Accordingly, by the Act of 1867, provision was made enabling a company, under strictly defined conditions, to reduce its capital. Nothing can be stronger than these carefully-worded provisions to show how inconsistent with the very constitution of a joint-stock company, with limited liability, the right to reduce its capital was considered to be." Per Lord Herschell.

Lord Herschell, L. C.

"The Act of 1877, upon the preamble that doubts have been entertained Lord Watson.

whether the power of reduction given by the preceding Act extended to paid-up capital, enacts (sect. 3) that the word 'capital' as used in that Act shall include paid-up capital. That declaration clearly expresses the will of the Legislature, that neither the paid-up nor the nominal capital shall be reduced otherwise than in the manner permitted by the statutes. . . . Persons who deal with and give credit to a limited company naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call, and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out except in the legitimate course of its business." Per Lord Watson.

Lord Mac-
naghten.

"Payment of capital to any one shareholder is just as much a reduction of capital, and just as detrimental to the interests of creditors, as the payment of the same amount among all the shareholders. It is none the less a payment off of capital within the meaning of the Act of 1867, as explained by the Act of 1877." Per Lord Macnaghten.

(16) **Leeds Estate, &c. v. Shepherd**, 36 C. D. 787 (1887).

The articles provided that no dividends should be payable, except out of profits arising from the business of the company.

No profits were ever made, but dividends were paid for many years at the rate of five per cent. The balance-sheets on which dividends were declared were prepared, not by the directors but by the manager. They were delusive, and over-estimated the assets, and were framed with a view of showing a profit available for dividend. The auditor never looked at the articles, but accepted the statement of the manager, and certified from time to time the accounts were true copies of those shown in the books. The directors did not know the true state of affairs, or that the balance-sheets were delusive; they never exercised any judgment with reference to the accounts, but relied on the manager and auditor. Held, that the directors were jointly and severally liable. Held also, that the duty of the auditor, after auditing the accounts, was not merely to verify the arithmetical accuracy of the balance-sheet, but to inquire into its substantial accuracy, and to ascertain that it contained the particulars specified in the articles and was properly drawn up, so as to contain a true and correct representation of the state of the company's affairs, and that he therefore had been guilty of misfeasance and was liable accordingly.

(17) **Lee v. Neuchatel Asphalte Co.**, 41 C. D. 1 (1889).

See *infra*, p. 890.

The company had a mining concession which was running out, but there was no evidence that its assets were of less value than they were when the company bought its undertaking. Held, that it was at liberty to divide the income, and under no obligation to make provision for depreciation.

(18) **In re Bennett, Masonic and General Life Assurance Co.
v. Sharp**, (1892) 1 Ch. 154.

In this case the articles provided that interest should be paid half-yearly on all the moneys paid on the shares until otherwise determined by the directors, but that no dividends or bonus should be payable except out of profits. No regular profit and loss account was ever made up, and the company never earned any profits. Interest, however, was continuously paid on the paid-up

capital. Held, that the directors were jointly and severally liable; and that as the action commenced before the 1st of January, 1890, they could not plead the statute of Limitations. See (8).

19) **Bolton v. Natal, &c. Co.,** (1892) 2 Ch. 124.

The principal objects of the company were to buy, let, and sell land, and to make advances.

Held, that having regard to *Lee v. Newchattel*, *ubi supra*, it was not bound to debit the profit and loss account with depreciation. But as the land depreciated was part of the circulating capital the decision can scarcely be supported.

20) **Lubbock v. British Bank of South America,** (1892) 2 Ch. 198.

A banking company, with a paid-up capital of 500,000*l.*, sold part of its undertaking for 875,000*l.* After deducting the paid-up capital and the debts and liabilities, there remained a net balance of 205,000*l.*

Held, that this was profit, and might be divided.

See further as to this case, *infra*, p. 879.

21) **Lands Allotment Co.,** (1894) 1 Ch. 616.

In this case the directors had applied, but without fraud, moneys of the company to an *ultra vires* purpose. Held, that more than six years having elapsed, the claim against them was barred by sect. 3 of the Trustee Act, 1889.

22) **Verner v. General and Commercial Investment Trust,**
(1894) 2 Ch. 239. *Infra*, p. 893.

The articles of an investment trust company declared that there should be applied to dividends the receipts from the dividends, income, profits, bonuses, and advantages payable in respect of the company's investments. The value of the investments had greatly depreciated, to some extent permanently; but during the past financial year the income had substantially exceeded the management expenses. The Court of Appeal held that the excess was applicable as dividend, although "fixed capital" had been lost, and distinguished this case from one in which the income arises from the turning over of circulating capital.

23) **London and General Bank, Ltd. (No. 2),** (1895) 2 Ch. 673.

Directors and auditor held liable for paying dividends out of capital, it being found in fact that they had not acted *bonâ fide*.

24) **Wilmer v. M'Namara & Co., Ltd.,** Stirling, J., (1895)
2 Ch. 245.

Held, in accordance with *Verner v. General, &c. Trust*, (1894) 2 Ch. 239, that goodwill and leases of a trading company were fixed capital, and accordingly that it was not necessary to make good any depreciation in ascertaining profits.

(25) Kingston Cotton Mill Co. (No. 2), (1896) 2 Ch. 279

Auditors who had relied on certificates of manager who grossly over-stated the value of the stock-in-trade, held not liable for dividends paid out of capital on the faith of such certificates.

**(26) Bosanquet v. St. John del Rey Co., North. J. (1897)
77 L. T. 207**

In this case the company's mine fell in, and, to restore it to working order, money had to be raised by the issue of debentures; and, there being no profits the interest thereon was paid out of capital. The mine having been restored to a profit-producing condition, it was held that it could pay dividends without making good to capital what had been so expended in interest. "The contention is that . . . the accounts ought to be kept so as to keep the claim in respect of interest alive, or, at any rate, that the profits ought to be dealt with on the footing that such liability existed. I see nothing, either in the articles of the company or in the general law, to require that, before dividends are paid, the profits must be applied in paying off a charge properly incurred in previous years. Having regard to recent authorities, I come to the conclusion that there is no reason why the proposed dividend should not be paid." This is in effect overruled by *Dorey v. Cory, infra*, pp. 865, 899.

(27) Moxham v. Grant, (1899) 1 Q. B. 88

The insurance money paid by underwriters to a company in respect of the loss of its ship cannot be distributed as dividend.

(28) In re National Bank of Wales, (1899) 2 Ch. 629

In this case it was laid down that, though the paid-up capital of a limited company cannot be lawfully returned to the shareholders under the guise of dividends or otherwise, yet the law does not prohibit such a company—even if it be a banking company—from paying dividends unless its paid-up capital is intact.

The payment of dividends out of the excess of the receipts over the outgoings of a year, after making some allowance for bad debts, losses made in previous years being ignored and in effect thrown on the capital, does not amount to a payment of dividends out of capital. If paid-up capital has been lost, its subsequent application in the payment of dividends is impossible.

Excluding cases in which it would be obvious that a particular debt or outlay could not be reasonably charged to capital, the question what losses can be properly charged to capital and what to income is a matter for business men to determine, and on such a matter the opinions of honest and competent men may differ. There is no hard and fast legal rule on the subject.

But if expenses or payments are obviously improperly charged to capital simply to swell the apparent profits and to make it appear that dividends may properly be declared, dividends declared and paid under such circumstances can no more be justified than if they were paid out of capital.

On appeal, however, the House of Lords (*Dorey v. Cory*, (1901) A. C. 477), whilst affirming the decision on other grounds, pointedly and significantly abstained from approving of the above proposition. See further, *infra* pp. 865, 899.

(29) *In re Barrow Hematite Steel Co.*, (1900) 2 Ch. 846.

In this case the Court was asked to sanction a reduction of capital alleged to have been lost or to be unrepresented by available assets. In ascertaining the assets for the purposes of the reduction, the reserve fund and the unappropriated profit and the value of goodwill were not taken into account. Cozens-Hardy, J., held that the loss or depreciation was not made out to the full extent, and he, therefore, refused to sanction the reduction. This decision was based partly on the ground that the reserve fund and the undivided profits ought to be treated as part of the assets, and, further, that the goodwill of the company was probably of considerable value, and ought to be brought into account; and, lastly, his Lordship said that even if the loss were made out, he would not have thought it right to confirm the reduction, for that, having regard to *Lee v. Neuchâtel Asphalte Co.*, 41 C. D. 1, and *Verner v. General and Commercial Investment Trust*, (1894) 2 Ch. 239, to the effect that a trading profit may be realized in payment of dividends notwithstanding depreciation in the fixed capital of the company, there was no necessity for reduction. See, however, as to this, what was said by the Lord Chancellor in *Dovey v. Cory*, *infra*, p. 899. *Barrow Hematite Steel Co.* was explained in the Court of Appeal in *Hoare & Co.*, (1904) 2 Ch. 208, *infra*, pp. 867, 868.

(30) *Foster v. New Trinidad Lake Asphalte Co.*, (1901) 1 Ch. 208.

In that case certain promissory notes forming part of the assets of the company had been considered of no value, but were paid off with arrears of interest, and the directors proposed to treat the whole sum as a windfall in the nature of an unexpected profit and distributable by way of dividend. It was held, however, that the amount ought not to be distributed without reference to the other business and assets of the company. Byrne, J., said: "I must not, however, be understood as determining that this sum or a portion of it may not properly be brought into profit and loss account or be taken into account in ascertaining the amount available for dividend. That appears to me to depend on the result of the whole accounts for the year. It is clear, I think, that an appreciation in total value of capital assets, if duly realized by sale or getting of such portion of such assets, may in a proper case be treated as available for the purposes of dividend"; and then, after referring to *Lubbock v. British Bank of South Africa* and *Verner v. General and Commercial Investment Trust*, *supra*, the learned judge proceeded, "If I rightly appreciate the true effect of the decisions, the question of what is profit available for dividend depends on the result of the whole accounts fairly taken for the year, capital as well as profit and loss, and although dividends may be paid out of earned profits in proper cases, although there has been a depreciation of capital, I do not think that a realized accretion to the estimated value of one item of the capital assets can be deemed to be profit divisible amongst the shareholders without reference to the result of the whole accounts fairly taken."

(31) *Dovey v. Cory*, (1901) A. C. 477. *Infra*, p. 899.

This case was the appeal to the House of Lords in *National Bank of Wales*, (1894) 2 Ch. 629, *supra*, p. 897.

The House of Lords affirmed the decision of the Court of Appeal exclusively on the ground that the respondent was not guilty of misfeasance or breach of trust merely because he had made false statements made

by the company's officials. The House pointedly declined to express any opinion on the question principally discussed in the Court of Appeal, that is, whether the double account system of ascertaining profits sanctioned in *Lee v. Neuchatel Co.*, *supra*, and *Verner v. General and Commercial, &c. Trust*, *supra*, was allowable. See pp. 880, 893, *infra*.

(32) **Fisher v. Black and White Publishing Co.**, (1901) 1 Ch. 174.

Where dividends are payable out of "the profits from time to time available for dividend" and the regulations empower the directors before declaring a dividend to carry any of the profits to reserve, profit placed to reserve is not profit "available for dividend."

(33) **Burland v. Earle**, (1902) A. C. 83.

There is no principle which compels a company, while a going concern, to divide the whole of its profits among the shareholders, and the reserve fund may, subject to the control of a general meeting, be invested in such securities as the directors may select, the matter being one of internal management.

(34) **Bond v. Barrow Hæmatite Co.**, (1902) 1 Ch. 353.

The defendant company was a smelting company; for the purposes of its business it had bought iron ore mines, and in connection therewith erected blast furnaces and cottages. The mines were flooded and the company surrendered the leases and pulled down the blast furnaces, and in the result sustained a loss of 200,000*l.*; there was also a loss of 50,000*l.* on other accounts. In the circumstances, the directors did not recommend the payment of any dividend on the preference shares, although there was a large sum of undivided profit, and the holders in the action claimed a declaration that the undivided profits ought to be applied in paying the preferential dividend on the ground that the loss was of fixed capital, and, therefore, that the cases of *Lee v. Neuchatel*, 41 C. D. 1, and *Verner v. General and Commercial Trust*, (1904) 2 Ch. 239, applied and enabled the company to pay the dividends notwithstanding such a loss. It was held by Farwell, J., that the 200,000*l.* loss was not a loss of fixed but of circulating capital, and that the loss must be made good before dividends could be paid; and that as to the 50,000*l.* loss, the plaintiffs had not proved that it was a loss of fixed capital, and accordingly the action failed and his Lordship dismissed it with costs.

The learned judge referred to Professor Marshall's definition of profits (*infra*, p. 883), and said: "I am precluded from adopting this in its entirety by authorities which are binding on me, because in this definition 'stock and plant' obviously include both fixed and circulating capital. . . . All the authorities, however, agree, I think, that circulating capital must be kept up. Now, in the present case, the 200,000*l.* realised loss arises from the surrender of the leases of certain mines, by the pulling down of certain furnaces, and on the sale of certain cottages. The company is a smelting company on a very large scale, and for the convenience of its works and by way of economy they acquired the leases of the surrendered mines in order to supply themselves with their own ore instead of buying it as required. The ore was used exclusively for the purposes of the company. The mines were drowned out and the cost of pumping them out was prohibitive. The company therefore surrendered the leases, pulled down the blast furnaces, and sold the cottages connected therewith. Now the evidence before me is all on one side. The plaintiffs called none, and

Sir David Dale and the defendants' other witnesses all agree that in a company of this nature these items *ought to come into the account before any profit can be said to be earned; and my own opinion coincides with theirs*, inasmuch as I think that the money invested in those items is properly regarded in this company as circulating capital. Suppose the company had bought enormous stocks of ore, sufficient to last for ten years; it could hardly be said that the true value of so much of this as remained from time to time ought not to be brought into the balance-sheet, and I can see no difference in principle for the purposes of this account between ore *in situ* and ore so bought in advance. . . . I cannot think that it would be right for the defendant company to purchase out of capital the last two or three years of a valuable patent and distribute the whole of the receipts in respect thereof as profits without replacing the capital expended on the purchase."

As to *Lee v. Neuchatel*, his Lordship said "it was relied on as an authority for the proposition as a universal negative, namely, 'that no company owning wasting property need ever create a depreciation fund.' In my opinion that is not the true result of the decision. It must be remembered that in that case there had been no loss of assets. The company's assets were larger than at its formation, and the Court decided nothing more than the particular proposition that some companies with wasting assets need have no depreciation fund."

(35) **Hoare & Co., Ltd., (1904) 2 Ch. 208.**

In this case the company had a paid-up capital of 1,950,000*l.* and a reserve fund of 231,487*l.* 10*s.* 1*d.*, which was composed principally of premiums on shares, and, to some extent, of premiums on leases, and as to the balance of ordinary profits. The reserve fund was employed in the business and not separately invested. The company, having lost about 592,000*l.*, proposed to deal with the amount as to 396,000*l.* by writing down the paid-up capital, and as to about 196,000*l.* by writing off a like amount, part of the reserve fund. Special resolutions were passed accordingly, but Buckley, J., refused to sanction the order, holding, on the authority of *Barrow Hematite Steel Co., (1900) 2 Ch. 846*, that reserves must be exhausted before capital can be cancelled. The Court of Appeal reversed the decision and sanctioned the reduction, holding that in such circumstances the loss should be treated as falling on reserves and capital in proportion to the amounts thereof respectively, and that as the company was writing off reserve rather more than its due proportion of the loss, there was no objection to the scheme, notwithstanding that it left the company with a reserve fund of substantial amount. Romer, L. J., who at the request of Vaughan Williams, L. J., delivered the first judgment, considered that the Court had jurisdiction, and said that the "reserve fund was a fund which, at the time it was created, arose from the fact that there were available assets (after deducting all liabilities of every kind, including the amount which is represented by the share capital) which might have been applied as the company thought fit without thereby doing any violence to the provision of the Companies Acts or to the articles of the company. In other words, the surplus which was carried to the reserve fund represented that which might have been properly applied at the time, if the company had so thought fit, in paying further dividends to the shareholders, and no person could have complained if they had done so. It was therefore a reserve fund properly created . . . they might have utilised it in equalising dividends, or, if they had chosen, they might have applied it in making good lost capital.

" . . . In my opinion, under the circumstances of this case, the loss ought to be treated as apportioned between the reserve fund and the capital account properly so called, that is, the share capital.

"In the present case the company propose to do more than that: they propose to attribute a larger proportion of the loss of assets to the reserve fund than they do to the capital account. In my opinion that is a thing which they were not absolutely bound to do, but which they certainly had a right to do . . . In the circumstances of this case I think that the Court ought to allow the small proportion of the reserve fund, which according to the scheme it is proposed to keep, to remain as a reserve fund."

Vaughan Williams and Cozens-Hardy, L. JJ., concurred.

This decision is of importance as emphasizing the principles that premiums on shares are, where the capital is intact, properly treated as profit (compare *Lubbock v. British Bank of S. A.*, (1892) 2 Ch. 198, *supra*, pp. 863, and *infra*, 879); and a loss of capital does not automatically absorb reserves, and that where reserves are employed in the business and merged in the general assets they should bear their rateable proportion of loss.

The resolutions, &c. were settled by the writer, and the decision was in accordance with his advice to the company.

(36) *Lucas v. Fitzgerald* (1903), 20 T. L. R. 16.

In this case an interim dividend was declared by the directors and paid, and at the end of the year it turned out that there had been a loss. The board which declared the dividend acted on the information supplied by the managing director. Lord Alverstone, C. J., held that such of the directors as had only been present at a subsequent meeting, at which the minutes of the previous meeting were confirmed, were not liable. He also said: "The declaration of interim dividends depends much more upon estimates and opinions than the declaration of a final dividend which is made upon the information contained in a formal balance-sheet."

(37) *Towers v. African Tug Co.*, (1904) 1 Ch. 558.

In this case an interim dividend was paid, as it turned out, out of capital. One of the directors and the manager had received their share of the dividend, and not returned, or up to trial offered to return, it. They, however, brought an action on behalf of all the shareholders, except defendants, against the company and the other directors, asking that the defendant directors might be ordered to repay the amount of the dividend. Afterwards all the other shareholders were joined as defendants at their own request. It was held by the Court of Appeal that the plaintiffs, having received their dividends with full knowledge or notice of the facts, could not, suing either individually or on behalf, &c., maintain the action, although the payment of the dividend was *ultra vires*; that the action would not have lain even if plaintiffs had repaid their shares before trial, and there was some doubt whether payment even before action would have availed them.

(38) *In re Spanish Prospecting Co., Ltd.*, (1911) 1 Ch. 92.

A. and B. agreed to serve a limited company at a fixed salary, which was only to be paid "out of profits (if any) arising from the business of the company, which may from time to time be available for such purpose, but such salary shall nevertheless be cumulative, and accordingly any arrears thereof shall be payable out of any succeeding profits as aforesaid." The business of the company included the purchase and sale of shares and debentures, and shares and debentures were accordingly purchased. The shares were sold for

cash, and the proceeds brought into profits and loss account. The debentures were included in the yearly balance-sheets of the company as an unvalued asset. Then the company went into voluntary liquidation; the liquidator sold the whole of the assets, the debentures realizing 2,072*l.*: all the creditors, except A. and B. (to whom about 8,000*l.* in respect of arrears of salary were due), were paid in full, and all the subscribed capital was returned to the shareholders, leaving a surplus of 3,328*l.* in the hands of the liquidator. Was this surplus "profits arising from the business of the company"? The Court of Appeal held that it was undrawn profits, and that A. and B. were entitled to be paid their cumulative arrears of salary out of it. The case is instructive, more especially on account of certain passages in the judgment of Fletcher Moulton, L. J. His Lordship said, "The question for our decision in the present case is of some general interest, because it turns upon the legal meaning of the word 'profits' . . . The word 'profits' has in my opinion a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. 'Profits' implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the state of the business at the two dates."

For practical purposes these assets in calculating profits must be valued and not merely enumerated. An enumeration might be of little value. Even if the assets were identical at the two periods, it would by no means follow that there had been neither gain nor loss, because the market value, the value in exchange, of these assets might have altered greatly in the meanwhile. A stock of fashionable goods is worth much more than the same stock when the fashion has changed. And to a less degree, but no less certainly, the same considerations must apply to buildings, plant, and other fixed assets used in the business, because one form of business risk against which business gains must protect the trader is the varying value of the fixed assets used in the business. A depreciation in value, whether from physical or commercial causes, which affects their realizable value is in truth a business loss.

"We start, therefore, with this fundamental definition of profits, namely, if the total assets of the business at the two dates be compared, the increase which they show at the later date as compared with the earlier date (due allowance, of course, being made for any capital introduced into or taken out of the business in the meanwhile) represents in strictness the profits of the business during the period in question."

"But the periodical ascertainment of profits in a business is an operation of such practical importance as to be essential to the safe conduct of the business itself. To follow out the strict consequences of the legal conception in making out the accounts of the year would often be very difficult in practice. Hence, the strict meaning of the word 'profits' is rarely observed in drawing up the accounts of firms or companies. These are domestic documents designed for the practical guidance of those interested, and so long as the principle on which they are drawn up is clear their value is diminished little, if at all, by certain departures from this strict definition, which lessen greatly the difficulty of making them out. Hence, certain assumptions have become so customary in drawing up balance-sheets and profit and loss accounts that it may almost be said to require special circumstances to induce parties to depart from them. For instance, it is usual to exclude gains and losses arising from causes not directly connected with the business of the company—such, for instance, as a rise in the market value of land occupied by the company. The value assigned to trade

buildings and plant is usually fixed according to an arbitrary rule by which they are originally taken at their actual cost and are assumed to have depreciated by a certain percentage each year, though it cannot be pretended that any such calculation necessarily gives their true value either in use or in exchange. These, however, are merely variations of practice by individuals. They rest on no settled principle. They mainly arise from the sound business view that it is better to underrate than to overrate your profits, since it is impossible for you to foresee all the risks to which a business may in future be exposed. For instance, there are many sound business men who would feel bound to take account of the depreciation in value of business premises (or in the value of plant specially designed for the production of a particular article) although they would not take account of appreciation in the same arising from like causes.

"To render the ascertainment of the profits of a business of practical use, it is evident that the assets, of whatever nature they may be, must be represented by their money value. But, as a rule, these assets exist in the shape of things or rights, and not in the shape of money. The debts owed to the company may be good, bad, or doubtful. The figure inserted to represent stock-in-trade, must be arrived at by a valuation of the actual articles. Property, of whatever nature it may be, acquired in the course of the business has a value varying with the condition of the market. It will be seen, therefore, that in almost every item of the account a question of valuation must come in. In the case of a company like that with which we have to deal in the present case this process of valuation is often exceedingly difficult because the property to be valued may be such that there are no market quotations and no contemporaneous sales or purchases to afford a guide to its value. It is not to be wondered at, therefore, that in many cases companies that are managed in a conservative manner avoid the difficulty thus presented and content themselves by referring to assets of a speculative type without attempting to affix any specific value to them. But this does not in any way prevent the necessity of regarding them as forming a part of the assets of the company which must be included in the calculation by which *de facto* profits are arrived at. Profits may exist in kind as well as in cash. For instance, if a business is, so far as assets and liabilities are concerned, in the same position that it was in the year before with the exception that it has contrived during the year to acquire some property—say, mining rights—which it had not previously possessed, it follows that those mining rights represent the profits of the year, and this whether or not they are specifically valued in the annual accounts.

"But though there is a wide field for variation of practice in these estimations of profit in the domestic documents of a firm or a company, this liberty ceases at once when the rights of third persons intervene. For instance, the revenue has a right to a certain percentage of the profits of a company by way of income tax. The actual profit and loss accounts of the company do not in any way bind the Crown in arriving at the tax to be paid. A company may wisely write off liberally under the head of depreciation, but they will be only allowed to deduct the sum representing the actual depreciation for the purpose of calculating the profits for income tax. The same would be the case if a person had a right to receive a certain percentage of the profits made by the company.

"In the absence of special stipulations to the contrary, 'profits' in cases where the rights of third parties come in mean actual profits, and they must be calculated as closely as possible in accordance with the fundamental conception or definition to which I have referred."

The learned judge added to the above some observations to the effect that his remarks did not bear on the vexed question of the fund out of which dividends may legally be paid in limited companies. "*Cases such as Ferner v. General and Commercial Investment Trust, (1891) 2 Ch. 239, and Lee v.*

Newchapel Asphalt Co. (1889), 41 C. D. 1, show that this fund may in some cases be larger than what can rightly be regarded as profits, and the decisions in these cases depend largely upon the fact that there is no statutory enactment which forbids it to be so.

Not even an express power in the memorandum can justify the payment of dividends out of capital, for such a payment would be a reduction of capital, requiring, under sect. 46 of the Companies Act, 1908 (reproducing the Acts of 1867 and 1877), the sanction of the Court, and the memorandum cannot dispense with the sanction, which, for the protection of the public, the Act requires. *Trevor v. Whitworth*, 12 App. Cas. 409; *Flitcroft's case*, 21 Ch. D. 519; *Raine's case*, 4 T. L. R. 303 (Kekewich, J.); *Mersina and Adana Co.*, 5 T. L. R. 680 (Stirling, J.); *Foster v. New Trinidad Lake Asphalt Co.*, (1901) 1 Ch. 208; *Fisher v. Black and White Publishing Co.*, (1901) 1 Ch. 174.

And, *a fortiori*, nothing in the articles can justify the payment of dividend or interest (except on capital paid in advance of calls: *Lock v. Queenaland, &c. Co.*, (1896) A. C. 461) out of capital (*Trevor v. Whitworth*, *ubi supra*; *Guinness v. Land Corporation of Ireland*, 22 C. Div. 375; *In re Bennett*, (1892) 1 Ch. 154); but the articles may, of course, restrict the meaning of the word "profit," and declare that dividends shall only be payable out of profit in that restricted sense. See *Oxford Building Society*, 35 C. D. 502, where the term "realized profits" was regarded as meaning "profits tangible for the purposes of division," as distinguished from estimated profits. As to "net profits," see *Bilney v. Ince Hall Coal Co.*, 35 L. J. Ch. 363; *Glasier v. Rolls*, 42 Ch. D. 453; as to "profits in hand," see *Stringer's case*, L. R. 4 Ch. 475.

Some persons, whilst admitting that dividends cannot be paid out of capital, have contended that where a company engages in the construction of works, interest may be paid on capital during construction. See *Alexandra Palace Co.*, 21 C. Div. 149, above. But the principles laid down in *Trevor v. Whitworth*, 12 App. Cas. 409, are wholly inconsistent with the legality of paying dividends out of capital during construction or otherwise. And the Indian Railways Act 1894 (57 Vict. c. 12), was, in effect, a Parliamentary recognition that dividends may not, even during construction, be paid out of capital without statutory powers. So is sect. 91 of the Act of 1908 giving companies power with certain safeguards to pay interest out of capital during construction of works.

Where shares are offered to the public a commission may, under sect. 89 of the Companies Act, 1908 (replacing sect. 8 of the Companies Act, 1900), be paid to subscribers.

As a company may not pay dividends directly out of capital, neither may it do so indirectly, *e.g.*, by entering into a contract with another company or person, one of the terms of which is that the latter shall pay interest on the capital of the former. *James v. Eve*, L. R. 6 H. L. 385. "There is no doubt that if it cannot be done directly, it cannot be done indirectly." Per Lord Chelmsford, L. C., and see per Fry, J., in *In re Alexandra Palace Co.*, *supra*, p. 860.

Thus in *Fisher v. Hull & Barnsley Rail. Co.*, 4 Mar. 1881 (25 S. J. 353), where the contractors had agreed to pay interest during construction, Jessel, M. R., granted an injunction restraining the payment, and the company in two subsequent sessions endeavoured, but without success, to obtain legislative authority. See also *Wye Valley Rail. Co. v. Haices*, 16 C. Div. 489. But see now sect. 91 of the Act.

The payment of dividends out of capital, being a misapplication of the company's funds, is treated as a breach of trust on the part of the directors, and accordingly they are jointly and severally liable to make good the amount with interest at 5 per cent. per annum. *Flitcroft's case*, 21 C. Div. 520; *Re Alexandra Palace*, *ibid.* 160; *Oxford, &c. Society*, 35 C. D. 502; *Leeds, &c. Co.*, 36 C. D. 787; *Carriage Co-operative Assoc.*, 27 Ch. D. 322; *Municipal Freehold*

Power in
memorandum
as to.

"During construction."

Through
contractors.

Liability of
directors.

Land Co. v. Pollington, 63 L. T. 238; *London & General Bank* (No. 2), (1895) 2 Ch. 673; *Bond v. Barrow Hematite Steel Co.*, (1902) 1 Ch. 353.

And the directors are liable not only for what they pay themselves but for the whole amount. "I do not see how to make any distinction between what the directors retained and what they paid to other shareholders." Per Cotton, L. J., *Flitcroft's case*, 21 C. Div. 536.

It is true that a member who receives a dividend knowing that it is paid out of capital, may be liable to make good the amount; for "the money of a company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents [i.e., the directors] of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them, with notice that it is being applied to other purposes, cannot, in this Court, say that he is not a constructive trustee." Per Jessel, M. R., *Russell v. Wakefield Waterworks*, 20 Eq. 479; *Holmes v. Newcastle Co.*, 1 C. D. 682; *Mozham v. Grant*, (1900) 1 Q. B. 88; *Towers v. African Tug Co.*, (1904) 1 Ch. 558. But even in such cases the directors will be primarily ordered to make good the amount, and will be left to recover from the other members if they can. *Alexandra Palace Co.*, 21 C. D. 149; *National Funds*, 10 C. D. 118.

And a member who takes a dividend in good faith, not knowing that it is paid out of capital, is not liable to return the same. *Flitcroft's case*, 21 C. D. 519; *Re Denham & Co.*, 25 C. D. 752; *Wye Valley Rail. Co. v. Hawes*, 16 C. Div. 489.

This is a common case; for where dividends are paid out of capital the members can in most cases show that they were deluded by fraudulent accounts. And where the directors represent that profit has been made, members are not bound to investigate.

"The directors made an express representation to the shareholders that profits had been made, and the effect of that representation cannot be taken away by showing that documents were laid before the shareholders, a thorough investigation of which would have shown that the representation was untrue, unless it is also shown that they did investigate them and discover the untruth." Per Jessel, M. R., *Flitcroft's case*, 21 C. Div. 532.

And even a director who in good faith concurs in the payment of a dividend out of capital is not liable to refund it. *National Bank of Wales*, (1899) 2 Ch. 629, 675.

Where directors openly and avowedly pay dividends out of capital, they may have a right of recovery against shareholders who take with notice that the dividend is paid out of capital. *Mozham v. Grant*, (1899) 1 Q. B. 88; but shareholders who have received dividends knowing them to be paid out of capital cannot keep such dividends, and at the same time compel the directors to make them good. *Towers v. African Tug Co.*, (1904) 1 Ch. 558.

Limitation

In some cases a claim against the directors may be barred by sect. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59). *Lands Allotment Co.*, (1894) 1 Ch. 617. Cf. *In re Sharpe*, (1892) 1 Ch. 154. And where they have acted "honestly and reasonably" and "ought fairly to be excused," the Court has now a discretion to grant them relief under the Companies Act, 1908, s. 279. See p. 715, *supra*.

Criminal.

Not only are directors who pay dividend out of capital civilly liable, but they may, at any rate in some cases, be prosecuted for conspiracy. *Burnes v. Pennell*, 2 H. L. Cas. 497; *Regina v. Esdaile*, 1 F. & F. 213. In the case last mentioned, the directors of the Royal British Bank were convicted of conspiracy to defraud. They had issued false balance-sheets, and, in particular, had included therein, among the assets of the company, debts which they knew to be bad. See *supra*, p. 857.

Moreover, a director or manager who makes, circulates or publishes, or concurs in making, circulating, or publishing, any written statement [e.g., a

report] or account [e.g., a balance-sheet] which he knows to be false in any material particular, may be liable to punishment under sect. 84 of the Larceny Act, 1861 (24 & 25 Vict. c. 96). See *Queen v. Gurney Finlayson*, R. P. 254. As to the Court directing a prosecution in winding-up under sect. 217 of the Companies Act, 1908, see *London and Globe Finance Corporation*, (1903) 1 Ch. 728; *Re Charles Denham & Co.*, 32 W. R. 921; *Re Express Fuel Co.*, W. N. (1875) 10; and *Northern Counties Bank*, 31 W. R. 546.

The Court will, at the instance of a single shareholder, interfere by injunction to restrain the payment of dividend out of capital (*Macdougall v. Jersey Imperial Hotel Co.*, 2 H. & M. 528; *Gillies v. Land Corporation of Ireland*, 22 C. Div. 349; *Davison v. Gillies*, 16 C. 347; and an interlocutory injunction may be granted; *Foster v. New Trinidad Co.*, (1901) 1 Ch. 208); but not at the suit of a mere simple contract creditor. *Mills v. Northern Co.*, 5 Ch. 621; *Coxon v. Grant*, (1891) 2 Ch. 78. Nevertheless, it would seem that there may be cases in which a creditor would have a *locus standi* (*Flitcroft's case*, 21 C. Div. 533); and if he is not paid in due course he can have the company wound up and make the directors personally liable through the medium of the liquidator as representing creditors for the breach of trust. *Re Sharpe* (1882). 1 Ch. 154.

Injunction to restrain.

General Observations on the foregoing Decisions.

The Companies Act, 1862, did not make any express provision in regard to the payment of dividends. It did not require that the power to pay dividends should be specified in the memorandum or in the articles of association, nor did the specimen forms of memorandum of association scheduled to the Act mention the payment of dividend as one of the objects. But the Act distinctly contemplated the payment of dividends; for sect. 38 made special provision in regard to payment in a winding-up of any "sum due to a member of a company in his character of a member by way of dividend, profits or otherwise." Moreover, the regulations in Table A., which were made *prima facie* applicable to all companies limited by shares, expressly provided for the payment of dividends, thus showing that payment of dividends was regarded by the Legislature as a matter of course in the case of a company "formed for the acquisition of gain."

The Act silent.

Whilst the power to pay dividends is thus treated by the Legislature as implied, there is no express provision as to what assets may be applied to the payment thereof. It was, however, assumed from the first that the fundamental principles of sound commercial trading applied, and that dividends must be paid exclusively out of profits. This assumption was not an unreasonable one to make, looking to the scheme of the Act and to the opinion expressed by Lord Campbell, L. C., in *Burnes v. Pennell* (1849), 2 H. L. C. 497, 525, to the effect that dividends are supposed to be paid out of profits only (Case 1, *supra*), and to the prosecution and conviction, in 1856, of the directors of the Royal British Bank for conspiracy to defraud by false representations as to solvency, made, *inter alia*, by paying dividends otherwise than out of profits. It is a corollary from the primary prin-

The power to pay implied.

Out of profits, not capital.

ciple that a limited company cannot reduce its capital by returning any part to the shareholders.

Accordingly case after case is to be found in which the proposition is laid down that dividends can only be paid out of profits, and that dividends may not be paid out of the capital. Nevertheless, Lord Lindley, on more than one occasion, objected to the proposition that dividends can only be paid out of profit, and preferred as more correct the proposition that dividend must not be paid out of capital (and see the observations of Farwell, J., in *Bond v. Barrow Hæmatite Co.* (1902) 1 Ch. 353).

The objection raised by Lindley, M. R., to the proposition that dividends may only be paid out of profit is that this expression "leads to the inference that the capital must always be kept up and be represented by assets which if sold would produce it." *Verner v. General and Commercial Co.*, (1894) 2 Ch. 239. On the other hand, in *National Bank of Wales, Limited*, (1899) 2 Ch. 629, the same learned judge held that even where the articles provide for payment of dividends out of profit, there is no such inference to be drawn. The objection therefore falls to the ground, and upon the whole it seems that the proposition that dividends are only to be paid out of profits may stand as the leading rule, subject, however, to one caution, namely, that the term "profit" is equivocal, and the operation of the rule therefore depends entirely on the meaning therein of the word "profits," and, as Farwell, J., said in the case cited: "There is no single definition of the word 'profits' which will fit all cases."

How Profits are to be Ascertained.

Three systems of account. In regard to this opinions differ, and there are several systems which are adopted or have been suggested. Of these, the following may be mentioned:—

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|--------------------------|---|
| Single account system. | (1) What is called the "single account" system, that is, the ordinary system adopted by business men, according to which profits are to be ascertained by a balance-sheet, including by reference a profit and loss account. |
| Double account system. | (2) The double account system for many years advocated by an eminent legal writer, according to which all companies under the Act are to be assumed (contrary to the fact) to keep a capital account and a revenue account, and those accounts are to be regarded as distinct accounts, and for the purpose of determining profits, accretions to or diminutions of capital are to be disregarded, but loss on revenue account is to be made good out of subsequent revenue. See <i>infra</i> p. 889. |
| <i>Lee v. Neuchatel.</i> | (3) The system propounded by the Court of Appeal in <i>Lee v. Neuchatel Co.</i> , 41 C. D. 1; according to which, whenever the |

ordinary revenue of the company for any specified period exceeds the ordinary outgoings of the company for such period, the excess is to be regarded as profit available for dividend, even though the revenue be derived from a wasting property, which, in the course of a few years, will be exhausted, and even though the company has lost capital during the same period. See *infra*, p. 890.

- (4) The system propounded by the Court of Appeal in *Verner v. General and Commercial Trust*, (1894) 2 Ch. 239: according to which the net revenue of any specified period is to be regarded as profit available for dividend, subject to the important qualification that, whilst loss or depreciation of "fixed" capital (*infra*, p. 894) need not be taken into account, loss or depreciation of "circulating" capital must be taken into account, and debited to profit and loss account in ascertaining profits. See *infra*, p. 893 *et seq.*

*Verner v.
General and
Commercial
Trust.*

1.—The Single Account System.

According to this system, the profits for any particular period are to be ascertained by a profit and loss account and a balance-sheet showing the true financial position of the company and the result, whether in the shape of profit or loss, of its transactions during such period. The balance, whether to the debit or the credit of profit and loss account, appears as an item in the balance-sheet; and the balance-sheet is not a capital account showing, as a matter of history, how the capital contributed has been applied in the past, but a living account showing the true financial position of the company at its date, and the difference in amount between the assets on the one hand and the debts, liabilities and paid-up capital on the other hand.

1. As to single
account
system.

Everything depends, as in an ordinary partnership, on how the balance-sheet works out. The mere fact that the profit and loss account (disregarding losses and depreciation) shows a credit balance is not treated as establishing the fact that the company has made a profit during the period, since that balance may, in the balance-sheet, be counterbalanced by an equivalent or greater loss of capital sustained during the year [or previously, unless, indeed, the previous loss shall have been written off].*

In this system paid-up capital is treated as a liability; not that the company is really a debtor to its shareholders in respect of capital, any more than a firm is to its members, but because "if you want to find out how you stand, whether you have lost your money or not.

* The same result is very commonly arrived at by debiting the profit and loss account with loss and depreciation, and crediting it with gains and receipts, whether extraordinary or ordinary.

you must bring your capital into account somehow or other." Per Lindley, L. J., *Lee v. Neuchatel Asphalte Co.*, 41 C. D. p. 23.

According to this system, if a leasehold colliery, or a patent or other wasting property is acquired, it appears as an asset in the balance-sheet at cost price, and as and when any depreciation takes place it is written down, or, what comes to the same thing, a depreciation fund is established and the amount thereof is placed on the other side of the balance-sheet.

And if the company sustains a loss in any other way, *e.g.*, by the loss of one of several vessels representing a part of its assets, the item "by value of vessels" in the balance-sheet will be written down accordingly, or the amount can be written off reserve.

On the other hand, if the value of the company's property goes up, and the company is satisfied that the increase in value is to be regarded as a permanent increase, the property may appear on the balance-sheet as an asset valued at the increased figure.

Nevertheless, it would be entirely contrary to practice to write up or down the value of a permanent instrument of profit, *e.g.*, a tramway, or factory, or building, merely because the value of labour and materials has gone up, or because the business has been more or less successful, or to write up or down any assets in sympathy with what are or may be mere temporary fluctuations in market prices or values.

So, also, if the company by its expenditure creates a new asset, *e.g.*, a patent or a concession, that asset may be brought into the balance-sheet at some figure not exceeding its estimated value.

And even goodwill, whether bought or created, may be an asset to be reckoned in order to determine the true financial position of the company. Thus, in *Murray v. Bush*, L. R. 6 H. L. 37, the deed of settlement of an insurance company provided that the company should be dissolved if the losses absorbed the reserve fund and 80 p.c. of the paid-up capital, and the question arose whether the contingency had happened. Lord Cairns considered that the goodwill which had been created by the company ought to be brought into account; "and whether that goodwill should be estimated, as it is stated to have been estimated by a valuator, as of the value of three years of their annual premiums, or at a smaller, or at a larger sum, I need not stop to inquire. It is abundantly evident that the goodwill of the concern as a growing concern was worth some substantial sum." See *Barrow Hematite Steel Co.*, (1900) 2 Ch. 846, as explained in *Hoare & Co.*, (1904) 2 Ch. 208.

This is the system adopted, with more or less modification, by all the banks and all the insurance companies, and also, in fact or ostensibly, by almost all the companies under the Act of 1908.

There is a considerable body of legal authority in favour of the single account system.

It seems to be the system which, in *Stringer's case*, 4 Ch. p. 475,

was treated as the proper system of ascertaining profits. In that case Lord Justice Selwyn considered that the company—

"would have been justified in declaring a dividend, provided they had put a fair, and no more than a fair, value upon the ships and other assets which they actually had. Taking it one step further, and assuming the case that several of the ships had been lost, that the company was bound to put down, as they did put down, their proportion of that loss as being a loss upon this balance-sheet, the other two-thirds of the loss were to be covered by the responsibility and guarantee of the *Confederate* government, and, according to the view of the learned Vice-Chancellor, inasmuch as until the end of the war the value of that guarantee could not be ascertained, no dividend could be declared. I confess I am unable to agree with that view. I think that under those circumstances the company was fully justified in putting a value on the ships and on the *Confederate* debt. . . . I think the company was justified in doing that which in truth is done in almost every business, namely, taking the facts as they actually stood, and forming an estimate of their assets as they actually existed, and then drawing a balance so as to ascertain the result in the shape of profit or of loss."

If, as suggested by the advocates of the other systems, profits are to be ascertained without regard to loss or depreciation of capital or fixed capital, what could the learned judge have meant by these words? He was dealing with a case in which there was evidently a balance-sheet of assets and liabilities, and he considered that this was a proper mode of ascertaining "the result in the shape of profit or loss," and he incidentally recognized the fact that in thus ascertaining profits the company was doing "that which in truth is done in almost every business."

So, in *Rance's case*, 6 Ch. 104, James, L. J., said that the company had only been in existence for eight months when a bonus was declared —

"a bonus which, of course, could only be lawfully made out of moneys which had been earned or believed to have been earned in the way of profit. . . . How was this done? Was there any attempt to make a balance-sheet or profit and loss account in such a way as any mercantile body, and certainly any insurance company, ought to have done? . . . The directors simply had before them the cash balance of the receipts and payments, and, without making the slightest provision on that account for anything whatever, they proceed out of the balance to declare this bonus. I quite agree that it would have been different if there had been, as there ought to have been, in the ordinary course of business, a balance-sheet *bonâ fide* made out with proper assistance, so as to ascertain the true state of the company."

Here, again, we have an eminent judge, well versed in business matters, declaring that "there ought to have been a balance-sheet *bonâ fide* made out with proper assistance so as to ascertain the true state of the company." If for the purpose of ascertaining profits the loss of fixed capital may be disregarded, what could the learned judge

have meant by requiring a balance-sheet in order to ascertain profit. Can it be that both these learned judges were under a misapprehension as to the law?

So also in *Helby's case*, 2 Eq. 175, Kindersley, V.-C., said

"A balance-sheet or summary of accounts would show, on the one hand, all the assets, and, on the other hand, all the liabilities of the company, and it was only on this sort of statement that any safe conclusion could be drawn as to the question whether there had been any profit for the half-year or not, and whether any and what dividend should be declared."

(Chitty, J., in *The Midland Land and Investment Corp.*, 8 Nov. 1886, said—

"In declaring a dividend, in my opinion, in trading concerns, the directors are entitled to put an estimate on the value of their assets from time to time, in order to ascertain whether there is or is not a surplus remaining after providing for liabilities [including, of course, paid-up capital]; and where they make those valuations from time to time on a just and fair basis, and take the precautions which ordinary prudent men of business engaged in a similar business would do, they are entitled to treat the surplus thus ascertained profit."

See further extract, *infra*, pp. 904—906.

So, also, in *Robinson v. Ashton*, 20 Eq. 28, Jessel, M. R., said: "in the absence of special agreement, the rise and fall in the value of fixed plant or real estate belonging to a partnership was as much profit or loss of the partnership as anything else."

And the same judge, in another case, said: "No balance-sheet can be made out for any useful purpose without distinguishing good bad, and doubtful debts." *Frank Mills* 23 C. D. 57.

There is good reason to believe that Jessel, M. R., considered that the single account system was the proper system, and acted on that in ascertaining profits a company was bound to take into account and make good loss or depreciation of capital.

Thus in *Ebbw Vale Co.*, 4 C. D. 827, that learned judge observed: "I considered it necessary to cancel lost capital in order to enable the company to apply current income to the payment of dividend after the passing of the Companies Act, 1877, and in making that requisite order sanctioning the reduction of capital, the court was guided by the Act, as appears above, p. 859, that 'the power conferred by the Act was extremely beneficial, inasmuch as it enabled the company to declare dividends where but for the Act no dividends would have been possible'—thus indicating clearly his view of the object and purpose of the Act. And see observations of B. in *English and French Exploration Co.*, (1902) 2 Ch. 845, 851.

So also in *Davison v. Guller*, 16 C. D. 347, the same learned judge (Jessel, M. R.) held that there could be no profit until proper pro-

vision had been made for depreciation. That was the case of a tramway, and his Lordship considered that in every year provision should be made for depreciation, and so it was in the case of a warehouse: supposing a warehouse-keeper should find, at the end of the first year, that he had no provision to expend money in repairs, but that, by reason of the usual wear and tear of the warehouse, it was 1,000*l.* worse than it was at the beginning of the year, he would set aside 1,000*l.* for a repair, or renewal, or depreciation fund before he estimated any profits; because, although that is not required to be paid that year, still it is a sum which is lost, so to say, out of capital and must be replaced."

and although it is not easy to reconcile with this decision *Dent v. London Tramways*, 16 C. D. 344, it is generally acknowledged that the M. R. considered the single account system to be the proper mode of ascertaining profit. Per Stirling, J., *Verner v. General Commercial & Trust*, (1890) 2 Ch. 239, and *infra*, p. 89. Per Lindley, M. R., in *National Bank of Wales*, (1899) 2 Ch.

in *Direct Spanish Telegraph Co.*, 34 C. Div. 307, the company, having lost a considerable portion of its capital by the loss of one of its cables, was advised by counsel of the company (Sir Morrice afterwards Lord-Davey) that they could not sell or lend in any of the shares until they had ascertained the cable was in a proper state of repair and working, and that the company had made adequate provision for that purpose, or reduced the capital under the Comp. Act, 1877. See *infra*, p. 901. Accordingly, special resolutions were passed for cancelling the lost capital, and these resolutions were confirmed by the Court, although the cancellation undoubtedly involved a hardship to the holders of the preference shares; and yet no one ventured to contend that the company could be placed in a dividend-paying condition otherwise than by cancelling the lost capital.

In *Lubbock v. British Bank of South America*, (1892) 2 Ch. 19, the question arose whether certain assets of a company were profit and Chitty, J., said—

"This is a trading company, and I have before me a balance-sheet of 1891, to which I refer by way of illustration to show how the accounts of such a banking company are kept, and properly kept, in my opinion. I have before me the defendant company's accounts up to December, 1890. They put down on the one side their liabilities, treating properly the 500,000*l.* which is subscribed by the shareholders as a liability for the purpose of the income account, as against the assets which they put down on the other side. On the same liability side, they properly put their current liabilities and certain other liabilities and reserve fund, which the company according to its constitution is justified in making, and they add up the total amount of those liabilities. On the other side they put down their assets, and for the purpose of giving information to the shareholders they divide the assets into certain heads—'Cash at Bank,' 'Bank premises and managers' residences in Brazil and River

Lubbock v. British Bank of South America

Plate'—and then they add up the total on that side. They of course—because there is not a suggestion that those accounts are not kept with perfect propriety and perfect honesty—therefore put down on the asset side the money value of their assets, some being in money itself and some not. Then when the two sides of this account are compared, there is a surplus of 44,000*l.* shown, which goes, according to the accountant's regular method of keeping accounts, to the liability side, and represents the balance of assets over liabilities. Now what is the result of keeping an account in this form? The capital of the bank is intact, and the account shows it, and after providing for the capital there remains a surplus which rightly goes to the profit and loss account. All that the company is required to do by force of the Companies Act of 1862 is to keep its capital intact, and not to pay dividends out of its own capital; in other words, to keep that capital for its creditors and any others who may be concerned therein. That mode of keeping the account is an excellent illustration of the right way to divide profit and loss. Taking the figures on this account, this sum of 44,000*l.* is profit made and profit available within the Act of 1862 for division among the shareholders, unless there is something in the articles which would prevent the directors and prevent the company from dividing the sum which thus stands to their credit.

"I say I have great difficulty in following the first portion of the argument for the plaintiff, because it was said that what was sold was part of the capital of the company, and that what came in over and above the 500,000*l.* was an accretion to capital, therefore it must be kept intact as part of the capital. That has—with great respect to the counsel who put forward this argument—nothing to do with the matter. The sale being an authorized sale, it is immaterial what is the thing sold. I put, during the argument, a humble illustration. A man's business is to make boots and shoes. He has 10,000*l.*, which he takes into that business as his capital. He makes boots and shoes, and spends the whole of his 10,000*l.* in doing it, and he sells and gets back from his customers a certain sum on the sale. He compares then, assuming he has sold all, what he has got back with his expenditure in producing the boots and shoes and putting them on the market, and if he finds he has his 10,000*l.* (I am treating it apart from any question of debts outstanding, supposing it is a good solid sale), then his capital is intact, and the rest—if there is a rest remaining in his hands—is profit. On the other hand, if he has only 9,000*l.*, his capital is not intact, and he has lost. It is exactly the same principle that has to be applied to a trading company under the Companies Act, and the capital that has to be regarded for the purpose of the Act of Parliament is the capital according to the Act, and not the things, whether houses, goods, boots and shoes, or hats, or whatever it may be for the time being representing the capital, in the sense of being things in which the capital has been laid out. When the company is formed to work a wasting property, such as a mine or a patent, different considerations may apply, as was decided in *Lee v. Neuchatel Asphalt Co.* I am not dealing with any such special case."

And although this case was distinguished by Byrne, J., in *Foster v. New Trinidad Co.*, (1901) 1 Ch. 208, *supra*, p. 865, his Lordship in no way impugned the principle of the decision.

Kay, L. J., in *Verner v. General and Commercial Trust*, (1894) 2 Ch. 268, said—

"I should be sorry if it were held that a joint-stock trading company can properly estimate their profits in any way differing from that in which an individual, or partnership of individuals, carrying on a similar business would

do. An ordinary trader takes a yearly account of all the capital employed in his business, allows for any loss or depreciation in value, and carries the balance to the profit and loss account, from which he makes out the profit or loss of the year. In this mode a loss or depreciation of such capital affects directly the profit of the year, which is thereby diminished. But if upon the whole capital account there is a gain, this goes to swell the year's profits. In my opinion a joint-stock trading company should do the same."

See further, *infra*, p. 892.

In the decisions relating to income tax, various expressions occur which tend to support the single account system.

Thus in *Knowles v. McAdam*, 3 Ex. Div. 23, Kelly, C. B., in the course of his judgment, said—

"What is the balance of the profit or gains? Take the simplest case. A man buys a bale of cotton for 20*l.* and sells it again for 25*l.*, no expenses being incurred except the price of the bale. His balance of profit is 5*l.*, which remains to him after having repaid himself everything he paid to obtain the bale. . . . Suppose a merchant dies and bequeaths to his son a warehouse containing 20,000 bales of cotton; the son carries on the trade and sells 1,000 of those bales. Is his profit what he receives for those bales without any deduction? No; his profit is the price at which he sells less the price he has paid for what he sells, or, if he has not bought it, less what he would have had to pay if he had bought it. Apply this principle to the case of a coal mine. Suppose a man pays 1,000*l.* for a lease of a mine for one year only. At the end of that year he has got all the coal in the mine and sold it for 1,200*l.*, the expenses of labour and materials being 100*l.* Is his profit 1,100*l.*? It would be an abuse of language to say so. His profit is what remains in his pocket after deducting the expenses, namely, 1,000*l.* for the liberty to get the coal and 100*l.* for the cost of getting it. That is, his profit is 100*l.* only. Now if that be true in the case of a lease for one year, it must be true in the present case, where the leases have an average of thirty-two years to run, and where the lessees get a portion of the coal year by year. There can be no difference in principle."

See also *Re Spanish Prospecting Co., Ltd.*, *supra*, pp. 868, 869.

No doubt it now appears that this mode of ascertaining annual profits or gains, though in strict accordance with the practice of business men, is not in accordance with the peculiar rules laid down in the Income Tax Acts (*Coltness Iron Co. v. Black*, 6 App. Cas. 329, *supra*, p. 87); but that does not derogate from the value of the above passage as indicating the view of the learned judge in regard to the ascertainment of profit for other purposes.

And this single account system closely accords, moreover, with the rules laid down or recognized by economists.

Views of
economists.

Thus McCulloch, in a passage approved by Lord Blackburn in *McCulloch v. Coltness Iron Co. v. Black*, *ubi supra*, says:—

"Profits must not be confounded with the produce of industry primarily received by the capitalist. They really consist of the produce or its value remaining to those who employ their capital in an industrial undertaking after all their necessary payments have been deducted, and after the capital wasted and used in the undertaking has been replaced. If the produce derived from an

undertaking, after defraying the necessary outlay, be insufficient to replace the capital exhausted, a loss has been incurred; if the produce is merely sufficient to replace the capital exhausted, there is no surplus—there is no loss; but there is no annual profit, and the greater the surplus is, the greater the profit."

Mill.

John Stuart Mill says:—

"The capitalist, then, may be assumed to make all the advances and receive all the produce. His profit consists of *the excess of the produce above the advances*; his rate of profit is the rate which that excess bears to the amount advanced."

Bonamy Price.

Bonamy Price says (Practical Political Economy):—

"The capital engaged in the business must be replaced in full by the products; for no business goes on permanently at a loss. We have seen that capital is consumed in producing; capital is wealth; and there must be restoration of such wealth as is destroyed not by enjoyment, but in creating other wealth. If that new wealth were not forthcoming there could be no motive to apply any wealth to capital. *Profit, which is reward, cannot begin till the replacement of the things consumed has been completed.* . . . Endless unforeseen causes may convert hope of profit into loss. In some operations, especially in farming, the product may not appear at all after all the outlay for procuring it has been incurred. Now all such risks for the restoration of the capital consumed must be met by an adequate insurance embodied in an increase of price. By some writers this insurance is regarded as a deduction from profit; but the more correct way of viewing it is to consider it as an item in the cost of production, as an expense included in it."

Sidgwick.

Sidgwick (in his Principles of Political Economy) points out that, in order to understand what is profit, it is necessary to form an exact notion of capital, i.e., of wealth, employed to bring a surplus or profit.

"To attain this result, let us begin by asking what is exactly meant from the point of view of the individual capitalist by 'wealth employed to bring a profit.' It does not mean that the wealth is necessarily in the form of instruments or materials for making new wealth, or in the form of food, clothing, &c. for the labourers who are using the instruments or materials; for, as we have seen, it does not matter to the individual whether his wealth is used productively or unproductively so long as he gets his profit. It merely means that the individual is using his wealth—either personally or by lending it to others—in such a way that he continually finds himself possessed of THE EQUIVALENT of what was originally devoted to such use, together with some additional wealth, *this additional wealth being what is called profit.* . . .

"We have, therefore, first to ascertain what portion of a man's wealth is being employed with the aim of making its owner continually RICHEN, and then to distinguish the capital from the profit. In the case of wealth that has been lent to some one else there is of course no difficulty, as the sum which the debtor pays for the use of the wealth is clearly profit, and the sum which he is bound to replace clearly capital. And the line drawn in this case can be ideally extended to include the case where the wealth has been spent in purchasing a perpetual annuity; for though here there is no one under legal obligation to

pay at any fixed time an equivalent for the principal, still actually the annuity can be at any time sold at its market value, so that we may regard this possible price as the capital. In this case, however, the price at any time may be less or more than the sum originally spent, and, therefore, in calculating profit, we have to subtract from or add to the sums annually received a sum sufficient to compensate for the difference."

Again, Professor Marshall in his *Principles of Economics*, Vol. I., p. 142, defines profits thus:—

"When a man is engaged in business his profits for the year are the excess of his receipts from the business during that year over his outlay for the business; the difference between the value of his stock and plant at the end and at the beginning of the year being taken as part of his receipts or as part of his outlay, according as there has been an increase or decrease of value."

It has, indeed, been suggested in the Courts that economists consider that loss or depreciation of what is called "fixed capital" (see *infra*, p. 884) should not be taken into account in ascertaining profits, but, as appears above, this is not the case. See also *infra*, p. 901.

Economists do not disregard depreciation:

Again, it has been suggested that economists consider that funds expended in the acquisition of "fixed capital" (*infra*, p. 884) are to be treated as sunken and gone, so that anything recovered in the way of income is so much profit; but this is not so, for the economist, like the business man, treats the capital sunk as represented by and re-appearing in the assets, whether in the shape of goodwill, or connection, or undertaking, which the expenditure has brought into existence or developed.

or treat money expended in fixed capital as lost.

Thus, Sidgwick says (*Principles of Political Economy*):—

Sidgwick.

"This leads me to consider a source of profit noticed in a preceding chapter, which exhibits the immaterial results of labour and expenditure as still more clearly separate from any material capital than in the cases just discussed—I mean, the saleable article called 'goodwill' or 'business connection.' Let us take, for example, the business of publishing a newspaper. The sale of a newspaper when it first starts is ordinarily so limited that its proceeds do not repay the current expenses of production, so that the business has to be carried on for some time at a loss. Hence, in order that the undertaking should be on the whole a profitable one, it is necessary that the proceeds of the sale should ultimately be sufficient to pay profit not only on the material capital actually employed in production, but upon all the wealth and labour that has been spent without return in the earlier years of the undertaking. The business may be regarded as having capital sunk in it which would be recovered in its price if it came to be sold, though it is actually represented merely by a certain habit of purchasing the newspaper that exists in the community at large. This potential price is properly reckoned as part of the wealth and capital of the individual owning the business."

Fixed and
circulating
capital.

In connection with the above suggestions, and what is said, *infra*, p. 903, it may be convenient here to refer to the distinction between "fixed" and "circulating" capital which is to be found in writers on political economy, and has been adopted by learned judges.

The notion that this distinction had some bearing on profits and dividends was first put forward in the Courts by the defendants' counsel in *Lee v. Neuchatel*, 41 C. D. 1. "The appellant forgets the distinction drawn by economists—which is a very substantial one—between fixed capital—the money expended in purchasing which is sunk once for all—and circulating capital, like stock in trade, which, in the ordinary course of business, is parted with and replaced by other capital." In that case the Court abstained from relying on the distinction thus drawn, and laid down the law in terms far beyond anything counsel had argued for; and in *National Bank of Wales*, (1899) 2 Ch. 629, 670, the same learned judge says, after citing *Lee v. Neuchatel Co.*: "What was lost there was fixed capital, and it is obvious that circulating capital, or any other money employed in earning returns must be deducted from them in order to ascertain how much of them can be regarded as profit."

But in *Verner v. General and Commercial, &c. Trust*, *infra*, p. 893, Lindley, L. J., in the Court of Appeal, laid great stress on the distinction, saying "that fixed capital may be sunk and lost, and yet that the excess of receipts over current payments may be divided; but that floating or circulating capital must be kept up, as obviously it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law." And the distinction is emphasized in *Bond v. Barrow Hematite Steel Co.*, *supra*, p. 866. What then is this distinction between "fixed" and "circulating" capital? Let us take, by way of elucidation, some extracts from the leading writers on political economy.

Adam Smith was the first to draw this distinction—

"If it (*i.e.*, stock) is employed in procuring future profit (as distinct from present enjoyment) it must procure the profit either by staying with him or by going from him. In the one case it is *fixed*, in the other it is a *circulating* capital." (*Wealth of Nations*, Pt. II. Ch. I.)

Ricardo altered the use of the terms, applying the name "circulating" to that which is frequently destroyed and has to be reproduced. He says (*Principles of Political Economy*, ch. 1, s. 5)—"In proportion as fixed capital is less durable it approaches to the nature of circulating capital. It will be consumed, and its value reproduced in a shorter time in order to preserve the capital of the manufacturer." But Mill and most other recent English economists distinguish circulating capital, "which fulfils the whole of its office in the production of which it is engaged by a single use," from "fixed capital,

which exists in a durable shape, and the return to which is spread over a period of corresponding duration." Marshall adopts these definitions.

Bonamy Price says, in his *Practical Political Economy*—

"Capital is divided into two classes, founded on a distinction pointed out by Adam Smith. He classed capital into circulating and fixed. Circulating capital is that which is consumed by a single use, and re-appears in full in the products which it has created. Thus the food of the gardener is restored in the potatoes dug up. The coals burnt in the factory, and the iron-ore which has been dissolved, re-appear in the pig-iron created. Fixed capital is that which is not entirely consumed by a single use, which is capable of doing its work more than once, and consequently does not require that its produce should, on a single use, restore it in its integrity.

"Circulating capital derives its name from its rapid movement. It is applied, then destroyed, and then recovered. A master carpenter sends his man to make repairs in a house. The work takes a day, and wood and nails are used up. When the man leaves at night the job is paid for. The wood, nails, and the man's wages destroyed the carpenter's capital. He receives it back again in the money received, or, rather, in the things which that money purchases. . . . But a distinction of importance must be drawn here. There is no such thing as fixed capital in an absolute sense. A part of what is called by this name is really circulating capital. The wear and tear of the engine and the building of the merchant ship and the cart horse are pure circulating capital, as truly as the coals which generate the steam. The circulation is completed by repairs, and repairs are only the capital destroyed in a machine by working re-appearing in its renovated state. These repairs are charged upon the goods made in their place. They enter into the cost of production. In the case of a cart horse and similar instruments there are no repairs, but the depreciation in its value is met by an annual item added to the cost of production. A farmer who employs twelve horses, each of which is expected to last twelve years, must be repaid the cost of a horse each year as replacement of capital used up."

Macleod in his *Theory and Practice of Banking*, p. 77, says that—

"Capital itself may be used in two distinct ways:—

"(1) The capitalist may retain it in his own possession, and make a continuous series of profits by its use, and consequently the capital is only replaced with the profits in a series of instalments. Capital used in this way is termed 'fixed capital.'

"The capitalist may part with it entirely; and replace the entire capital and profits in one operation; hence it goes away from him entirely. Capital used in this way is termed 'floating' or 'circulating' capital.

"It must be clearly understood that it is according to the intention of the person who uses it, and the purpose and method in which it is used, that it receives either of these names. The same article may be floating capital in the hands of one person, and fixed capital in the hands of its next possessor, if the first produces it for the purpose of selling it outright, and the second purchases it for the purpose of making profit by its use.

"This distinction is often overlooked, and the term 'fixed capital' is often applied to articles of a particular nature, and floating or circulating capital to articles of another nature. . . .

"It must be carefully observed that Smith's distinction of certain articles as fixed capital, and of other things as floating capital, is erroneous.

"Thus houses, lands, &c. are by no means invariably fixed capital. It is quite common for speculators to buy up land and build houses for the express purpose of selling them again. In the hands of these speculators, houses and lands so traded with are floating capital, because the entire property in them is parted with in one operation. But if a person buys land for the purpose of farming it himself for profit, or of letting it out to farmers, or buys or builds the houses for the purpose of letting them to tenants, then such houses and lands are fixed capital. . . .

"So a shipbuilder builds ships and sells them to a company. In the hands of the builders the ships are floating capital; in the hands of the company they become fixed capital. . . .

"If a person buys into the Funds or shares as an investment to produce an income, they are fixed capital. But there is a class of persons, called stock-jobbers, who buy this kind of property with the intention of selling it again with a profit, and they keep a stock of it as traders do goods. In the hands of such persons such property is floating capital. . . .

"It is therefore incorrect to apply the terms 'fixed' and 'floating' capital to any object, whatever its nature may be, unless we know the intention of its owner in using it.

" . . . The only species of property which is necessarily floating capital is money. Money, to be used, must necessarily be paid away and change masters. Almost all other property is capable of being used in either way at the will of the owner."

The distinction between fixed and circulating capital we thus see does not, according to economists, depend on the nature of the asset, or on its durability, but on the mind and intention from time to time of its owner. We also see that it is extremely difficult to determine what is and what is not fixed capital. Thus shares or other assets are sometimes bought by a company without any distinct determination as to whether they shall be kept or resold; and accordingly whether they are fixed or circulating capital is an open question. And even where assets are required with a specific intention, there is no obligation to record that intention—indeed, to do so would be contrary to all practice.

Furthermore, intentions change. Thus, suppose a company formed to buy, sell, hold by way of investment, and deal in shares, and that it acquires some shares intending at the time to sell. They are at this stage circulating capital, but if they happen to fall in price the company may change its mind and determine to keep them, and thereupon they become fixed capital. A few months afterwards the company may determine to sell them, and thereupon they return to the category of circulating capital.

So as regards "fixed" capital, there is no such thing as fixed capital in an absolute sense. In many cases a part of what is called by this name is really circulating capital.

Act of 1877.

Lastly, it is a matter of notoriety that the Companies Act, 1877 (replaced by sect. 46 of the Companies (Consolidation) Act, 1908),

whereby power was given with the sanction of the Court to cancel capital "which has been lost or is unrepresented by available assets," was passed to remedy the particular grievance which was supposed to exist, namely, that after a loss of capital by depreciation a limited company could not pay dividends unless and until the loss was made good, and could not, like a partnership, write off the amount and resume payment of dividends. This grievance had been accentuated by the decision of Jessel, M. R., in *The Ebbw Vale Co.*, 4 C. Div. 827. See *supra*, pp. 859, 880. *Ebbw Vale Co.*

The Bill for the Act of 1877, the outcome of the decision last mentioned, was referred to a Select Committee of the House of Commons, and from the evidence before that Committee it is clear that everyone supposed that the grievance which the Bill was to remedy was that where there was a loss of capital a company could not write down its capital by the amount of the loss but must make good the amount out of subsequent profits, and as we have seen, Jessel, M. R., in exercising in relation to the *Ebbw Vale Company* the powers given by the Act within a few months after it came into operation, took occasion to say explicitly what he understood to be the object of the Act, for in giving judgment his Lordship said that the power given by the Act was extremely beneficial, inasmuch as it enabled the company to declare dividends where but for the power no dividends would be possible.

Yet now it is not uncommon to argue that the real object of the Act was not to enable dividends to be paid which otherwise could not be paid until loss was made good, but to enable a company to reduce its capital so that the subsequent dividends might be paid at a higher rate per cent. on the reduced capital than the rate which the company would have been able to pay on the unreduced capital. In fact both benefits result from the Act.

An objection sometimes made to the single account system is that it involves periodical re-valuations which may be difficult and, perhaps, impracticable. As to this, it is generally considered that there need be no re-valuation of assets of a permanent character so long as there is no reason to suppose that they have diminished in value; and that what are *bonâ fide* regarded as casual and temporary fluctuations in the value of such permanent assets should be disregarded. Objections.

Even if a re-valuation is to be made, it is generally considered that in determining the value it is not necessary or proper to regard merely selling value. It may be that the asset could not be sold, or could not be sold for what it cost, and yet, as part of a going concern, it may to the company be worth its cost. On the other hand, if a company gives 20,000*l.* in cash or paid-up shares for a patent, and the patent is held void, it is generally considered that such a loss cannot be disregarded, unless, indeed, it can be set off against some increase in the value of another asset, or some newly created asset, or as goodwill.

Another objection which the advocates of the other systems sometimes raise is, that the single account system gives a sanction to the writing up of the value of permanent assets so as to accord with their estimated value for the time being, and that this is likely to lead to payment of dividends out of profits which only exist by way of estimate; in other words, is open to abuse.

The answer to this criticism is that writing up the value of permanent assets, and carrying the increase to profit and loss, is unquestionably a departure from ordinary commercial practice. It may be justified in special cases, and great numbers of concerns, including many banks, insurance companies, and trading companies, do, as a matter of fact, write up some classes of assets from time to time, *e.g.*, when they act on the rule of taking them at market prices of the day; and it is clear that there is no law against that process.

There is clearly also no obligation—though there may be a temptation—to write up permanent assets, and even if they are written up it does not follow that the increase in value will be divided. There is no obligation to divide, and there is an obligation—a very strong obligation—not to pay dividends otherwise than out of profits.

The single account system has this merit too that it follows the practice adopted in an ordinary partnership. In such a partnership there are no profits available for division till loss has been made good, and it matters not whether loss is incurred on capital account or revenue account, for it is a question not of revenue, but of profit. No doubt, with the consent of all the partners, the revenue, or, for that matter, the capital, can be divided without making good the loss, but *primâ facie* a loss has to be made good out of subsequent earnings or fresh contributions, or must be written off, before divisible profits can be made. So, also, upon a dissolution of an ordinary partnership nothing can be taken by way of profit until lost capital has been made good. See the Partnership Act, 1890 (53 & 54 Vict. c. 39); *Nowell v. Nowell*, 7 Eq. 538.

And in *Rishton v. Grissell*, 5 Eq. 326, where an agreement had been made that the plaintiff, as manager, should have a percentage on the profits of the defendant's business, it was held by Page-Wood, V.-C., that the defendant was entitled to charge the profit and loss account in every year with sums representing the depreciation arising from the running out of the lease and the waste of plant and machinery.

It is, therefore, not surprising that the single account system should have been so generally adopted by companies, "for, after all," as

* When at the Bar, Lord Davey in one case advised that a company having lost one capital asset whilst other capital assets had largely appreciated, it was allowable to have a resolution and to adopt a new balance-sheet on the footing thereof, and thus to extinguish the loss.

Jessel, M. R., said in *Griffith v. Paget*, 6 C. D. 515, "these companies are commercial partnerships, and are, in the absence of express provisions, statutory or otherwise, subject to the same considerations." And see cases *supra*, pp. 857 *et seq.*

2.—The Double Account System.

2. Double account system.

According to this system, the profits of an undertaking are the excess of revenue receipts over expenses properly chargeable to revenue account; the capital account and revenue account are to be kept distinct, and for the purposes of determining the profits we are to disregard accretions to or diminutions of capital. Accordingly, loss on capital account *need not*, whereas loss on revenue account paid out of capital *must*, be made good out of subsequent revenue or otherwise.

The principal objections to this system are—

1. That it draws a distinction between loss on capital account and loss on revenue account, which appears to have no foundation in principle. Why should it be necessary, in determining profits, to make good out of revenue a loss of capital on revenue account if it is not necessary to make good a loss on capital account? Why should it be necessary to make good gradual loss, and yet not necessary to make good a sudden or extraordinary loss? The result of the loss in either case is exactly the same, namely, that the paid-up capital is *pro tanto* diminished. On what principle, then, is the distinction between gradual and sudden loss to be supported? It is not supported by the cases. The views expressed by the Lords Justices, in *Lee v. Neuchatel Co.*, and *Verner v. General and Commercial, &c. Trust*, *infra*, and in *Bosanquet v. St. John Del Rey Co.* (1897), 77 L. T. 207, and *National Bank of Wales*, (1899) 2 Ch. 629, 670, are opposed to any such distinction.

2. That it lays down as an arbitrary rule that "accretions to capital" are to be disregarded in determining profits; but there is no authority for such a proposition, and the every-day practice of the commercial world negatives the existence of such a rule; and now the Courts have held that there is no such rule. *Lubbock v. British Bank of South America*, (1892) 2 Ch. 198; *Verner v. General and Commercial, &c. Trust*, (1894) 2 Ch. 239; *Foster v. New Trinidad Co.*, (1901) 1 Ch. 208.

3. That it does not even require loss of circulating capital to be made good, whereas, at any rate to this extent, the Court of Appeal considers that loss must be taken into account. See *Verner v. General and Commercial, &c. Trust*, *supra*, and *National Bank of Wales*, (1899) 2 Ch. 629, 670, and *infra*, p. 897; also *Bond v. Barrow, &c. Co.*, (1902) 1 Ch. 353.

4. That it assumes that every company has, or ought to have, a capital account and a revenue account, whereas such a mode of ascer-

taining profits is only adopted by a comparatively few concerns, such as tramways, trust investments, and other companies of a special character.

5. It makes the Companies Act, 1877, superfluous: for if this is the proper mode of ascertaining the profits, it follows that there was no real necessity for the passing of that Act, whereby power was given to a company to reduce capital lost or unrepresented by available assets, for what was the use of reducing capital if loss or depreciation did not in any way affect the payment of dividends?

3. Double
account
system (Court
of Appeal).

*Lee v.
Neuchatel Co.*

3.—*The system approved by the Court of Appeal in Lee v. Neuchatel Co., 41 C. Div. 1.*

In this case the company had a nominal capital of 1,000,000*l.* in 10*l.* shares, and had issued the whole of these shares as fully paid up, as the consideration for the transfer to it of an asphalt concession, and other assets. It was alleged by the plaintiff, but not proved, that the concession and assets had become depreciated, and that a large part of the capital had been lost, and that the company ought to be restrained from paying a dividend (which it proposed to pay out of its revenue) until the loss or depreciation had been made good. It was, however, held by the Court of Appeal, affirming the decision of Stirling, J.—(1) that there was not sufficient evidence of depreciation or loss; (2) that if the property of the company was not sufficient to make good its share capital, there was no obligation to make it good out of revenue; and (3) that although the property was a wasting property, there was no obligation to make any provision for depreciation. Cotton, L. J., it is true, treated the case as special. "Of course the present case is very different from that of a company where money has been paid on all the shares. That case is open to different constructions. All that was taken by the company from the first were the assets. But his Lordship agreed that there was no obligation, under the Act of 1862, to make good lost capital out of revenue.

And Lindley, L. J., considered that it was wholly immaterial whether there had or had not been a loss or depreciation of capital, inasmuch as a company may apply its net revenue to payment of dividends, even if it has lost the whole of its capital; and Lopes, L. J., concurred, being of opinion that capital and revenue accounts are distinct, and that for the purpose of determining profits, accretions to and diminutions of capital are to be disregarded.

In the above case Lord Justice Lindley put the case of a company which had sunk 250,000*l.* in acquiring a property "which, if put up for sale, would, perhaps, not yield 10,000*l.*," and said that in such case—

"So long as they pay their creditors there is no reason why they should not go on and divide profits, so far as I can see, although every shilling of the capital may be lost."

And again his Lordship said—

"If a company is formed to acquire and work a property of a wasting nature—for example, a mine, a quarry, or a patent—the capital expended in acquiring the property may be regarded as sunk and gone, if the company retain assets sufficient to pay its debts. It appears to me there is nothing whatever in the Act to prevent any excess of money obtained by working the property over the cost of working it from being divided among the shareholders, and this, in my opinion, is true, although some portion of the property itself is sold, and in some sense the capital is thereby diminished. If it is said that such a course involves payment of dividend out of capital, the answer is that the Act nowhere forbids such a payment as is here supposed. . . . But it is, I think, a misapprehension to say that dividing the surplus, after payment of expenses of the produce of your wasting property, is a return of capital in any such sense as is forbidden by the Act."

If this system is correct, no balance-sheet is necessary in order to ascertain divisible profits; all that you want is an account of income and expenditure. And, although a company may not directly pay dividends out of capital, there is not by this method the slightest objection, in point of law, to its doing so indirectly, for, according to Lord Lindley's view, there is nothing in the Act to prevent that.

Accordingly, if a company with a paid-up capital of 100,000*l.* likes to buy, say, ten acres of coal for 100,000*l.*, and works one acre per annum, and, after paying expenses of raising the coal and of management, has, say, 15,000*l.* per annum in hand, that sum is profit available for dividend, and there is no obligation on the company to treat any part of it as capital, and when at the end of ten years the coal has been worked out, and the 100,000*l.* has disappeared and the capital has thus become reduced to *nil*, we are not to regard this as a reduction of capital prohibited by the Act! But is it not obvious that each year's income in such a case includes a return to the company of part of its capital outlay, and therefore that the company is each year paying dividends consisting in part of capital? What would become of debenture holders whose principal was payable, say, fifteen years after issue?

The Court got at this strange result on the theory that the mode in which profit is to be ascertained is by the law left to the particular company, and there is no objection to a clause in the articles of association to the effect that a company shall not be bound to make good wasting property, or that the net revenue shall be available for dividend notwithstanding loss of capital. (See Forms 296 and 297, *supra*.) It is clear, however, that the articles cannot effectually authorize that which would amount to a reduction of capital. *Trevor v. Whitworth*, 12 App. Cas. 409; *Re Sharpe*, (1892) 1 Ch. 154. And this being so, it is not easy to conceive that they can effectually sanction that which is only an indirect mode of authorizing the return of capital.

It should, however, be added that Lindley, L. J., appears subsequently to have modified to some extent the views above referred to, and it has become abundantly clear that those views are not shared by some other learned judges, and that they do not commend themselves to the common sense of accountants, economists, or business men in general.

Thus we find Chitty, J., adopting an entirely different rule as to the proper mode of ascertaining profits (p. 879); we find Stirling, J. following *Lee v. Neuchatel* with hesitation (p. 893), and evidently against his own judgment; we find Kay, J., in effect (p. 880), disclaiming the doctrine laid down by Lindley, L. J., and it is well known that Rigby, L. J., whilst at the Bar, advised, on more than one occasion, that income was not profit when it was counter-balanced by loss or depreciation. See also *Dovey v. Cory*, (1901) A. C. 477. Lindley, L. J.'s view has also provoked much unfavourable comment from accountants, bankers, and others.

Palgrave.

The following observations in Palgrave's Dictionary of Political Economy, sub tit. "Capital," are very pertinent and to the point:

"Legal ruling that capital need not be replaced from profits.—A trader's assets are in most cases wholly or partly of a perishable nature. Before ascertaining the profits derived from such assets in a given year, provision ought to be made for the depreciation estimated to have taken place during that year. If, for instance, a person who invested 1,000*l.* in the purchase of a patent having five years to run, and producing an annual profit of 500*l.*, treats the whole of the annual 500*l.* as the profit of the respective year, he will find at the end of the five years that his source of income has disappeared. If, on the other hand, at the end of each year a sum of 200*l.* is carried to the credit of a sinking fund, and the remaining 300*l.* only are treated as income, the owner of the patent will, at the end of the five years, be able to invest his original 1,000*l.* in some other profitable manner. Where the facts are so very plain this seems almost a truism, but in many cases it is more difficult to distinguish between income in the proper sense and repayment of capital. The inquiry ought, however, always to be made and acted on. The importance of taking the depreciation of property into account in ascertaining the profits of a given year is even more obvious in the case of a company than in the case of a private individual. The gradual disappearance of wasting property must, in the end, materially damnify preference shareholders, debenture holders, and ordinary creditors, and must also cause great injustice as between the persons entitled to the income of shares for limited periods and the persons ultimately entitled to the property of the shares. It seems strange that, although the integrity of the capital of limited companies is in other directions most jealously watched by our Courts, the greatest laxity is allowed with reference to the valuation of assets of a wasting nature. In the leading case of *Lee v. Neuchatel Asphalt Co.*, 41 C. D. 1, it was held by the Court of Appeal that 'there is nothing in the Companies Acts to prohibit a company formed to work a wasting property, as, e.g., a mine or a patent, from distributing as dividend the excess of the proceeds of working above the expenses of working, nor to impose on the company any obligation to set apart a sinking fund to meet the depreciation in the value of the wasting property.'"

See also the article on "Depreciation," *ibid.*

4 - *The System approved by the Court of Appeal in Verner v. General and Commercial Trust, (1891) 2 Ch. 239.*

In this case the company was formed to invest its capital in stocks, funds, shares, and securities of various descriptions, and to apply the income in paying dividends. It had raised 600,000*l.* by the issue of share capital, and 300,000*l.* by the issue of debenture stock, and had invested the whole. The market price of some of the investments acquired fell, and others proved worthless, so that to the extent of at least 250,000*l.* the capital was not represented by equivalent assets; but the income from the investments, or from those which yielded an income, was in excess of the annual outgoings. On these facts it was held by the Court of Appeal, affirming the decision of Stirling, J., that the company might apply this excess income to the payment of dividend, notwithstanding the loss of capital or depreciation.

Verner v. General and Commercial Trust

Stirling, J., in his judgment, referred to what Lord, M. R., said in *Re Ebbw Vale Co.*, 4 C. D. 827, "as indicating his opinion to be that when loss of capital had occurred in a company governed by the Act of 1862, dividends could not be paid unless the loss was made good," and to the consequent passing of the Companies Act of 1877, which—

"does provide a means by which a company which has lost capital, or whose capital is, to some extent, not represented by available assets, may reduce that capital, and so be enabled properly to pay a dividend on the reduced capital; and we all know that to this process of reduction of capital for the purpose of enabling dividends to be paid, recourse has been largely had in practice. This, I am bound to say, seems to be a consideration to which great weight ought to be given, so much so that if I had not the guidance of the judgments of the members of the Court of Appeal in *Lee v. Neuchatel Co.*, 41 C. D. 1, I should probably come to the conclusion that the only proper course which could be taken by a company, constituted as the present company is, would be to present a petition, and obtain the sanction of the Court to a reduction of capital before a dividend was declared." But his Lordship said that such a view was inconsistent with the principles laid down by the Court of Appeal in *Lee v. Neuchatel Co.*, *ubi supra*, and, accordingly, applying those principles to the particular case, he held that it had not been made out that the payment of dividend was *ultra vires*, but he said, "I base my decision on the peculiar nature of the constitution of this particular company, and it is not to be assumed that I should have arrived at the same conclusion if I had been dealing with an ordinary trading company: if, for example, the object of the company had been to carry on the business of a stockbroker, and the investments had been the ordinary stock-in-trade of this business."

This doubting judgment was not entirely satisfactory to the parties to this very friendly action or to the various other companies interested, and accordingly the matter was carried to the Court of Appeal (Lindley, A. L. Smith, and Kay, L. J.J.) as an interlocutory appeal.

In the result the decision of Stirling, J., was affirmed.

Lindley, L. J., in delivering the judgment of A. L. Smith, L. J., and of himself, said that the broad question raised was whether a limited company which has lost part of its capital can lawfully declare and pay a dividend without first making good the capital which has been lost; that he had no doubt that it could, although it could not lawfully return paid-up capital to the shareholders.

"There is a vast difference," the learned judge went on to say, "between paying dividends out of capital and paying dividends out of other money belonging to the company, and which is not part of the capital mentioned in the company's memorandum of association. . . . If, therefore, the company has any assets which are not its capital within the meaning of the Companies Acts, there is no law which prohibits the division of such assets amongst the shareholders.

"Further, it was decided in that case (*Lee v. Newchattel Asphalt Company*)—and, in my opinion, rightly decided—that a limited company formed to purchase and work a wasting property, such as a leasehold quarry, might lawfully declare and pay dividends out of the money produced by working such wasting property, without setting aside part of that money to keep the capital up to its original amount.

"There is no law which prevents a company from sinking its capital in the purchase or production of a money-making property or undertaking, and in dividing the money annually yielded by it without preserving the capital sunk so as to be able to reproduce it intact either before or after the winding-up of the company. . . .

"But although there is nothing in the statutes requiring even a limited company to keep up its capital, and there is no prohibition against payment of dividends out of any other of the company's assets, it does not follow that dividends may be lawfully paid out of other assets regardless of the debts and liabilities of the company. A dividend presupposes a profit in some shape, and to divide as dividend the receipts, say, for a year, without deducting the expenses incurred in that year in producing the receipts, would be as unjustifiable in point of law as it would be reckless and blameworthy in the eyes of business men. The same observation applies to payment of dividends out of borrowed money. Further, if the income of any year arises from a consumption in that year of what may be called circulating capital, the division of such income as dividend, without replacing the capital consumed in producing it, will be a payment of a dividend out of capital within the meaning of the prohibition which I have endeavoured to explain.

"It has been already said that dividends presuppose profits of some sort, and this is unquestionably true. But the word 'profits' is by no means free from ambiguity. The law is much more accurately expressed by saying that dividends cannot be paid out of capital than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up, and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction, which I am endeavouring to explain, is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided; but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law."

Kay, L. J., however, whilst agreeing that in the special circumstances of the case the appeal must be dismissed, said: "I have not a very confident opinion in the matter, but on the whole I am not satisfied [i.e., in the circumstances of the case] that there is any legal obligation on the directors to replace lost capital out of income"; but, as appears from the passage cited from his judgment above, at p. 880, his Lordship disapproved of the double account system, and was of opinion that the profits of a joint stock trading company should be ascertained in the manner usual in the case of partnership concerns, viz., on the single account system, *supra*, p. 880.

Such was the not too encouraging result of this friendly action, in which the defendants had the great advantage of being sued by a plaintiff who was not unwilling to be defeated. Stirling, J., apart from the authority of *Lee v. Neuchatel Asphalt Co.*, *supra*, which was binding on him, was evidently against the payment of dividend in the circumstances, Kay, L. J., was not very confident that it could be paid, and Lindley, L. J., whilst in terms reiterating the paradoxical propositions laid down in *Lee v. Neuchatel Co.*, showed that he in effect qualified them considerably by laying down that dividend presupposes profit, and that loss of "circulating" capital must be made good in ascertaining profits.

The views expressed by the Court in *Vernor v. General and Commercial Trust* depart somewhat from the views expressed in *Lee v. Neuchatel Co.*, and appear to involve the following not altogether consistent propositions:—

- (1.) Dividend presupposes profit of some sort; but it is for the company to determine by its articles or by resolution, what sort of profits are available for dividends, and if they do so, the Court will not, subject to what follows, interfere, however illusory or unsound the principle adopted for arriving at profits may be.
- (2.) To divide the net income arising from a company's property is not to be regarded as in any sense a return of capital, even when the income arises from a wasting property acquired by an expenditure of capital, for instance, from a lease of ten acres of coal, one acre of which is worked out each year, unless indeed the wasting property is circulating capital. See *Bond v. Barrow Hematite Co.*, (1902) 1 Ch. 353.
- (3.) Therefore, though an express power in the memorandum to return capital to shareholders can only be exercised with the sanction of the Court, a power in the articles to apply the proceeds arising from a wasting property in paying dividends, is free from objection, although the result is the same.
- (4.) Loss or depreciation of "fixed" capital does not affect the profits available for dividend, or render it necessary to make good the same out of income. "Fixed capital" does not

Resulting propositions.

The regulations are to be followed subject to next paragraph).

Net income of wasting property is divisible as profits.

Express power in articles to apply such net income is equivalent to sanction of Court to reduce capital. Loss, &c. of "fixed capital" need not be made good out of income.

mean property physically fixed, but property which the company means to retain as part of its undertaking. See further, pp. 881 *et seq.*, *supra*.

Otherwise as to "circulating capital."

- (5.) But in ascertaining profit for a particular period, loss or depreciation of "circulating" capital during the same period must be taken into account. Circulating capital means here capital which performs its whole office in the production in which it is engaged by a single use, *e.g.*, the goods which the tradesman has for sale, he sells out and out and gets the money in exchange; the materials which the workman uses up in making repairs for a customer; the horses of a horse dealer.

Realized accretions of capital are divisible as profits.

- (6.) Accretions to capital, when realized, may be brought into the profit and loss account of the year and dealt with accordingly. *Lubbock v. British Bank of S. A.*, (1892) 2 Ch. 198. Compare *Foster v. New Trinidad Co.*, (1901) 1 Ch. 208 (*supra*).

Legal mode of ascertaining profits if regulations admit.

- (7.) A legal mode of ascertaining the profits of a particular period, if the articles so provide, is to take an account of the ordinary outgoings, and in so far as the receipts exceed the outgoings, and the loss of circulating capital during such period, the same may be treated as profit. But see *Dovey v. Cory*, *infra*.

- (8.) A balance-sheet need not disclose the true position of the company. It deals, as regards the assets, not with existing facts, but with past history. It shows what the particular assets cost, not what they are worth. Thus, if a company buys a property for 10,000*l.* and the value has fallen to 1,000*l.*, it will—on this hypothesis—be properly entered on the balance-sheet as property that cost 10,000*l.*, and it will remain at that figure even though each year, by consumption or otherwise, it depreciates more and more.

From this analysis of the judgment in *Verner v. General and Commercial Trust* it is plain that the Court of Appeal allowed the greatest possible latitude to shareholders, and afforded the least possible protection to creditors, and if the above propositions are all to be accepted as correct, it is obvious that the law is in a defective condition.

The system, commercially unsound

One thing is clear, *viz.*, that these decisions, whatever their authority as expositions of the law, did not pretend to touch the commercial or economical practice in such matters, and from that point of view, the systems of ascertaining profits which they sanction are so obviously unsound that men of business generally refuse to act on such systems.

Following these decisions came, in 1899, the decision of the Court of Appeal in

National Bank of Wales, Limited, (1899) 2 Ch. 629 (on appeal, *sub nom. Dorey v. Cory*, see *infra*, p. 899).

In that case the company was being wound up, and it was sought to make a former director, Mr. Cory, liable for alleged misfeasance or breach of trust in paying dividends out of capital, or making false statements in reports and otherwise which resulted in such dividends being paid. The defence was two-fold: (1) That he had acted honestly, and that if the dividends were paid out of capital he was not cognizant thereof, or that the statements complained of were false; and (2) that the dividends were not in fact paid out of capital, but out of revenue applicable to the payment of dividends.

As to (1), it appeared that Mr. Cory had acted on false information given to him by the officials of the company, and it was held by the Court that he was not guilty of a breach of duty in not discovering that those whom he trusted were misleading him. As to (2) it was held, in accordance with the principles laid down in *Lee v. Newchapel Co.*, 40 C. D. 1, and *Verner v. General and Commercial Co.*, (1894) 2 Ch. 239, that the dividends in question were not in fact paid out of capital. "What was done," said Lord Lindley, who delivered the judgment of the Court,

was this: the accounts were made up annually. Such losses incurred during the year as the directors recognized as losses were written off or provided for by carrying sums of money over to a reserve fund, and the balance of the receipts in any year over the outgoings in the same year, after making some allowance for debts and deductions for sums carried over to the reserve fund, were treated as the profits of that year, and were distributed as dividends; losses written off any year were not brought forward the next year, so as to diminish the profits of the next year, but were simply ignored, a fresh start being made every year and dividends being paid out of the excess of the annual receipts over the annual expenses. The effect of this was to throw all bad debts, written off and not provided for by an increase of the reserve fund, on to the capital: to diminish the paid up capital year by year, and nevertheless to keep paying dividends out of the annual receipts over the current expenses. It is obvious that such a procedure, if long continued, would ultimately exhaust the capital of the company, and the first disastrous year in which the current receipts exceeded the current outgoings would produce great embarrassment. Any dealing with the company's assets, however reprehensible, must be justified by the fact of being accompanied with paying dividends out of the paid up capital of the company. The paid up capital of a limited company cannot be lawfully distributed to the shareholders under the guise of dividends or otherwise. Even an ordinary resolution authorizing the payment of interest to shareholders on the shares paid upon their shares cannot authorize a payment of such interest out of capital see *Shelford*, (1892) 1 Ch. 151; but paid up capital which is lost can be made good in paying dividends, than in paying debts. Its loss renders the application of it impossible. There was no such dealing with the capital of the company in this case as to amount to an illegal appropriation

of it. Further, it is not possible for the Court to say that the law prohibits a limited company, even a limited banking company, from paying dividends unless its paid-up capital is intact. Suppose a heavy unexpected loss is sustained, which must be met if there are assets with which to meet it, the capital, even if it is capital, must, if necessary, be applied to meet it. Such an application of capital is a perfectly legitimate use of it. There is no law which in the case supposed prevents the payment of all future dividends until all the capital so expended is made good. Many honest and prudent men of business would replace a large loss of capital by degrees, and would reduce the dividends, but not stop them entirely, until the whole loss was made good. No law compels them to pay none at all. There are cases in which no honest, competent man of business would think of charging particular debts or expenses to capital.

"We are certainly not prepared to sanction the notion that all debts incurred in carrying on a business can be properly permanently charged to capital, and that the excess of receipts over other outgoings can be afterwards properly divided as profits, as if there had been no previous loss. No honest, competent man engaged in trade or commerce would carry on business on such a principle. But excluding cases in which every one can see that a particular debt or outlay cannot be reasonably charged to capital, it may be safely said that what losses can be properly charged to capital and what its income is a matter for business men to determine, and it is often a matter on which the opinions of honest and competent men will differ; see *Timothy v. Parrish*, 33 Beav. 336. There is no hard and fast legal rule on the subject.

"There can, however, be no doubt that, if expenses or payments are obviously improperly charged to capital, and are so charged simply to swell the apparent profits, and to make it appear that dividends may properly be declared, dividends declared and paid under such circumstances cannot be treated as being properly paid out of profits, and can no more be justified than if they were paid out of capital. This was determined in *Bloomfield v. Metropolitan Bank*, and has been acted upon in many other cases—e.g., *Rance v. Bank*; *Attford Bank v. Banking and Investment Society*; *Leeds Arcade Building and Investment Co. v. Shepherd*; *London and General Bank* (No. 2).

"It would seem that *Jenni. M. R.*, inclined to the opinion that a limited company could not pay dividends unless its paid-up capital was kept up; see *Ebbw Vale Steel, Iron and Coal Co.* But no decision has yet gone this far, and it has since been decided that dividends may be paid, even by a limited company, although its nominal capital is not kept up; see *Verner v. General and Commercial Investment Trust* and *Lee v. Neuchatel Asphalt Co.* What was lost there was fixed capital, and it is obvious that circulating capital, or any other money employed in earning returns, must be deducted from them in order to ascertain how much of them can be regarded as profit. If the returns do not exceed the money spent in procuring them (whether such money be called circulating capital or by any other name) there can be no profits, and no ingenious process of book-keeping can alter the fact. It is not denied that in this case the annual receipts did exceed the annual outgoings, and, the dividends having been paid out of the excess, the allegation that they were paid out of capital is not accurate. But, as already pointed out, it does not at all follow that the course adopted by the directors in declaring dividends year after year as they did was legally justifiable. It cannot be denied that the balance-sheets and profit and loss accounts concealed the truth, as now known, from the shareholders, and were, as it now turns out, grievously misleading. The shareholders were never told that the paid-up capital was being constantly diminished by bad debts, as now appears to have been the case. The shareholders were told every year that proper provision was made for such debts, and now that the case has been thoroughly investigated, it is really reduced to the question whether Mr. John

Cory was justified in making the statements he did, and in dealing as he did with debts which have now been ascertained to be bad. It is easy to be wise after the event, and there is danger in treating a director as knowing years ago what now appears to be the fact. But it is the duty of the Court to examine the state of things as they appeared to him when the dividends were declared, and to decide whether he was justified in what he did by what he knew or ought to have known. What he ought to have known is as important as what he knew.

The views thus expressed did not advance matters much beyond the earlier decisions. They only emphasized and carried to their logical conclusion the principles laid down in the cases just referred to, and illustrated in the clearest way that, according to the view of the Court of Appeal, a limited company was at liberty to pay dividends year by year, although its capital was being concurrently diminished and the dividends were [not] in a business sense paid out of profits.

This, however, was carried to the House of Lords, and is reported under the name of

Dovey v. Cory, (1901) A. C. 477

The House of Lords affirmed the decision of the Court of Appeal, on the ground that, as the respondents by their counsel admitted, they "did not impute to Mr. Cory any moral obliquity," the Commission in effect cleared him of the charge of misfeasance or breach of trust, and therefore of any liability for the same; but as regards the other grounds on which the Court of Appeal had decided the case, the House of Lords expressed an extremely guarded opinion. The Lord Chancellor said:

My Lord, I am very clearly of opinion that the judgment of the Court of Appeal is right and ought to be affirmed. But my opinion is entirely based on the question of fact that he [Cory] was guilty of no breach of trust whatever, and for reasons which I will refer to hereafter. I am very anxious not to deal with some reasons given for their judgment by the Court of Appeal, which, in the view of the facts that I take, do not arise here."

And then, after dealing with the question of misfeasance and breach of trust, his Lordship proceeded thus:

If I assume, as I do, that Mr. Cory acted upon representations made to him which he believed, and which came from the officers of the bank, to whom he was, in my judgment, justified in giving credit, the discussion of whether the dividends actually paid were or were not properly divisible has no bearing on Mr. Cory's liability, and I am very reluctant to give any opinion upon it, inasmuch as the question may arise when it may be necessary to decide it. I deprecate any premature judgment. My Lords, I am, as I have said, very reluctant to enter into a question which, for the reasons I have given, does not arise here, and into which the Court of Appeal has entered at some length. The only reason why I refer to it at all is lest by silence I should be supposed

to adopt a course of reasoning as to which I am not satisfied that it is correct. I doubt very much whether such questions can ever be treated in the abstract at all. The mode and manner in which a business is carried on, and whether usual or the reverse, may have a considerable influence in determining the question what may be treated as profits and what as capital. Even the distinction between fixed and floating capital, which may be appropriate enough in an abstract treatise like Adam Smith's 'Wealth of Nations,' may with reference to a concrete case be quite inappropriate. It is easy to lay down as an abstract proposition that you must not pay dividends out of capital, but the application of that very plain proposition may raise questions of the utmost difficulty in their solution. I desire, as I have said, not to express any opinion. But as an illustration of what difficulties may arise, the example given by the learned counsel of one ship being lost out of a considerable number, and the question whether all dividends must be stopped until the value of that lost ship is made good out of the further earnings of the company or partnership, is one which one would have to deal with. On the one hand, people put their money into a trading concern to give them an income, and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve its ruin. On the other hand, companies cannot at their will and without the precautions enforced by the statute, reduce their capital. But what are profits and what is capital may be a difficult and sometimes an almost impossible problem to solve. When the time comes that these questions come before us in a concrete case we must deal with them, but until they do, I for one decline to express an opinion not called for by the particular facts before us, and I am the more averse to doing so because I foresee that many matters will have to be considered by men of business which are not altogether familiar to a court of law."

And Lord Macnaghten, in the same case, whilst expressing his concurrence, said that he desired to guard himself from being understood to assent to all the propositions supposed to have been laid down by the Court of Appeal in this case.

Lord Davey went further. After expressing his concurrence as regards Mr. Cory's liability, he said:

"I desire to express my dissent from some propositions of law which were laid down in the Court of Appeal, and on which your Lordships thought it right to hear the respondent's counsel. The learned judges seem to have thought that a joint stock company incorporated under the Companies Acts may write off to capital losses incurred in previous years, and may in any subsequent year, if the receipts for that year exceed the outgoings, pay dividends out of such excess without making up the capital account. If this proposition be well founded, it appears to me that a company whose capital is not represented by available assets need never trouble itself to reduce its capital with the leave of the Court, and subject to the other conditions imposed by the Act of 1877, in order to enable itself to pay dividends out of current receipts. My Lords, it may be that I have misapprehended the statement of law intended to be made by learned judges in the Court of Appeal. I think that is possible. For, as I had that in *Pepper v. General and Commercial Investment Tr.* (1880) 14 Q.B. 239, at page 266, Lord Lindley says: 'Perhaps the shortest way of explaining the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided; but that floating or circulating capital must be kept up, as otherwise it would enter into and form part of such excess, in which case

to divide such excess without deducting the capital which forms part of it will be contrary to law.' I reserve my opinion as to the effect of an actual and ascertained loss of part of the company's fixed capital, as in the case put by Mr. Swinfen Eady of a loss of a ship uninsured. But, subject to this observation, I think that the statement of law contained in the passage I have quoted is not open to objection, and it is only because the learned judge appears to me to have departed from it in his judgment in the present case that I have troubled your Lordships with these remarks."

From these *dicta* it is plain that the House of Lords was not prepared to accept as sound the principles as to the payment of dividend laid down in the Court of Appeal in the *National Bank of Wales* principles which in the main accorded with those adopted in *Lee v. The Neuchâtel Co.*, *supra*, p. 890, and in *Verner v. General and Commercial Trust*, *supra*, p. 893.

Had the principle there laid down not been open to criticism, the House of Lords would have affirmed the decision without making such pointed and significant reservations. In dealing as it did with the matter the House, in effect, administered a salutary caution to those who thereafter were minded to act on those principles.

Reviewing then the several systems above discussed, it is submitted that the single account system is the one which is open to the least objection. Clearly the Legislature intended to limit the power of companies to pay dividends; and it seems not unreasonable to assume that the limit contemplated was that dividends should only be paid out of profits, and that profits should be ascertained as men of business usually ascertain the same, and not in accordance with rules which would allow capital assets to be gradually transferred to the pockets of the shareholders although representing assets acquired with the capital they have contributed, and meant by the Legislature to meet the claims of creditors subject to the fair risks of trading.

The single account system conforms to these requirements. It has the advantage of being commercially and economically sound, which is more than can be predicated of the other systems; and the objection that it gives facilities for writing up and down the assets, and for the payment of dividends out of fictitious profits, applies equally to the systems approved by the Court of Appeal in *Verner v. General, & Co.*, *ibid supra*, for according to that system circulating capital is to be valued. Moreover, as appears above (p. 888), it is contrary to practice, as applied to the single account system, to write up and down permanent capital assets.

No doubt the single account system does not permit a company limited by shares to expend its capital, or most of it, in the acquisition of a wasting property—say, a ten years' mining lease—and to divide the net yearly income so that at the end of the lease the capital will be gone. And it is suggested that not to be able to form a company on such a footing is a hardship. Who is harmed? it is asked. The answer is that it is not consistent with the scheme of the Com-

Review of the
systems.

panies Act for the protection of creditors to allow the capital thus in effect to be returned to the shareholders without the sanction of the Court, and those who elect to take the privileges of limited liability under the Act must pay the price and submit to the restrictions imposed by it.

The most serious objection to the systems approved by the Court of Appeal is just this, that they derogate from the rights of creditors by sanctioning the distribution as profit of that which obviously includes capital. If the memorandum were to authorize the division of the capital among the shareholders by ten equal instalments, the authority would be clearly void: can it then be legal to authorize the expenditure of the capital in an acre of coal, or in an annuity for ten years, or a leasehold for ten years, and to distribute the annual income without making good the capital from time to time consumed under the name of income, when in the result at the end of the time the capital will have in fact been returned to the shareholders? Surely the answer must be in the negative if the Act prohibiting reduction of capital without the sanction of the Court is not to be rendered a dead letter. "I think," said Fry, J., in *Re Alexandra Palace Co.*, 21 Ch. D. 169, "no subterfuge by which is attempted to return capital to shareholders, and thereby diminish their liability, ought to be countenanced for one moment by the Court." And see the remarks of Farwell, L. J., *supra*, p. 171.

Another objection to those systems is that they afford great opportunities in another way for covertly transferring the capital assets into the pockets of the shareholders; for not only may income which really represents a return of capital be divided by way of profit, but a large expenditure one year may be debited to capital and the enhanced income of the next year treated as profits; e.g., capital may be expended one year in removing the cover from a piece of reef sufficient for next year's work: this expenditure may be placed to the debit of capital, and next year the whole income from working the piece uncovered, less the working expenses of that year, may be treated as profit.

Or, a crop of unfruitful prices may be sowed one year in order, by driving competition away, to reap a fuller harvest of profit next year; in such case, if the unfruitful prices result in a loss, that will fall on capital, and next year the whole profit of the year will be available for dividend.

Further, if in applying the rule laid down in *Verner v. General and Commercial Co.*, (1899) 2 Ch. 239 that in ascertaining profits "fixed" capital need not, but "circulating" capital must, be kept up—the usual (*supra*, p. 831) definitions of fixed and circulating capital are to be adopted, the absurd conclusion would follow that in ascertaining the profits of an omnibus company the loss or depreciation of horses and vehicles need not be taken into account; and that in ascertaining the profits of a manufacturing company the loss and

depreciation of machinery, implements and rolling stock need not be taken into account; and in either case that the so-called profits of the year may legitimately be swollen by omitting to make any provision for such loss or depreciation. If this is what the Court of Appeal meant it follows that the Court, whilst adopting the phraseology of the economists, has discarded their principles; for clearly in such cases there can, from an economist's point of view, be no profit until the loss and depreciation has been made good or provided for: unless the view (*supra*, p. 882) of Professor Bonamy Price should be adopted, namely, that there is no such thing as absolute fixed capital, and that assets of the description just mentioned ought to be taken to include and to consist in part of circulating capital, so that the consumption of each year, so far as it consists of circulating capital, should be made good, and that this is what the Court meant. But this can scarcely be maintained; for the views expressed by the Court of Appeal in *Lee v. The Neuchatel Co.*, 40 C. D. 1, were approved, and in that case the Court said that it was not necessary in the case of a wasting property to make good, in ascertaining the profits, the year's consumption of capital.

It may be that the House of Lords will ultimately hold that, whilst the single account system is a sound and proper system for the ascertainment of profits, it is not the only allowable system, and that, under the Companies Act, any mode of ascertaining profit may be adopted which does not directly or indirectly involve the treating as profit that which is in fact capital, or property which ought to be applied to make good capital lost or unrepresented by available assets.

Thus, it may be held allowable to act on the footing that each financial year of the company is to be considered a separate adventure, and that the surplus receipts of the year, after paying expenses and restoring capital to the position it was in at the commencement of the year, are, unless the articles otherwise provide, to be considered the profits of the year. This would be a workable system, and the objections are

- (a) That it ignores the main purpose for which the Companies Act, 1877, was passed, and in effect shows that Act to have been practically needless; and
- (b) That it is not consistent with the rules laid down in *Lee v. Neuchatel Co.*, 40 C. D. 1, according to which it is *not* necessary, in ascertaining the profits of the year, to make good the capital consumed during such year;

or it may be that the House of Lords will hold that another allowable mode of ascertaining profits is to treat the paid-up capital and all borrowed moneys like the capital of a settled fund, and accordingly to invest it in permanent investments, and then to treat the net income arising therefrom, after payment of expenses and interest, as profit available for dividends, accretions to and diminutions of capital, as in

the case of a settled fund, being disregarded in ascertaining income. But this system again is open to the difficulty (a) above referred to, and it cannot be applied to a company in which the capital cannot thus be kept separate.

Or, again, it may be held that it is open to a company to ascertain profits by periodical valuations of assets, so that if at the end of any year it appears that the value of the assets exceeds the paid-up capital and the debts and liabilities, the excess may be treated as profit; and there may be other allowable systems; and there can be little or no doubt that this last-mentioned mode would be allowable.

But all this is in the nature of speculation, and pending an authoritative declaration on the subject the practice of prudent men of business must be the safest guide.

As to the Employment of Accountants.

Employment
of accountants
and auditors.

For the purpose of ascertaining profits, directors are entitled to employ skilled agents, such as accountants, valuers, actuaries and auditors (*Leeds Estate Co. v. Shephard*, 36 Ch. D. 787), and to give credit to their reports, provided that they—the directors—act *bona fide*, and

Rance's case

"If," said Lord Justice James, in *Rance's case*, 6 Ch. 418, "the directors, by placing unfounded reliance upon the representations of their servants or actuaries, had arrived at the conclusion that they had made a divisible profit, this Court ought not, I say, to sit as a Court of Appeal from that conclusion, although it might afterwards be satisfactorily proved that there were very great errors in the accounts, which would not have occurred if they had been made out with greater strictness or with more scrutinizing care."

In the same case, Lord Justice Mellish said:

"I quite agree that if directors, or a proper actuary, had made out a profit and loss account, the Court ought to assume, very strongly indeed, that it was a correct account, and ought not, without very strong reasons showing that it was done *malâ fide*, to set it aside, or declare a dividend made upon it improper."

Denham & Co.

"It is sufficient if directors appoint a person of good repute and competent skill to audit the accounts, and have no reason for suspecting that anything is wrong. The directors are bound to examine entries in the company's books." Per Chitty, J., *Denham & Co.*, 25 C. D. p. 768; approved in *Duncan*, (1901) A. C. 477.

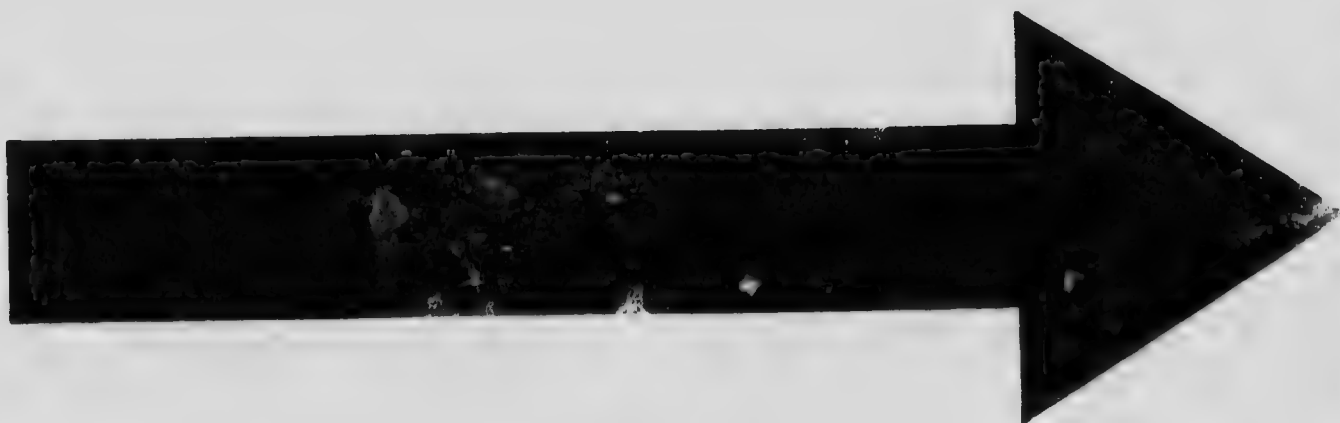
*Midland Land
and Investment
Corp.* (not
reported).

In the case of *Midland Land and Investment Corporation, Limited* (who were before Chitty, J., in Nov. 1886), the question arose whether a dividend had been paid out of capital. It appeared that the directors had employed an experienced valuer to value the assets of the corporation, which consisted of building land and ground rents and contracts and options, and had prepared a balance-sheet in which, upon the basis of this valuation, it appeared that the value of the assets exceeded the debts and liabilities by 100,000*l.*, and out of the surplus thus shown the directors had carried 20,000*l.* to the dividend fund and been party to its distribution by way of dividend.

The valuer had in many cases valued the assets at more than they cost the company, and much more than they afterwards realized, and it was contended that the dividend ought not to have been paid out of profits which rested on estimate. Chitty, J., however, was of opinion that the directors were not liable, and the following extracts from his judgment (8 Nov. 1886) are of interest:

"In declaring a dividend, in my opinion, in trading concerns, the directors are entitled to put an estimate on the value of their assets from time to time, in order to ascertain whether there is or is not a surplus remaining after providing for liabilities, and where they make those valuations from time to time on a just and fair basis, and take all the precautions which ordinary prudent men of business engaged in a similar business would do, they are entitled to treat the value thus ascertained as profit. But in saying that, regard must, of course, always be had to the nature of the business. I put this illustration before you, and I put it again. There are some trading concerns dealing in goods and the like where the turn-over is rapid, and where the business is brought to market with the greatest facility. With a large business, and supposing the whole stock-in-trade is turned over and converted into money, in the ordinary course of dealing, within a few weeks or a few months, the directors there are entitled to put a valuation upon the goods, and to say that, having regard to the state of the market, seeing that there is no serious apprehension that the sales will not proceed in the ordinary way, they are entitled to treat, for the purpose of profit, their valuation as a basis on which they can say there is a profit shown. . . . That is a simple case. I put now one that requires more caution on the part of the directors, and that is where the turn-over is not rapid, and where the nature of the business, such as the business these directors had to deal with, is an eminently speculative one, and where they cannot bring their commodity, whether it may be ordinary goods or building land, such as in this case, into the market rapidly, and where they must wait before they realize, and where their market is liable to great fluctuations one way or the other. A case of that kind requires more skill, and more judgment, and more caution. Still I refrain from laying down, and I think I should be wrong in laying down, that, that being a trading concern, the directors were not entitled to make a just estimate of what they considered to be the profits, making all reasonable allowances, and all reasonable reductions with regard to the prospects of trade, and the particular trade in which they are engaged, and the general commercial prosperity which may, or may not, of course, have a direct or indirect bearing on their own particular business. Now, when it comes to questions of valuation, it is undoubted that, except in various rare cases, the directors are not the persons who have the skill. Their constituents, the shareholders, are not to suppose that they have the skill to make valuations which require a special knowledge and special consideration, and the directors under those circumstances pursue a right course if they employ a gentleman of integrity—a gentleman of reputation in the town or district where he lives, a gentleman who is supposed and generally reputed to be a competent and skilled man—to make a valuation. The directors cannot go round, as I have said during the course of the argument, each man individually, and value the properties such as those which formed the staple of the assets of this company. Their valuations would be useless, and they must therefore employ a competent man. In this case the directors did employ a gentleman against whom nothing has been said. Nothing has been said as to his position, as to his skill, or as to his integrity, and the directors received from this gentleman a report and valuation which is dated the 31st January, 1880, and that formed the basis of the balance-sheet in respect of which the dividend for the year ending the 31st of December, 1879, was declared. . . .

Upon that report he advised the directors that he had carefully surveyed



and valued the whole of the properties, and he concluded his report by stating that he estimated the total present value of all the above properties at 824,747l., and he said he had arrived at this valuation without any knowledge of the book debts of the corporation representing such properties. I understood that to be, that he had arrived at his conclusion without reference to the sums to be found in the company's books. . . . He says in his estimate he had not taken credit for any prospective values. Now, there I think he was right; but I think the directors were entitled to rely on what the skilled valuer told them—that he had, as he says in substance, taken the present value, and had not taken credit for any future, and in that sense speculative, value. . . . The substance, therefore, is that the dividend was to be paid out of the fund which was represented by the surplus, which had been ascertained to be 109,990l., of the assets as valued over and above the liabilities. Now, it is obvious that the directors did not advise that the whole of this estimated profit—because I agree that it is an estimate, and it must be an estimate—should be dealt with. . . . I think, under these circumstances, that it would be a terrible thing for all companies, shareholders as well as directors, to say that this was not justified. . . . I think, therefore, . . . that no case is made out against the directors with regard to the dividend paid on the balance-sheet of 31st December, 1879.”

[Taken from transcript of shorthand note.]

“I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers—and the theory of his being free from moral fraud assumes, under the circumstances, that he was—there appears to me to be no case against him at all. The provision made for bad debts, it is well said, was inadequate; but those who assured him that it was adequate were the very persons who were to attend to that part of the business; and so of the rest. If the state and condition of the bank were what was represented, then no one will say that the sum paid in dividends was excessive.” Per Lord Halsbury, *L. C.*, in *Dovey v. Cory*, (1901) A. C. 477.

“I think the respondent was bound to give his attention to, and exercise his judgment as a man of business on, the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information and advice of the chairman and general manager, as to whose integrity, skill and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in *Hallmark's case* (9 Ch. D. 329), and by Mr. Justice Chitty in *Dryham & Co.* (25 Ch. D. 752), that directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) the chairman to go carefully through the returns from the branches and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference.” Per Lord Davey, *Dovey v. Cory*, (1901) A. C. 477.

An auditor, or accountant, or valuer who neglects his duty may be held liable for the consequences. *Leeds Estate Co. v. Shephard*, 36 C. D. 787; *London and General Bank* (No. 3), (1895) 2 Ch. 673; *Oxford Benefit Building Society*, 35 Ch. D. 511; *New Oriental Bank Co.*, 41 W. R. 16. But in making his investigation he is entitled to

rely on documents vouched by servants of the companies unless he has reason for believing those servants to be dishonest. *Squire Cash Chemist v. Ball*, 28 T. L. R. 81. The Act of 1908, sects. 112, 113, reproducing sects. 21-23 of the Act of 1900, imposes on him a statutory duty, and he is liable for breach thereof.

Opinions of Counsel.

Looking to the divergent views which prevail as to the mode in which profits are to be ascertained, it may be of interest to give a few opinions of counsel.

Opinions of counsel on mode of ascertaining profits

The following is an extract from the opinion given (1884) by the late Lord Davey (when at the Bar) to a cable company:—

"I am of opinion that the directors cannot properly pay a dividend on any of the shares (including the preference shares) until they have taken one of two courses, i.e.—

- "(1) Have put the original cable into a proper state of repair and working order, or made adequate provision for that purpose; or
- "(2) If they determine to abandon the old cable, have taken proper steps under the Companies Act, 1877 (40 & 41 Vict. c. 26), to write off the capital represented by that cable, or a proper amount of it, as lost capital unrepresented by available assets. See judgment of Sir George Jessel in *Darison v. Gillies*, 16 C. D. 347.

"In making provision for the restoration of the old cable to a proper state of repair, I do not think it would be necessary to set aside the full amount required in one year; but if the expenditure is of such a character that it can be spread over a limited number of years, the directors would be justified in so dealing with it.

"If the directors determine to discontinue the use of the old cable, they should, of course, in arriving at the amount of the loss to be written off, take into account, on the one hand, the value (if any) of the cable in its present state, and the value of the new cable; and, on the other hand, the sum still owing in respect of the borrowed money for the construction of the new cable."

The following opinion (in relation to a trust investment company) was given in December, 1887, and was signed by the late Sir John Rigby (afterwards Lord Justice Rigby) when at the Bar, and by several other well-known Chancery lawyers:

"1. Is there any obligation upon directors to take into consideration the question of loss arising from permanent depreciation of securities, and to exercise their *bona fide* judgment in such consideration? Are they under obligation to write down the value of such securities in their books, and to replace such loss either out of reserve fund, if there be any sufficient for the purpose, or out of the profits of the company derived from dividends or interest on securities, if there be no other funds available for the purpose?

"Directors should not neglect to take into consideration a depreciation in value of securities which, in their judgment, appears to be of a permanent character. Loss should be made good out of reserve fund, or, failing this, out of the income of the then current year. Depreciation in value which has become of such a marked character as to be unavoidable should be dealt with as ascertained loss.

"2. Are they (the directors) bound, for the purpose of dividend, to neglect entirely temporary fluctuations in value of securities?"

"Directors are justified, though not bound, to take a very close estimate of securities of the company, as by actual valuation on a certain day. They may consider the securities as retaining their value if, in their opinion, the fall in value is only due to casual variation of the market.

"3. Whether, in case of an investment, consisting of shares in a company which has publicly reduced its capital, of a company in liquidation, or in bonds of States, or other debtors long in default, they (the directors) would not run a risk of a Court holding that their judgment had not been *bonâ fide* exercised if they neglected to treat the loss as permanent?"

"This case comes within the principles of the answer to the question No. 1.

"4. Whether they may take into account rises in value of securities held, whether a general rise or what the directors may conclude to be a permanent rise in any particular security, as a set-off or in reduction of the permanent loss of capital arising in the case of securities not sold?"

"The directors may take into account the rise in value of a security, but it must be of the same marked and permanent character as a depreciation referred to in answer to question No. 1."

The following opinion was given in 1890 by Sir John Rigby (afterwards Lord Justice Rigby) when at the Bar:—

"I am of opinion that the directors would not, under the circumstances, be justified in distributing the balance of revenue account, or any part thereof, by way of interim dividend. It appears to me that the profit there shown is counterbalanced by loss during the same period arising from depreciation of securities, so that in substance there are no profits out of which dividends can properly be declared.

"My opinion, above written, is founded on the assumption that the valuation of securities of June 30th was a proper valuation, such as the directors were willing to accept as correct. I am by no means of opinion that the market prices of the day for the different investments would necessarily be binding on the directors, as the value for immediate sale would not necessarily represent the true value to the trust. If it could be shown, by satisfactory valuation of competent persons such as the directors could stand by, and justify if necessary, that the real value of the investments differed from the market value of the day, I am of opinion that such real value, when ascertained, might properly be taken as the basis for estimating whether, on the whole, there had been a loss or profit during the period over which the transactions of the company extend, and the result might be to liberate a sum available for interim dividend."

PRIVATE COMPANIES.

CHAPTER X.

INTRODUCTORY NOTES.

THE term "private company" had until quite recently no very precise signification. In the last edition but one of this work it was used in its popular sense as denoting a company registered under the Act of 1862, but intended to be carried on without any appeal to the public for share capital. In this sense the term had long been recognized, even in the Courts of law. Thus, in a case before the Court of Appeal in 1881, Cotton, L. J., said: "But here it is an established fact that when the company was formed it was intended to be a *private* company, that is, it was intended to carry it on without calling in the public, or issuing any shares except to the then existing shareholders." *British Seamless Paper Box Co., Lim.*, 17 C. Div. 467. And in *George Newman & Co.*, (1895) 1 Ch. 685, Lindley, L. J., said: "It is true that this company was a small one, and is what is called a *private* company."

Meaning of
"private
company."

Many industrial and banking companies," said Lord Herschell in *Salomon v. Salomon & Co.*, (1897) A. C. 22, "of the highest standing and credit have in recent years been, to use the common expression, 'converted' into joint stock companies, and often into what are called *private companies*, where the whole of the shares are held by the former partners." And in the same case Lord Macnaghten said: "Among the principal reasons which induce persons to form private companies . . . are the desire to avoid the risk of bankruptcy, and the increased facility afforded for borrowing money."

And in *Wragg, Limited*, (1897) 1 Ch. 796, Vaughan Williams, J., said: "There have been probably in the last twenty-five years an enormous quantity of *private* companies formed in which the partners in the business which was sold and the shareholders in the new company have been identical. It is a very usual way of dealing with a business, and the truth of the matter is, that the more valuable the business is, the more often does this in practice happen. Two partners

in a first-rate business do not want, because they are converting their business into a company for convenience of administration and distribution of profits and liabilities, to let any strangers or outsiders into a share in the business, and the consequence is that in all probability, if you were to take a list of the private companies in existence at the present moment, you would find that their solvency compared very favourably with that of the solvency of what are ordinarily spoken of as public companies as distinct from private."

It was quite time—with this rapid multiplication of private companies going on—that a more precise meaning should be attached to the term, and this has now been done by sect. 121 (1) of the Act of 1908, replacing sect. 37 of the Act of 1907. The definition runs as follows:—

121.—(1) For the purposes of this Act the expression "private company" means a company which by its articles—

- (a) restricts the right to transfer its shares; and
- (b) limits the number of its members (exclusive of persons who are in the employment of the company) to fifty; and
- (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

(2) A private company may, subject to anything contained in the memorandum or articles, by passing a special resolution and by filing with the registrar of companies such a statement in lieu of prospectus as the company, if a public company, would have had to file before allotting any of its shares or debentures, together with such a statutory declaration as the company, if a public company, would have had to file before commencing business, turn itself into a public company.

(3) Where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this section, be treated as a single member.

This definition summarises what may be called the three characteristic points or incidents of a private company—(1) restrictions on the transfer of shares; (2) limited membership; (3) no appeal to the public to subscribe. But it is to be observed that the test whether a company is a private company within the definition depends not on whether the company possesses these three features, but on whether its articles contain the specified provisions. And so long as the articles contain the provisions the company is a private company even though it disregards and acts in contravention of those provisions, *e.g.*, by allowing the number of members to be more than fifty. *Park v. Royalties Syndicate*, (1912) 1 K. B. 330. It appears from the 20th Annual Report of the Board of Trade that the number of companies registered in 1910 was 7,181, and that of these 5,036 were registered as private companies, besides which 15,621 companies were by special resolution converted into private companies. Thus the popularity of the private company is marked.

Thus defined the "private company" is given various privileges and immunities by the Act, thus:—

- (1) A private company may be formed by two persons instead of seven subscribing the memorandum of association (Companies Act, 1908, s. 2).
- (2) No consents by directors to act need be filed, or list of directors delivered to the registrar (s. 72).
- (3) A private company is not bound by the provisions as to going to allotment under sect. 85 (7).
- (4) A private company may commence business immediately on registration, and without obtaining a certificate entitling it to commence business (sect. 87).
- (5) A private company need not file with the registrar a statement in the form of a balance-sheet (sect. 26).
- (6) A private company need not forward and file a report for the statutory meeting (sect. 65 (10)).
- (7) A private company may pay commission to persons for subscribing or underwriting its shares (sect. 89). *Dominion of Canada Trading Syndicate v. Brigstone*, (1911) 2 K. B. 648.
- (8) A private company is exempt from the provisions of sect. 114, which gives to the holders of preference shares, debentures and debenture stock the same right as ordinary shareholders have to receive and inspect the balance-sheets of the company, the reports of the auditors and other reports. See further, *infra*, p. 996 *et seq.*

But, subject to these and a few other distinctions made by the Companies Act, 1908, a so-called private company, though private in the sense above-mentioned, is in no way different from any other company under the Act. "If it takes the benefit of the Act [of 1862], it is bound by the Act as much as any other company. It can have no special benefit or immunity." *Trevor v. Whitworth*, 12 App. Cas. 434. And in point of law it is a public company, for all companies registered under the Companies Act, 1908, are public companies (see *Sharp*, 45 C. D. 286, and *Lysaght*, (1898) 1 Ch. 115); although foreign companies purchasing their undertakings are not necessarily public companies. See *Re Castlehow*, (1903) 1 Ch. 352.

A private company, for instance, must make a return of allotments to the registrar under sect. 26 of the Act. It must hold the statutory meeting required by sect. 65. It must keep a register of its members accessible to the public under sect. 30. It must register its mortgages and charges under sect. 93. It must keep a register of its directors (whether they are called managers, trustees, or otherwise in the articles) and notify changes in the directorate to the registrar. If its articles require a share qualification for the directors sect. 73 applies, and no director must act without one unless within some prescribed period not exceeding two months from his appointment. It must

make a return of allotments to the registrar under sect. 88. It must observe the statutory requirements as to audit of its accounts (sect. 112).

Private companies may be formed

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|---|--------|---|
| 1) To acquire and carry on an existing business, or to carry out and complete some pending operation or transaction. (Class A.) | { or { | 2) To establish and carry on some new business, or to carry out some operation or transaction about to be commenced. (Class B.) |
|---|--------|---|

Where an existing business is made over to a private company formed for the purpose of taking it over, the operation is termed "the conversion of the business into a private company." Or if, as is commonly the case, the vendors have practically all the shares in the company, they are popularly said to have "turned themselves into a company," a description that is not perfect, but approaches more nearly to accuracy than the one previously noticed. Where persons are engaged in some single transaction, operation or adventure, it is extremely common to form a private company to take over their interests and liabilities, and carry out and complete such transaction, operation or adventure.

Private companies formed thus to carry out and complete some pending operation or transaction, or some contemplated operation or transaction, are commonly called *Syndicates*. At one time, syndicates were usually formed by agreement in writing signed by the members of the syndicate, but such agreements had the disadvantage of rendering the members partners, to the extent at least of making them agents for each other, and thereby exposing them to serious risk. Accordingly, it has now become usual to form and register syndicates as private companies. As to syndicates generally, see *supra*, p. 158.

Inducements
to conversion.

There can be no doubt that in most cases the principal inducement to conversion is that by means of a private company the great benefit of "limited liability" can be obtained.

In order to appreciate the extent of this boon, it is necessary to contrast with it the position of those who engage in business without availing themselves of the Companies Act.

According to the law of England (prior to the Limited Partnerships Act, 1907), a person who goes into business, whether on his own account or as a partner in a firm, is liable for all the debts incurred in the business to the full extent of his means. "If," says the law, "you want to trade, you must risk all you have." This is bad enough in the case of an individual trader, but it is worse still in the case of a partner, for his whole fortune is at the mercy of a dishonest or imprudent partner. Thus:

- (a) Suppose a man to have 20,000*l.* invested in his business, and 5,000*l.* otherwise invested. He desires to limit his liability

to the 20,000*l.*, so that if the business fails the 5,000*l.* will at any rate remain intact. He cannot do so.

- b) Suppose a man with a fortune of 50,000*l.* to be partner in a concern in which he has invested 5,000*l.* He desires to limit his liability to the 5,000*l.* He cannot. If the firm fails, the whole of his fortune may be swept away to pay the creditors, even though the failure may have been caused by the dishonesty or imprudence of his partners, or some person in the employment of the firm, and even though the partnership deed expressly declares that his liability is to be limited to 5,000*l.*
- (c) Suppose A., B. and C. to enter into partnership upon an agreement that each shall contribute by way of capital 2,000*l.*, viz. 1,000*l.* down and 1,000*l.* when wanted, and that the liability of each to creditors shall be limited to the amount so contributed. This attempt to limit their liability is void as to outsiders; and if debts are incurred, each partner will be liable "to his last shilling and his last acre" to pay the creditors in full, and in default may be made bankrupt.

The striking observations of James, L. J., in *Baird's case*, 5 Ch. 733, find here an appropriate place:—

"As between the partners and the outside world (whatever may be their private arrangements between themselves), each partner is the unlimited agent of every other in every matter connected with the partnership business or which he represents as partnership business, and not being in its nature beyond the scope of the partnership. A partner who may not have a farthing of capital left may take moneys or assets of the partnership to the value of millions, may bind the partnership by contracts to any amount, may give the partnership acceptances for any amount, and may even—as has been shown in many painful instances in this Court—involve his innocent partners in unlimited amounts for frauds which he has craftily concealed from them."

And in *Greenwood's case*, 3 De G. M. & G. 459, 476, Lord Cranworth, L. C., said: "A., B. and C., carrying on business together, may stipulate among themselves that no one of them shall be liable for more than 1,000*l.*; yet, if in the conduct of their business they incur a debt to the extent of 10,000*l.*, every one of them would be liable for it notwithstanding any stipulation they might have made with one another. That doctrine does not depend upon the persons dealing with the partners having notice, and any notice would be quite immaterial."

Such are the risks which the common law imposes on those engaged in business as individuals, and however wholesome a tonic unlimited liability may be to a trader, it is highly detrimental to all enterprise in trade. Who can wonder that the Legislature at last found itself

obliged to relax the severity of the law, and to permit persons by forming a limited liability company under the Act of 1862, to place such limit on their liability as the dictates of prudence might suggest?

"These limited companies," in the words of Jessel, M. R., "are the offspring of a great necessity, that is, that men should be entitled to engage in commercial pursuits without necessarily involving the whole of their fortune in that particular pursuit in which they are engaged." Report of Com. of 1877 on the Acts.

And this observation may also be added to the credit of the company system: that though limited liability restricts the fund available to creditors, this fund—the capital of the company—is, so far as it goes, a reality, and persons dealing with a company have the means of knowing what they have to depend upon. In the case of an ordinary trader, *non constat* he has any capital at all available for his creditors.

Nevertheless, it took a good many years before the full significance of the change and immense advantages offered by the Act of 1862 were understood and appreciated. At first, the machinery of the Act was used almost exclusively for public companies with numerous shareholders, and the notion of utilizing it for private concerns scarcely entered the minds of the commercial community; it may be doubted whether it was contemplated at the time even by the Legislature; but by degrees it was discovered that private companies and syndicates could without difficulty or inconvenience be formed and work under similar conditions, that the Act had, in effect, struck off the fetters imposed on freedom of contract by the common law, and had emancipated the community at large from the tyranny of unlimited liability.

Since this discovery of the advantages of conversion, thousands of private companies have been formed, and the number is rapidly increasing, as day by day the advantages of the system become more apparent and more appreciated. Out of 7,000 companies registered in 1910 no less than 5,000 were private companies.

It is in what is known as a sleeping partnership that the advantage of excluding unlimited liability are perhaps the most strikingly manifested. A sleeping partner takes no place in the management, and is not ostensibly a partner, yet he incurs the same liabilities as an ordinary partner. The fact that his interest is kept private, and that the creditors never even heard of him, affords him no protection; and if the firm gets into difficulties, and his connection with it is discovered, he can be sued along with the other partners, and may be made bankrupt.

Thus, suppose that A., B. and C. are in partnership under the firm name of "A. and B.," and that C.'s interest is kept entirely secret, and that the firm gets into difficulties, and is sued by D. for a large sum; D. will have an opportunity of asking A. and B. on oath whether they have any other partner, and out will come the fact that

Sleeping
partner
facilities.

C is a partner; thereupon C. will be made a co-defendant, and judgment will go against the three. This risk operates as a serious discouragement to capitalists to put money into a private firm or help a trader who is starting in business, whatever may be their confidence in his integrity and ability. If, however, the business is worked as a private company, C. can have as large an interest as he likes without incurring any additional liability beyond his shares, and there is no need for his name to appear in the register of members or elsewhere in connection with the company, for his shares can be placed in the name of a trustee or nominee, or in the names of several.

This option of remaining incognito is in many cases a matter of great importance, and especially in the case of syndicates (p. 158. *supra*); for it very commonly happens that leading financiers, peers of the realm, members of Parliament, and commercial men of standing, whilst willing to subscribe to a syndicate, make it a condition that their names shall not appear.

The facilities which a company has for borrowing unquestionably constitute another inducement to the formation of private companies. Borrowing facilities.

These facilities are much greater than those of an individual or firm engaged in trade. Not only can a company borrow in the same way and by the same methods as an ordinary individual, but it can raise money by the issue of debentures or debenture stock, and the advantages of debentures and debenture stock are two-fold. In the first place, they enable a company to raise a large sum on easy terms by the contributions of a number of small lenders on the same co-operative principle on which a company's capital is subscribed; and in the next place they are securities with which the public is familiar: they are easily enforced, and can be made readily transferable. If issued by a company in good repute, they are a very marketable security. No advantageous, indeed, is this mode of raising money found to be that it is by no means uncommon for a business to be converted into a company solely for the purpose of raising a loan by the issue of debentures or debenture stock.

In this way a large sum may be raised on easy terms, which, but for the conversion, it would have been impossible to raise. Moreover, a member of the company may himself become a secured creditor on its assets by becoming a debenture holder (*Salomon v. Salomon & Co.*, 1897) A. C. 22, 52), without being postponed to other lenders, as he would be if as a partner he lent money to the firm.

Debentures are commonly made payable in ten or fifteen years. Debenture stock is usually in the nature of a permanent loan.

Another inducement to conversion which very commonly operates is the urgent necessity for the introduction of additional capital, and the knowledge that a private company has far greater facilities for securing such additional capital than an unconverted concern. Further capital.

Capital in many cases is the life-blood of a concern, and it is always a great misfortune where the development of a promising concern is arrested by want of it. It is not possible here to specify all the cases in which additional capital may be required, but in the case of a manufacturing concern the following are a few salient instances.

It may be wanted to enable the parties interested to enlarge and extend the works; to buy, manufacture, and hold larger stocks, to buy in the cheapest market for cash; to make a large capital outlay in the way of advertisements; to replace and clear off bank and other advances; to open and establish branches; to buy up other concerns; to lend money to customers with a view to tying their trade; to pay out a retiring or deceased partner; and for many other purposes.

By converting the concern into a private company, the parties are at once placed in a position, by issuing preference shares, debentures or debenture stock, or by mortgaging the uncalled capital, to raise additional capital on the most favourable terms.

The tied-house system.

Another inducement to conversion is the recognition of the fact that the concern is one in which the tied-house system can with advantage be adopted. That system necessarily involves the possession of large capital resources, and it is rarely that it can be worked satisfactorily without converting the undertaking into a company. The system thus referred to is that which is so generally adopted by brewery companies. According to it the brewery company acquires a public-house and then lets it to a tenant at a fixed rent, the tenant being bound by contract to buy all his malt liquors from the brewery company at ordinary published prices, less some specified discount; thus the public-house is "tied" to the brewery. Another tie is effected by the brewery company lending to the owner or tenant of a public-house a sum of money secured by mortgage of the public-house, and by a stipulation that whilst the loan is outstanding all malt liquors shall be bought from the brewery company. Of late years it has been discovered that the tied-house system is not applicable to brewery businesses only, but can with advantage be adopted in relation to other business concerns, and there can be no question that the system is susceptible of further development. In order, however, to adopt and work this system, it is essential that the tying concern should be able to supply goods of a satisfactory quality, and that by means of competent inspectors, or otherwise, it should be able to watch and safeguard its interests in relation to the borrowers or tenants. Where a concern ties a business by a loan, it is extremely common to require the conversion of the business into a private company, so that the tying concern may be able to have its loan secured by debentures on the undertaking of the tied concern. Sometimes the tied-house system is still further developed by making it one of the terms of the letting or loan that the tenant or borrower shall not only purchase a certain class of goods from the tying concern, but shall purchase some other class of goods from such person or persons or

company as the tying concern shall from time to time nominate. Two or more concerns may thus tie trade and then nominate each other, and by a judicious system of co-operation of this kind highly favourable results are sometimes obtained.

There is another aspect to conversion. It sometimes happens that a man engaged in business develops extraordinary management capabilities. Perhaps he has established and built up the business either alone or with partners, or he may merely have worked up the business. In either case his experience and judgment may in the result have rendered him invaluable, and his capacity for organisation and management may amount to quite an exceptional gift. He may be possessed of ideas and initiative, and of great energy, courage, and determination, and with the power to inspire others with unlimited confidence in his capacity. A man of this kind is often able, with ease to manage directly, or by means of skilled subordinates selected by himself, not only the original business, but a business of ten times its magnitude, and both he and his friends and supporters may be fully cognisant of the fact. That such a man should remain satisfied managing a comparatively small business amounts to a great waste of ability. By converting the concern into a private company, full scope may be afforded for his remarkable powers. The company may take over the existing concern, and with the assistance of further capital, contributed willingly by those who know and feel confidence in the manager's ability, prudent developments may be made, and new branches established in different places, and other concerns may be acquired. Thus, before very long a great concern may be built up worthy to engage and capable of absorbing the attention of such a competent manager, assisted by other directors working in harmony with him. Men of this calibre are not to be found every day, but, when found and backed by capital, they are capable of achieving the very highest success in commercial concerns, as may be seen exemplified in the heads of so many great industrial undertakings both in England and America to-day.

Utilisation of extraordinary management capacity.

Another inducement to conversion consists in the facilities offered by corporate existence for co-operation, reciprocal concession, and joint purse arrangements. Thus, three or four firms may be carrying on a similar class of business and be on friendly terms, and yet be engaged in competition. Each employs a separate set of travellers and each has to incur various expenses which might be largely reduced if the firms worked together. In such cases it is very common to convert the firms into a single company, dividing the capital in proportion to the value of the several undertakings and making the members of the firms or some of them directors of the company. In adopting such a course there should be a large saving in working expenses, and the combination may endow the united concern with capacities for development and profit far exceeding those possessed by the individual firms. Sometimes a number of

Combination and amalgamations.

Conversion
with a view
to subsequent
public
conversion.

firms prefer not actually to amalgamate, but to convert each into a separate company with its own separate capital, and then all can enter into an agreement to pool their profits and divide them in certain specified proportions, or to offer to one another special advantages and privileges which, in the result, will tend to the common benefit.

It not uncommonly happens that the owners of a business find that it is doing very well, but are confident that certain measures which have been adopted by them, *e.g.*, extended advertisement, improved processes of manufacture, acquisition of patents, or what not, will, in the near future, result in a great development. They, however, want at once further capital and the advantages of corporate life, and accordingly they convert the concern into a private company, fully intending that in the course of a year or two, when the anticipated developments shall have taken place, the business shall be brought out as a public company. Such a conversion may facilitate very largely the ultimate conversion into a public company. Thus, there may be a number of members of the partnership at the moment willing to convert the concern into a private company who may not be unwilling in a year or two hence to convert the same into a public company. Again, by converting into a private company the concern is enabled to raise without difficulty the requisite funds to secure the anticipated development, and further is able to place the undertaking in such a condition that its audited balance-sheets and accounts will figure well in the prospectus of the future public company, and that the large dividends on the shares in the private company will justify the capitalization of the undertaking on a satisfactory footing.

Not uncommonly, also, it is considered desirable to convert a concern into a private company with the full intention that some of the company's shares shall before very long be offered for subscription by the public. Thus the members may, on the conversion, receive, say, 100,000 preference shares and 100,000 ordinary shares, and they may determine that, after the company has been in existence for a time, they will have the preference shares offered for public subscription, and either appropriate the proceeds themselves, and so, in effect, draw it out of the business, or apply the proceeds in taking up further ordinary shares in the company. This is a mode of converting the concern into a public company without re-registering the concern. Many instances might be pointed out in which this course has been adopted, and amongst those the great concern known as Bass, Ratcliff and Gretton, Limited.

Customers'
participation.

Another inducement to conversion is that by means thereof it is possible to enable customers to participate in the profits of the undertaking, and thus to interest them in its success. With a view to such participation the capital of the concern may be made to consist in part of preference shares carrying a fixed dividend, say 5 p.c.p.a., but without any right to attend or vote at general meetings or to inspect the accounts, and customers, or leading customers, at the time of the

conversion may be given the opportunity of taking up such preference shares or some of them, and if desired some can be set aside for allotment to subsequent customers as and when thought expedient. Occasionally, also, such preference shares may be given a limited right to participate also in surplus profits, *e.g.*, in proportion to the goods purchased from the company by the holders. Sometimes, instead of preference shares, debentures or debenture stock, or even ordinary shares, are issued to customers. It has been found from experience that the possession of a continuing capital interest of this kind in an undertaking is highly favourable to the development of business where the number of persons so interested is considerable, for each person so interested is conscious that in dealing with the concern, and in introducing additional customers, he is indirectly enhancing the value of his own shares in it. The writer knows of cases where the adoption of this mode of development has, in the course of a few years, doubled and quadrupled the profits of a concern.

Restrictions on Directors.

Another and very strong inducement to the formation of private companies is, that persons trading as a company can effectually restrict the powers of the acting partners, *i.e.*, of the directors. In the case of an ordinary trading partnership every partner is, in contemplation of law, the unlimited agent of every other partner in every matter coming within the scope of the partnership business. Thus, every partner may enter into engagements, however improvident, binding on the firm, may pledge and sell the partnership property, may buy goods on account of the partnership, may borrow money, contract debts, and pay debts on account of the partnership, may draw, make, sign, indorse, accept, transfer, negotiate, and procure to be discounted, promissory notes, bills of exchange, and other negotiable paper, in the name and on account of the partnership. And this perilous general agency of partners cannot be limited by agreement between the partners so as to bind outsiders. *Baird's case*, 5 Ch. 733. Accordingly, a person dealing with a partner is entitled, unless he has express notice to the contrary, to assume that the partner has the usual powers. For instance, suppose the articles of partnership provide that one of the partners shall not be entitled to accept bills in the name of the firm; a bill accepted by him in the name of the firm will nevertheless be valid unless the person taking it knew that he was not entitled to accept it, and even then a *bonâ fide* indorsee gets a good title. A man, therefore, who is a member of a trading firm is at the mercy of his partners, just as they are at his mercy. If one member of a firm proves imprudent or dishonest, he has it in his power to involve his partners in liabilities unlimited in amount. Partnership, in other words, is essentially based on mutual confidence, and there is no security that such confidence will not be

Limited
agency of
directors

abused. But the directors of a company are in a very different position. They are *special* agents, and have only such powers as are given to them by the articles of association or other regulations of the company; and every one dealing with a company is presumed to know the contents of such articles of association, for they are registered public documents. *Supra*, p. 79. If, therefore, the articles say that the directors shall not borrow more than a specified sum, the onus is on a lender to see that they are not exceeding their power. If he does not, he takes the security at his risk should the borrowing limit prove in fact to have been exceeded. So, if the articles say that every contract of a certain kind, *e.g.*, a negotiable instrument or a mortgage, must be signed by at least three directors, the person dealing with the company must see that three directors sign, otherwise the instrument or security will as a rule be invalid. See *supra* p. 79. The power of thus effectually limiting the authority of the acting partners is of great value, and constitutes one of the chief advantages which a company has over a partnership.

Advantages of incorporation.

Not less striking is the convenience which incorporation affords in dealing freely with the shares of a trading concern. In an ordinary partnership, the death, bankruptcy, or retirement of a partner, the admission of new members, or the sale or settlement of shares seriously dislocates, if it does not dissolve, the partnership. Not so with a company, which is a body corporate with perpetual succession.

A company, in contemplation of law, is an artificial person having an existence independent of the members who from time to time compose it (*supra*, p. 27). It is also a body corporate with a perpetual succession; and accordingly no change among those members occasioned by death, bankruptcy, retirement, new admission, or otherwise, affects the company's identity: it still remains in law the same person, and continues to exist until dissolved according to law.

Some of the advantages resulting from this independent separate existence of the company may be specified.

Death.

1. As regards Death.

Where a man is possessed of a profitable business, or of a business which promises to be profitable, he very commonly wishes to provide for its continuance in the event of his death. If he proposes to bequeath the concern to some person (*e.g.*, a son) absolutely, there is no difficulty; but perhaps his sons may be under age or not anxious to go into the business; and he may wish the concern to be carried on for the benefit of his estate until they attain maturity, or until certain sums are raised (*e.g.*, for his widow and daughters), or otherwise for a limited period; or he may desire to give an interest in the concern to persons (*e.g.*, his daughters) who could not personally carry it on.

In such cases the ordinary course (where the concern is not converted into a company) is to bequeath the business, with the capital

employed in it, to trustees, who are directed to carry it on so as to effect the testator's wishes.

But it is often a matter of great difficulty to find trustees competent and willing to undertake such trusts; for in carrying on the concern (even though acting avowedly as trustees or executors) they become personally responsible for all debts and liabilities incurred in carrying on the business after the testator's death, with a right of indemnity, it is true (see *Bennett v. Wyndham*, 4 D. F. & J. 259; *Re Raybould*, (1900) 1 Ch. 199), but an indemnity which is frequently restricted to the assets employed in the business. This responsibility may even result in bankruptcy, if the concern is not successful. Moreover, however prudently the trustees may act, there is a certainty of anxiety, and not improbably the executors' management may be questioned, quarrelled with, misconceived, or disapproved by the persons beneficially interested, and they may be called to account in an action in the Chancery Division or elsewhere. Even if trustees are found who are willing to undertake the responsibility, they may predecease the testator, or when upon the death of the testator they are properly advised as to their responsibilities, they may decline to act, or they may die before the trusts are at an end, or wish to retire, and there may then be great difficulty in finding successors to them.

Where, however, the business has been converted into a private company these difficulties disappear. Upon the conversion all the shares in the company (with the exception of perhaps a dozen) are issued to the former owner as fully paid up, and he becomes managing director, with power, by will or otherwise, to appoint, or authorize others (*e.g.*, his trustees) to appoint, directors. By his will the shares are bequeathed to trustees, who themselves become or appoint directors. As the directors of the company are under no personal liability for the company's debts, there is no difficulty in finding persons to act, especially as directors receive remuneration, which trustees do not. Thus upon the death of the testator the business will go on as usual, and in due course the shares will be sold, distributed, or otherwise dealt with as the testator directs.

The above deals with the case of a sole trader dying; where several persons are carrying on business in partnership the difficulties are still greater, and the death of one or more may seriously prejudice the survivors and the persons interested in the estate of the deceased. *Prima facie*, the death of a partner dissolves the partnership as to all the partners, and the concern has to be wound up and the assets realized and distributed. In the absence of special authority under the will of the deceased partner, his executors or trustees cannot leave his capital in the concern, and accordingly, if the surviving partners desire to continue the business, they must purchase the share of the deceased partner, if, that is, they can arrange matters with the executors. But this may entail the withdrawal of such an amount of capital as will seriously cripple the concern. Moreover, it may be

impossible to arrange terms with the executors, and an action in the Chancery Division may be necessary.

To meet these difficulties, the articles of partnership very commonly provide that the survivors shall purchase or shall have the option of purchasing the share of the deceased; but in either case, whether there is or is not an option of purchase, the withdrawal of capital may be disastrous to the concern, even though spread over several years, not does it preclude the representatives of the deceased partner from having the accounts taken by the Court. Sometimes the deceased partner authorizes the trustees or executors to carry on the business in conjunction with the surviving partners; but here again difficulties are apt to arise, for the trustees or executors may disclaim, or the surviving partners may be unwilling or find it impracticable to act with them, or disputes may arise. As stated in Lord Justice Lindley's work on Partnership, "The position of the executors of a deceased partner is, in fact, one of considerable hardship and difficulty; if they insist on an immediate winding-up of the firm, they may ruin those whom the deceased may have been most anxious to benefit whilst if for their advantage the partnership is allowed to go on, the executors may run the risk of being ruined themselves. With the view to obviate this, it is not unusual for one partner to make his co-partner his executor; but the difficulty of the executor's position is thus rather increased than diminished, for his own personal interest as a surviving partner is brought into direct conflict with his duty as an executor. Everything, therefore, which he does is liable to question and misconstruction on the part of the persons beneficially entitled to the estate of the deceased; and he is practically much more fettered in the discharge of his duties, and in the exercise of his rights, than if he had not to act in the double character imposed on him."

If, however, the concern is converted into a company, these difficulties and inconveniences are got rid of. The shares of the deceased partner form part of his estate, and are bequeathed in trust, or otherwise dealt with as may be convenient, and his estate will be represented on the board of directors by his trustees or their nominees, who, being mere agents of the company, can act without incurring personal responsibilities.

Bankruptcy.

2. *As regards Bankruptcy.*

Where a man is engaged in trade, whether alone or in partnership, he is liable to be made a bankrupt, if he gets into financial difficulties. His position may be the result of misfortune, or of the fraud or misconduct of a partner or clerk, and he may be quite blameless himself, but as he has neglected to avail himself of the advantages offered by the Companies Act, 1908, he must take the consequences—administra-

tion of his assets in bankruptcy, together with the stigma attaching to publicly declared insolvency. A company, on the contrary, cannot be made bankrupt; nor can its shareholders be made bankrupt in respect of the company's liabilities, for the company's liabilities are not theirs. If the company gets into difficulties it will, it is true, be wound up voluntarily or otherwise, and its shareholders will have to pay up the amount, *if any*, unpaid on their shares; but that is all. Where, on the other hand, bankruptcy befalls a member of a partnership, great inconvenience may be caused to the solvent partners; for the share of the bankrupt partner has to be ascertained and paid to the trustee in bankruptcy, and this again may involve an action in the Chancery Division. Sometimes articles of partnership try to meet the case by giving the solvent partners the option of taking the share of the bankrupt partner at a valuation, or at the amount at which it stands in the books, or otherwise, on favourable terms. Such provisions, however, cannot be relied on, for the law will not allow a man to interfere with the ordinary operation of the bankruptcy law by giving his partners a benefit at the expense of his creditors or to their prejudice. But if the partnership has been converted into a company, the bankruptcy of a member does not affect the company, or will only do so indirectly. The trustee of the bankrupt on his part sells and transfers the shares of the bankrupt, or if worthless or onerous disclaims them, but that is all (see p. 29, *supra*). The company on its part proves for the estimated value of future calls or for damages for disclaimer, and there is an end of it. The trustee is not entitled to have the accounts of the company taken and the property sold, or to require the other shareholders to pay off the bankrupt's share; accordingly, the concern goes on as before, its capital remains intact, and its powers are unaffected. Moreover, articles may be so framed that on a shareholder becoming bankrupt, the trustee is compellable to sell the bankrupt's shares to some of the other shareholders. See *supra*, p. 849.

See Lord Macnaghten's observations, *infra*, p. 944.

3. As regards Lunacy.

When, again, a partner becomes lunatic or of unsound mind, the partnership is placed in an extremely inconvenient position, worse than in the case of bankruptcy. Litigation is generally inevitable, and the capital of the lunatic partner has to be found and paid out. But the lunacy of a shareholder causes a company no material inconvenience. The committee retains or transfers the shares as the Court directs, and there is no room for litigation so far as the company is concerned.

4. As regards the Holding of Property.

In the case of a partnership the property of the firm is usually vested in the partners jointly, or in one or more in trust for all, and

Lunacy.

Holding
property.

the admission, retirement, death, or bankruptcy of a member generally involves some dealing by conveyance or otherwise with the property: which is both troublesome and expensive. Moreover, where partnership property is to be dealt with, *e.g.*, by sale or mortgage, it is very common to find that by reason of some slip or omission the legal estate is outstanding in the representatives of a deceased partner, or some release or conveyance is requisite, in order to complete the title of the partners. But in the case of a company this multiplicity of conveyances is avoided. The property is vested in the company as a body corporate with perpetual succession, and no changes of individual membership can affect the title (*supra*, p. 27). Shareholders may come and go, but the property remains vested in the company, and the directors for the time being can, in the name of the company, convey, assign, mortgage, or deal with it unaffected by these vicissitudes.

Contracts.

5. *As regards Contracts.*

Then, too, in respect of contracts a company has many advantages.

For example: Contracts with a partnership are in law regarded as contracts with the members of it, for the partnership has not in law any separate existence; accordingly, if a partner dies, retires, or becomes lunatic or bankrupt, or if a new partner is admitted, difficulties and inconveniences may ensue, and releases, assignments, powers of attorney, and indemnities may be requisite. But a company, being a body corporate, can sue and be sued on contracts made with it, notwithstanding any alterations among its shareholders (*supra*, p. 28). Again, where a continuing guarantee is given to a firm (*e.g.*, that goods supplied shall be paid for), any alteration in the firm will *primâ facie* put an end to the guarantee as to goods subsequently supplied. Not so in the case of a company. Moreover, a company has the great advantage of being able to contract with its shareholders, and to sue and be sued on such contracts (*supra*, p. 29). Thus, if a shareholder is indebted to a company for money lent, or in respect of a call made on his shares, the company can sue for the recovery without difficulty. Conversely, if a shareholder lends money to the company, he can sue for it and enforce any security given him by the company, just as if he were not a shareholder (*Salomon v. Salomon & Co.*, (1897) A. C. 22); and if the company fails, he can prove for the money lent in competition with the outside creditors (*supra*, p. 29). But a firm has no such independent status, and great difficulties and inconveniences arise in seeking to enforce contracts between members of a partnership in connection with the business of the firm; while, should the firm become insolvent, a member of it (except under very special circumstances) cannot prove in competition with the outside creditors of the firm, who must first be paid in full before the creditor-partner can get anything.

6. *As regards Admission of New Members.*Admission of
new members

The admission of a new partner generally involves the preparation of a special deed of covenant, and sometimes of an entirely new deed of partnership, besides accounts, valuations, &c. But in the case of a company the transaction is of the simplest character. If the new shareholder is to bring in capital (in ordinary parlance, subscribe for shares), he takes shares in the company to the amount agreed on, is entered in the register, and thereupon the transaction is complete. Where he is not to bring in new capital, but is to take the place of some existing member, the latter signs a transfer of his shares to the new member, who pays him the purchase-money; the transfer is registered, and the transaction is complete.

7. *As regards Retirement.*

Retirement

Where a member of a partnership retires, the concern is more or less dislocated, the capital *pro tanto* reduced, and the rights of all the parties affected. Moreover, the retiring partner still remains liable for the existing debts and obligations of the partnership, and must rely on the covenant of the continuing partners to indemnify him; and if that covenant is not performed, he may have to pay the creditors or become bankrupt, even though years have passed since his retirement. The retiring member may even become liable for subsequent debts of the firm, unless his retirement is advertised in the *Gazette*, and, as regards existing customers, notified by circular. But in the case of a company the retirement of a shareholder is effected without difficulty. He signs a transfer to the person who takes his place; this is registered, and the transaction is complete. There is no need to give notice in the *Gazette*, or by circular or otherwise; and the retiring member is entirely freed from the debts and liabilities of the company, with this qualification, that if within one year after his retirement the company is wound up, and any debts or liabilities, contracted before his retirement, remain, which the existing shareholders have not the means to pay, he may be called on to contribute to the payment of the same, but only to the extent (if any) of the capital remaining unpaid on the shares formerly held by him (see sect. 123 of the Companies Act, 1908, replacing sect. 38 of the Act of 1862). Accordingly, if his shares were fully paid up, he is not even for a year under any liability; and so, too, he is under no liability where his shares were not fully paid up when he transferred them, but were subsequently paid up by the transferee.

8. *As regards Sale, Mortgage, and Settlement of Shares.*Sale, mort-
gage, &c.

The sale of a share in an ordinary partnership dissolves it, and to mortgage or settle shares in such a partnership involves very serious

difficulties, and is likely to give rise to litigation and dispute. But shares in a company can be readily sold, mortgaged, charged, settled, bequeathed, or otherwise dealt with. Thus, in the case of a mortgage, the shares can be transferred to the mortgagee subject to redemption, and with authority to sell, in certain events; or an equitable security can be created by signing a blank transfer of the shares and depositing the share certificates, accompanied by a memorandum, with the mortgagee, and giving notice to the company. In the case of a settlement the shares can be transferred to trustees, or the settlor can execute a declaration of trust.

It will thus be seen that the conversion of a trading concern into a company, while it gives protection to the partners by limited liability and permanence to the business by incorporation, supplies, also, a simple and effective machinery for dealing with all the interests of the partners, thereby rendering them more convertible and easy of realization, and proportionately enhancing their value and the value of the business.

Employés.

9. Admission of Employés to share Profits.

The appropriation of some share of the profits of a concern to the employés therein is well calculated to promote the success of the concern; but in the case of a partnership it is not easy to grant anything but a precarious right to share profits, unless the employés are admitted to the partnership, a thing which may be open to grave objection. In a company, however, there is no such difficulty or objection. The schemes commonly adopted are to give the employés a special class of "employés' shares," or to allow them to take up shares on favourable terms, or to vest shares in trustees, who are to receive the dividends and distribute them among the employés, or accumulate for their benefit. Another scheme is to establish a participation fund, and to notify that at the end of each year a certain percentage (either specified or communicated in confidence to the auditor) of the surplus profits will be carried thereto; and in such case the employés are given participation certificates conferring a right to equal or varying shares in the fund subject to conditions. Sometimes all the employés are admitted to participate; in other cases only those who have been employed for at least two years or more; in other cases only the managers or heads of departments. See Chap. XI., *infra*.

Government contracts.

10. As regards Government Contracts.

By the Act 22 Geo. 3, c. 45 (repealed in part, Statute Law Revision Act, 1871), it is provided that any person who shall directly or indirectly enter into a Government contract shall be incapable of being

elected a member of Parliament, or if already a member, his seat becomes void; and there are severe penalties for violations of the Act. Hence a sole trader or member of a partnership cannot sit in Parliament if he or his firm is interested in any Government contract; but if the concern is converted into a private company this inconvenience is avoided, for the Act does not apply to an incorporated trading company contracting in its corporate capacity and for the general benefit of such company.

Looking, however, at the heavy penalties, it is not desirable to act in such a case without careful consideration and taking the best advice in view of all the circumstances.

11. *As regards Simplicity of Arrangement.*

Simplicity.

This affords another inducement.

In the case of a partnership, particularly if the arrangements are special, the preparation of the articles of partnership involves very careful consideration and, consequently, considerable delay, and in the result a document is produced in the most admired style of the conveyancer's cabalistic art, which, in all probability, if not bewildering, is barely intelligible to the partners; whereas, in the case of a private company, the memorandum and articles are comparatively short, simple, and readily understood by anyone. Matters which in a deed of partnership involve elaborate provisions can be easily dealt with in articles of association, and the reason is that a company being an independent entity the legal relations between the company and its creditors or the company and its shareholders are incomparably simpler and work more smoothly. Yet a company remains in substance, though not in point of law, simply a statutory partnership, and endowed with all the advantages of a partnership, but free from its disadvantages.

12. *As regards Death Duties.*

Death duties.

Conversion affords considerable facilities for the working out of plans if not for avoiding, at least for minimizing as far as practicable, the heavy estate duties imposed by the Finance Act, 1894, and subsequent Acts. Moreover, it has been held that in computing estate duty which, under the above Act, is to be paid upon the "principal value" of all property which passes on death (sect. 1), and under sect. 7 (5) is to be ascertained as if the property was sold in the open market at testator's death, the valuation of shares, which are subject to special restrictions [as in Forms 312 *et seq.*] as to transfer and fair value, must be made with due regard to those restrictions, and not as if the shares were freely transferable. *Att.-Gen. v. Jameson*, (1904) 2 Ir. Rep., K. B. D. 644.

Where Private Company Advisable.

Conversion
of existing
business.

At this stage it may be convenient to give some instances of the many cases in which private companies are commonly formed.

And, first, as to cases of conversion, that is to say, when an existing business is to be turned into a company.

1. A firm consists of several members, each of whom has laid by some private means which he is desirous of freeing from the risks of trade. To effect this partners convert the business into a private company, become the sole directors of the company, and receive paid-up shares in substitution for their interests in the business. Henceforth their assets outside the business are free from risk.

2. An individual, or a firm, is engaged in a business of a profitable but speculative character, out of the profits of which he or they can make savings. It is desired to place these savings beyond the risk of danger from the business collapsing. Accordingly the business is converted into a private company, and the savings are thus freed.

3. A firm consists of several members, one of whom is entitled to the greater part of the capital, and has, besides, private means. He is disposed to retire on the fortune he has accumulated. If his liability could be limited, he would be willing to leave part of his capital in the business, and to assume the position of a sleeping partner. The only way in which this can be effected is by converting the business into a company, and it is accordingly done.

4. A man desires to leave his business to trustees, in order that it may be carried on for the benefit of his family until his sons attain the age of twenty-one years. He finds that the persons whom he wishes to appoint as trustees object to undertake a trust which will involve them in unlimited liability, and may prove ruinous. Accordingly, he converts the concern into a private company, and the difficulty is removed.

5. The owner of a profitable business dies. There are competent managers, but the owner's sons are not inclined to devote themselves to the concern, and at the same time they are unwilling to incur the unlimited liability involved in carrying it on through managers. Accordingly, they convert it into a private company.

6. Another example is given by a very great lawyer (Sir G. Jessel).* "A man dies, leaving his property to three or four sons. He is the senior partner in a concern. If the capital were taken out the concern would be ruined. The junior partners cannot go on: they say to the children, who are not in the business and who have succeeded to large fortunes, 'If you shut up the business you will lose a great deal: let us form it into a limited company, which will

* Select Committee (1877) of House of Commons on the Companies Acts, 1862 and 1867. Mins. of Ev., Answers 2307, 2309.

enable you gradually to draw out of the concern, and, in the meantime, it can go on as usual." I have known that done with great success."

7. A capitalist is willing to supply a trader, or a trading firm, in whom he has confidence, with additional capital in consideration of a share of the profits, but does not wish to incur the liabilities of partnership. He therefore stipulates that the business shall be converted into a company. He will then bring in the additional capital by taking shares in the company to the amount agreed on, and paying for the same in cash. In such a case the capitalist very commonly stipulates that he or his nominee shall be one of the directors for a term of years, and sometimes that the shares to be allotted to him shall be preference shares.

8. A., B. and C. are trading in partnership as shipowners, and are entitled to several steamships or other vessels. By the negligence, misconduct, or imprudence of their servants they may be involved in litigation and personal responsibilities of the most onerous character, *e.g.*, in respect of loss of life, of damage to other ships or to merchandise, caused by collision or otherwise. They desire to get rid of all personal liability, and to throw upon each vessel the liabilities incurred by or in respect thereof. Accordingly each ship, with the business connected therewith, is converted into a private company, and the members of the firm become managers of the company. Henceforth the assets of the company must bear the liabilities. Great numbers of such "single-ship" companies have been formed.

9. A., B. and C. are entitled to a valuable business. By reason of a temporary lock-up of funds, or otherwise, they find it necessary to consult their principal creditors. Bankruptcy, with its costly officialism and commercial discredit, would be disastrous to all concerned, and more especially to the creditors. Accordingly the concern is converted into a company. The smaller creditors are paid off in full, and the principal creditors all take debentures for their debts, and are given paramount control in the management of the company. The concern is thus placed on its legs, and as and when practicable the debentures are cleared off, and meantime the creditors have the fullest security that it is possible to give them, and are able in fact to manage their own affairs and protect their own interests as well as, if not better than, under that species of arrangement known as an inspectorship deed.

10. A. and B. have for many years had the exclusive sale in England of a commodity manufactured abroad by C. and D. Each firm has made large profits, and they are disposed to combine their interests. Accordingly they convert the two concerns into a company, and get shares in the company in proportion to their average profits during the last five years.

11. A. B. is a builder, and has taken land and erected large numbers of houses. Of these he has sold some, but the bulk he has

let and then mortgaged. After paying the ground rents and interest on the mortgages, the property returns a considerable margin of income; but the builder's interest is not easily dealt with, and his profit, represented by the equities of redemption, is locked up. He wishes to facilitate the realization of his interest, and to get some marketable equivalent. Accordingly he vests the property in a private company, and receives in exchange debentures and paid-up shares. These he can sell or pledge as he may think fit, being securities much more readily, of course, dealt with than equities of redemption.

12. A. B. is a manufacturer. He has a profitable business, which is mainly worked by a number of experienced departmental managers. He wishes to be bought out by them, but they have little capital. Accordingly the concern is made over to a private company in consideration of the whole of the ordinary shares; and he enters into an agreement with the managers providing that, to the extent of the profits of each year in excess of, say, 5 per cent., he will make over a corresponding amount of his paid-up shares to the managers. Thus, in the course of some years they will, if the concern is worked successfully, obtain the whole or the greater part of the shares. Sometimes provision is made for annulling the agreement if the profits do not keep up to a minimum figure.

13. A., B. and C. are carrying on business in a foreign country of which they are subjects. They have, or want to have, a branch or agency in England to sell goods manufactured by them abroad, and to buy raw material and take orders. They find that they are, or will be, chargeable with English income tax on their profits whether made here or abroad. To avoid this they convert the English branch or agency into a private company, and by re-arrangement of system thenceforth only pay on the profits of that branch or agency.

14. A foreign company finds that in order to maintain its English patents it must manufacture goods in England, and build up or acquire works for that purpose, but it rather dreads the consequent risks, to say nothing of income tax. Accordingly it forms a private company here and works through that, and thus limits its risks and liabilities as much as it chooses.

The above are all cases of conversion, but great numbers of *private companies are formed to establish some new business* or carry out some special operation, or transaction, or adventure.

The following are examples:

Non-conver-
sion cases.

15. A. is the tenant for life of a landed estate, and B. his son is the tenant in tail in remainder. B. has recently come of age. The estate is capable of being utilised for building purposes; it is subject to mortgages for large amounts carrying interest at different rates and liable to be called in on comparatively short notice. It is desirable to consolidate these and to facilitate future operations. Ac-

Accordingly the estate is vested in a company; the company issues debentures or debenture stock, with which, or with the proceeds of which, all the mortgages are cleared off and the requisite working capital is provided; and the father and the son receive paid-up shares in the company, which, as to part, are made over to the son absolutely, and, as to the residue, are settled on the father for life, and afterwards on the son absolutely. In the result the complication of a series of mortgages is got rid of. There is one permanent charge at a moderate rate of interest, and there is ample capital to develop the estate and turn it to the best account, and future dealings and operations are greatly facilitated.

16. A., B. and C. desire to start a newspaper, or to supply a village or town with waterworks, or to build a theatre or a town hall, or to acquire and work a building estate, or to provide a race-course or a cricket ground or swimming baths, or to erect some flats or workmen's dwellings; but they do not wish to incur unlimited liability. Accordingly they register a private company and take up shares thereof to the extent of the capital which they are disposed to embark. Each of the subscribers becomes a director, and further funds, if wanted, are raised by the issue of further shares or of debentures.

17. A., B. and C. desire to purchase and work a ship, and place it under the management of a particular firm in whom they have confidence; but they are not prepared to incur the serious responsibility attached to the ownership of a ship by individuals. Accordingly they form a private company, in which they take up shares so far as may be necessary to provide the purchase-money for the ship. The company then acquires the ship, and the firm are appointed to be agents for its management.

18. A., B. and C. desire to establish a manufacturing or commercial business. Each has some capital, but one of them does not relish the notion of unlimited liability. Accordingly it is agreed that instead of going into partnership they shall form a private company and carry on the business on that footing, each contributing his portion of the capital, and taking part in the management.

19. A. is a public contractor with great resources and reputation. B. and C. are competent and trustworthy contractors, but with limited means. They are anxious to undertake some contract, and apply to A. for assistance, offering him a large share in the profits if he will contribute a certain portion of the needed capital, and give his advice and assistance. A. is not prepared to go into partnership with those gentlemen, and thus place his great fortune at their mercy, and accordingly he stipulates for the formation of a private company to carry through the transaction, and offers to subscribe for share therein, B. and C. undertaking the whole management of the business.

20. A. has a patent for an invention, but no capital. The utility of the invention is fairly obvious; but it requires to be more thoroughly tested, and expense must be incurred in so testing it, and also in

obtaining foreign patents, and perhaps in floating a company to purchase the patent rights. B., C. and D. agree to form a syndicate which shall find the requisite funds. The patent rights are made over to the syndicate, on the footing that A. shall have, say, one-third of the shares in the syndicate free, that is, fully paid, and that the other subscribers shall pay up their shares in cash. The capital of the syndicate is fixed accordingly, say, at 3,000*l.* in 100*l.* shares. The invention is tested, and, if found satisfactory, foreign patents are obtained, and the public company is formed and floated. The patents are re-sold to that company at a profit, and the net proceeds of sale are divided rateably amongst the members of the syndicate, which is then dissolved.

21. C. has obtained in America or in one of the Colonies an option or contract to purchase some mining property. Money is wanted to send out an independent expert, and, perhaps, to work the property to a limited extent, and thus prove its capabilities. C. places his option or contract and knowledge at the disposal of a syndicate in consideration of shares in the syndicate. The syndicate then obtains the necessary reports, works the property sufficiently to ascertain its value or practicability, and re-sells it at a profit, either to some company formed for the purpose of acquiring it or to anyone who is willing to buy it on satisfactory terms.

22. A. has a going business which requires immediate financial assistance. For certain reasons it is not practicable to convert the business at once into a company, and go to the public, and, accordingly, a private company is formed to find the requisite funds in consideration of a share in the business and the power to dispose of it. The syndicate takes over the business, sets the concern on its legs, and then, on a favourable opportunity, disposes of it on the best terms obtainable.

23. The prospects of some company are likely to be damaged by hostile attacks and fictitious sales of its shares. A., B. and C., and others who are interested in the company, and desire to resist these attacks, form a syndicate to buy up all shares offered for sale, and to hold the same for a limited period, and then re-sell on the best terms obtainable.

24. Some mercantile commodity is likely to rise in value. A syndicate is formed to acquire and hold a large stock of it and to re-sell when the rise has taken place.

25. A company is about to be brought out, but considerable preliminary expenses will have to be incurred in advertising, legal charges, fees to brokers, solicitors, and otherwise. A private company is formed to find the requisite funds, the vendor agreeing to repay them with a bonus out of the purchase consideration which he is to obtain from the company. The company is then floated, and in due course the vendor pays off the private company's advance and bonus.

26. It is desired by certain parties to apply to some government or authority for a concession, charter, or other special privilege. In order to obtain this, expense must be incurred, and the requisite funds can only be found by co-operation. Accordingly A., B. and C. and others form a private company.

27. A. and B. have carried on business for many years in South America as agents and consignees for a large number of English manufacturers. A. and B. have stopped payment and become insolvent, and their affairs are in confusion. They are largely indebted to the English manufacturers, and hold goods belonging to them which have been consigned for sale. A. and B. are also largely indebted to local creditors who claim priority, and who have attached not only the goods of A. and B., but also the goods consigned. The English manufacturers determine to co-operate for mutual protection and benefit. Accordingly they form a private company, make over their claims to such company, and receive in exchange shares and debentures, or a common stock of nominal amount, constituted by a trust deed, which pools all the claims and securities. The company then appoints a competent agent to protect and enforce the interests of all the English creditors, or of the company as their transferee, and to enforce their rights; and, further, to establish and work an agency for the further sale of goods to be consigned by the English manufacturers.

28. The members of a club wish to provide the club with suitable buildings. Accordingly a private company is formed, and the requisite funds are raised by the issue of shares and debentures, and the club pays a rent for the use of the buildings.

29. An American or foreign firm sells large quantities of its products in the United Kingdom. It desires to establish an agency here without incurring more than a limited liability. Accordingly it forms a private company here, and appoints its agents to be directors thereof.

30. A., B. and C. are members of a theatrical company, in receipt of a salary of 5*l.* a week. They wish to lease a theatre, manage it for themselves, and divide the profits. They form a private company, subscribe the capital as far as they are able in the ratio of their salaries, and raise the remainder on debentures.

31. A. is a market gardener and fruit grower; B. and C. experts at jam-making. A., B. and C. combine to form a private company, and work up a jam-making business, which may be sold at a large profit to a public company.

32. A few persons are interested in a project (*e.g.*, the promotion of a public company, or the acquisition of a concession or patent), for which funds will be wanted for a time. They form a private company and subscribe for, say, 50,000*l.* of shares, paying up 5 per cent., and the company raises any further money required by mortgage to its bankers of the uncalled capital.

33. In the case of a private company it frequently happens that the parties, &c. who form it desire not to disclose at first its main purpose. Thus, suppose A., B. and C. wish to form a private company to send out an agent to acquire a concession for the construction of a particular railway, or for the purchase of mines in a particular district. If the objects clause of the company's memorandum were expressly to state this object, the result might be to raise up rivals, and wreck the scheme by premature disclosure. This danger or inconvenience can, however, be readily avoided by expressing the objects of the private company in general terms, *e.g.*, to acquire any concessions for the construction of railways, tramways, docks, or harbours, &c. Or, again, if it is desired that the names of the capitalists who are finding the requisite funds should be kept in the background, their shares can be put in the names of trustees or nominees.

Procedure.

Where the *ad valorem* stamp duty would be heavy, a special course of procedure may be necessary to avoid or minimise it; but we shall now proceed to describe the ordinary procedure to be adopted in the establishment of private companies, whether of Class A. or Class B. (*supra*, p. 912). First as to Class A.:

1. Let us take a case of conversion. Where it is desired to convert a going business into a private company, the first step is to ascertain the value of the business. To arrive at this a valuation will be made of the assets of the firm, including the goodwill, the stock-in-trade, business premises, moneys, bills, notes, and book and other debts due to the firm; and an account will be taken of the debts and liabilities of the firm. The valuation and account are sometimes made and taken by the owner or owners, and sometimes by some person appointed by him or them. In most cases the valuation and account are not made or taken in a detailed manner, but the position is fairly estimated, regard being had to the last balance-sheet. In the present case we will suppose that the partners come to the conclusion that the assets are worth 200,000*l.*, and that the debts and liabilities amount to 42,000*l.*,* so that the net value of the business is 158,000*l.*

The next point is to settle the limit of liability which the partners desire to fix, for on this depends the most important term of the agreement. In many cases of conversion the owners of business concerns, whether sole or in partnership, desire to incur no personal

* The vendors of the business of course remain personally liable to the creditors in respect of these debts and liabilities, unless the creditors novate, that is, accept the liability of the company in substitution for that of the vendors; but whether they do this or not the vendors are entitled to be indemnified by the company against all such debts and liabilities.

liability to the creditors of the company: they are willing to hand over the business with its assets and liabilities to the company, but they desire, should the company be unsuccessful, not to be under any personal liability to pay its debts; they wish the remedy of the creditors of the company to be exclusively against the assets of the company. Where this is the desire of the parties, the conversion, to give effect to it, must be on the footing that the owner or owners shall receive the value of the business in shares issued as fully paid and returned as such under sect. 88 of the Companies Act, 1908. Upon such shares there is no personal liability. They entitle the holder to votes and dividends, but no call can be made on him. Sometimes, however, a vendor may be willing to accept in payment for his business, or share of a business, shares not fully paid up, but with some liability attaching: for instance, a trader desirous of converting his business, valued at 10,000*l.*, into a company, may be willing to incur a liability to supply 2,000*l.* additional working capital if required; in such case the conversion will be effected on the footing that he shall receive 2,000 shares of 6*l.* each, with 5*l.* per share credited as paid up; he will then be liable to pay up the balance of 1*l.* per share (equal to 2,000*l.*) when required, but will be under no further liability.

2. When the company is formed to take over and complete a single transaction, the preliminary steps are of a similar character. Thus, suppose that the transaction is a contract to erect an exhibition; the value of the contract will be ascertained, and the owners will receive paid-up or partly paid-up shares of equal value.

Secondly, as to private companies of Class B. (*supra*, p. 912), i.e., to establish or undertake some new business, transaction, or enterprise.

In such cases the persons interested fix the amount of the capital of the company, and the amount to be contributed by them respectively, and whether they are to pay up at once, or by instalments, and what property (if any) they are to make over to the company, and for what consideration, and what will be their duties; and having settled these matters they proceed to form the company accordingly.

The preliminaries having been settled, the further course of procedure will be as follows:—

1. Settle and sign a preliminary agreement defining the terms of conversion, if such agreement is considered expedient. (See Form 305.)
2. Settle and sign the memorandum and articles of association and the agreement for transfer to the company. (See pp. 956 *et seq.*, *infra*.)
3. Apply for registration of the company as a "private company,"

one which does not invite the public to subscribe for its shares (*infra*, p. 997), and procure registration accordingly.

4. Then—on incorporation—let the company enter into an agreement with the vendors, and let that agreement be carried into effect. (See p. 956. *infra*.)

The agree-
ment.

The formation of a private company or syndicate involves, in most cases, the execution of an agreement.

Form 306, *infra*, p. 956, will give the reader some idea of the form of such a document in the case of a conversion.

In reference to the agreement the following points should be noticed:—

1. The agreement, it will be observed, is made between the members of the firm and the company; accordingly it cannot be executed until *after* the company has been registered, because until then the company has no existence.

Sometimes, as in the case of other companies, it is deemed expedient to have an agreement before the memorandum and articles of association are prepared, *e.g.*, where there is reason to apprehend that a member of a firm who has assented to the conversion may change his mind unless bound by agreement at once. In such case the agreement will be made between the vendors and some person "on behalf of the intended company," and will recite the intention to form the company, and provide that the memorandum and articles shall be in a form already approved, or in such form as the vendors, or the majority of them, shall approve, and will define the terms of sale as in the above agreement.

2. In the form of agreement given at p. 956, the business is supposed to belong to three persons; but the form can readily be adapted to a case where the business belongs to a single person, or to a firm consisting of a greater or less number of persons than three.

3. Sometimes, instead of specifying part of the property transferred in the body of the agreement (clause 1), it is found more convenient to specify it all in the schedule. In such case clause 1 will provide for the sale and purchase of "the property specified in the schedule hereunder written," and particulars will be given in the schedule.

4. In some cases the sale does not include all the property of the firm. Part of the ready money, for instance, may be excepted, or some branch of the business, or some other item; indeed, the sale sometimes includes scarcely any property except the goodwill of the business, and possibly some pending contracts, or the business premises. If the vendors are carrying two cognate businesses, *e.g.*, bootmaking and saddlery, but converting only one of them, it may be desirable not to part with the exclusive right to the trade name.

5. The shares agreed to be taken by the vendors in the form at p. 957 are, it will be observed, to be deemed to be fully paid up.

the object being that the partners—A., B. and C.—may be free from all liability to creditors of the company. Such creditors have their remedy against the assets, but none against A., B. and C. personally. This freedom from liability, however, applies only to debts and liabilities incurred by the company subsequently to the conversion. As to the debts of the firm existing at the date of the sale, though as between the vendors and the company the latter is, by clause 3 of the agreement, bound to pay, yet the creditors who have nothing to do with the conversion still retain their right to call on A., B. and C. to pay, and would no doubt enforce this right if the company failed to pay in due time. It may fairly be assumed, however, that the debts and liabilities taken over will in ordinary course of business be soon discharged by the company, or, at all events, A., B. and C. be released by novation, that is, by the creditors accepting the company as their debtor in substitution.

6. Sometimes the vendors determine to accept part payment in fully paid-up shares and part in debentures or acceptances of the company. Or, again, it is sometimes provided that the share of one partner (e.g., the wealthy partner, who desires to withdraw) shall be paid for partly in shares and partly in cash payable by instalments. Special cases of this kind must, of course, be specially provided for by the agreement.

7. As to clause 6 of the agreement. Upon the conversion of a business into a private company it is almost always provided that the company shall accept the title of the vendors without investigation.

8. The agreement is expressed in the above form for the sake of simplicity, but modifications are generally desirable in order to avoid or minimise stamp duty.

9. As to fraudulent companies, see p. 946.

In the case of a private company of Class B. (*supra*, p. 912), the agreement (if any) will provide for the transfer to the company of the concession, patent, or property, or for the placing at the disposal of the company of the services of some expert, or otherwise as the circumstances may require.

Conversion commonly involves some *ad valorem* duty, but this may in some cases be avoided or minimised. And it is well settled that persons are perfectly free, provided they comply with the law, to adopt that course which will best enable them to avoid or minimise the duty. "It is no fraud on the Crown; it is a thing which they are perfectly entitled to do." Per Lord Esher, M. R., *Commissioners of Inland Revenue v. Angus*, 23 Q. B. Div. 579; *Simms v. Registrar of Probates*, (1900) A. C. 323.

It must, however, be left to the practitioner to point out the various expedients open; for to specify them here would be to invite the Legislature to intervene with fresh taxation.

Where a business is converted into a company it is usual to send Notice of conversion.

out a notice to customers—and, in the case of an important concern, to procure the insertion of a paragraph in the money article of some of the leading newspapers—stating that the business has been converted into a company, with a capital of so much, and that the shares have all been taken up by the partners and their relations, or as the case may be.

Form of
circular.

The following is a specimen of a circular:

A., B. and C., Limited.

SIR,—We beg to inform you that we have converted our business into a limited company bearing the above name.

The object of the conversion is to secure the many advantages incident to incorporation, and more especially to avoid the dislocations and inconveniences which the death or retirement of any partner might cause.

The capital of the company has been fixed at 600,000*l.*, divided into 60,000 shares of 10*l.* each, the whole of which are appropriated to ourselves as fully paid up in substitution for our interests in the business.

The directors of the company are A., B., C. and D., and D. has been appointed to the office of managing director.

All debts and liabilities of the firm are undertaken by the company, and all debts due to the firm are to be paid to the company.

The conversion will not affect the general conduct of the business, which will be carried on as heretofore, and we trust that the satisfactory relations which have heretofore subsisted between you and the firm will continue to subsist between you and the company.

We have the honour to remain,

Yours faithfully,

A., B., C. & Co.

Companies Limited by Guarantee.

Companies
limited by
guarantee

When a private company or syndicate is to be formed for some temporary purpose, *e.g.*, to acquire patent rights and as a preliminary thereto to test the invention, and in due time to sell and divide the proceeds, it is now not uncommon to register the concern as a company limited by guarantee and without a share capital. This is a mode of formation much more elastic than the ordinary mode. Though there is no capital divided into shares, it is possible to place the members in as secure and advantageous a position as if they held shares in a capital. The guarantee is no hindrance. It may be merely nominal, *e.g.*, a liability on each member, in the event of a winding-up, to pay, say, 1*l.* Where this mode of incorporation is adopted, it is possible to enable the company to divide any of its assets (whether in the nature of capital or profits) by way of dividend among its members, and to do a variety of other things which, in the case of a company formed in the ordinary way, are not permissible. See further, *supra*, pp. 492 *et seq.*, 795 *et seq.*

Cases as to Private Companies.

The following cases, as some of the most instructive relating to private companies, may here be mentioned. They are given mostly in chronological order:—

Trevor v. Whitworth (1887), 12 App. Cas. 409. This was a case in which the articles of association of a private company, limited by shares, contained power for the company to purchase its own shares. Acting on this power, the directors bought up the shares of one of the members, *bonâ fide* thinking that it was to the interest of the company so to do. Held, that the purchase involved in effect a reduction of the capital of the company, and was therefore *ultra vires* and illegal. In that case Lord Macnaghten said:

"It is said that the company was a family company; but a family company, whatever the expression means, does not limit its trading to the family circle. If it takes the benefit of the Act [of 1862], it is bound by the Act as much as any other company. It can have no special privilege or immunity. It was said that the board did not want Whitworth's shares to be sold to outsiders or put on the market. Unfortunately there was nothing special in that."

This decision is still good law—a primary principle for private and public companies alike that a company cannot purchase its own shares, but the Companies Act, 1908, while imposing many new and onerous obligations on companies, exempts private companies from many, although by no means all, of the obligations imposed on companies generally. See p. 911, *supra*.

Foster v. Commissioners of Inland Revenue, (1894) 1 Q. B. 516. In this case it was held that an agreement in writing to transfer a business to a company in consideration of shares was, in effect, an agreement for sale within the Stamp Act, 1891. It was contended that in substance the vendors sold to themselves; but the Court held that the company, being a separate entity, was the purchaser, and that it was not possible to disregard the fact and treat the members as the company without disregarding the settled legal distinction between the members and the company of which they are corporators.

Newman & Co., (1895) 1 Ch. 685. In this case one Newman had converted his business into a private company, and had applied funds of the company to *ultra vires* purposes. This was done with the privity and consent of the other members, and it was contended that, as it was a private company, no objection should be made to such transactions; but it was held otherwise. The following extracts from the judgment of Lindley, L. J., are in point:

"It is true that this company was a small one, and is what is called a private company, but its corporate capacity cannot be ignored. Those who form such companies obtain special advantages, but accompanied by some disadvantages. A registered company cannot do anything which all its members think expedient,

Trevor v. Whitworth.

(Reduction of capital by company purchasing shares.)

Foster v. Commissioners of Inland Revenue.
(Stamp duty on sale agreement)

Newman & Co.
(Present to director *ultra vires*.)

and which, apart from the law relating to incorporated companies, they might lawfully do as incorporated. A company's assets are its property, and not the property of the shareholders for the time being; . . . Mr. G. Newman and his co-directors evidently ignored their legal position entirely. They regarded Mr. G. Newman as the company, and it never seems to have occurred to them that he and his brothers could not do as they liked with what they regarded as their own property, or, rather, as his, for he and his children held the bulk of the shares. If this view were correct in point of law—if the body corporate could be disregarded—it would follow that Mr. G. Newman and his brothers would be liable without limit for the debts which were contracted in the name of the company. This would be a just and proper result to arrive at; but the Court is precluded by the terms of the Companies Act, 1862, ss. 191, 192, from adopting it. The Court is bound to recognize the company as incorporated, and to give effect to all the consequences of such incorporation."

It was a pity the principles so clearly expounded here were not adhered to by the Court of Appeal.

Salomon v. Salomon & Co.
(One-man company legal.)

Salomon v. Salomon & Co., (1897) A. C. 22, dealing with one-man and other small companies. In common parlance, a "one-man company" is a company in which all, or practically all, the shares belong to one man, *e.g.*, where the capital is divided into 100,000 shares and 99,994 of them are held by one man, whilst the remaining six belong to other persons more or less subject to his influence, as his clerks or relatives. A "two-man company" has a corresponding meaning.

Thousands of private companies have been formed within the last quarter of a century having the great bulk of their share capital in the names of one, two, three, four, or five principal shareholders; the other members holding only one share apiece, and being mere nominees of the principal shareholders or shareholder; and until the year 1894 no doubt was openly expressed as to the regularity of the constitution of such companies.

In that year, however, in the case of *Broderip v. Salomon*, (1895) 2 Ch. 323, the question was for the first time raised, and the regularity of the constitution of a so-called "one-man company" was challenged in the High Court of Justice.

The facts of that case, shortly stated, were as follows: Salomon, a solvent leather merchant, owned a profitable business, and in order to obtain the advantages of limited liability (*supra*, p. 912 *et seq.*), he determined to convert his business into a private company. Of the shares in the capital he took 20,000, and his wife and sons and daughter each took one. No one else ever had a share in the company. He also received mortgage debentures for 10,000*l.* as part of the consideration payable to him for the transfer of the business. These debentures he mortgaged to one Broderip as security for a loan. The boot trade later on became unexpectedly depressed, and at the end of the year the company got into difficulties. Broderip then brought an action to enforce the debentures, and a winding-up order was shortly afterwards made against the company on another credi-

tor's petition. There were unsecured creditors to the extent of several thousands of pounds. The learned judge before whom the action came conceived the singular notion that the company, although duly incorporated, was a sham, and that, although it was a distinct entity, it was a mere alias for Salomon, and he decided in effect that, in the circumstances, Salomon was bound to pay the unsecured creditors out of his own pocket, although his shares had already been paid up in full.

The case then went to the Court of Appeal, and was re-heard by the Lords Justices Lindley, Lopes, and Kay, who, strange to say, affirmed the decision, and in doing so expressed views of a still more remarkable character. Lindley, L. J., said: "The Legislature never contemplated an extension of limited liability to sole traders or to a fewer number than seven. . . . Although in the present case there were, and are, seven members, yet it is manifest that six of them are members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the Legislature intended not to be done."

And Lopes, L. J., said: "It was never intended that the company to be constituted should consist of one substantial person and six mere dummies, nominees of that person without any real interest in the company. The Act contemplated the incorporation of seven independent *bonâ fide* members who had a mind and will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on the whole business in the same way as before, when he was a sole trader."

And Kay, L. J., said: "The statutes were intended to allow seven or more persons, *bonâ fide* associated for the purposes of trade, to limit their liability under certain conditions and become a corporation, but they were not intended to legalize a pretended association for the purpose of enabling an individual to carry on his own business with limited liability in the name of a joint stock company."

The views thus expressed naturally created great uneasiness, not to say [doubt and anxiety, and some] consternation, in the minds of those who were interested in private companies, and well they might, for their effect would have been to disincorporate and wreck thousands of flourishing concerns.

However, experts in company law soon arrived at the conclusion that the decisions of both Courts were erroneous, and that the views expressed by them were unsound, and in the next edition of his work "Private Companies" the author ventured to make the following observations:

"Grave doubts exist whether the views expressed in these dicta are well founded. It is pointed out that there is not a syllable in the Act to show that it was intended to enact that limited liability should be conditional on there

being, and continuing to be, seven members 'beneficially' or 'substantially' interested in the company; and it is argued, with some reason, that if the Legislature had intended to impose such a condition it would have said so in plain terms. Again, it is said that, if this was the intention, it is very singular that sect. 48 of the Act says not a word on the subject. That section provides that if any company under the Act carries on business when the number of its members is less than seven for a period of six months after the number has been so reduced, any person who is a member of such company during the time that it so carries on business after such period of six months, and is cognizant of the fact that it is so carrying on business with fewer than seven members, shall be severally liable for the payment of the whole of the debts of the company contracted during such time.

"If the intention was as suggested, it would have been easy to deal with the matter in this section, and use the phrase, 'members beneficially and substantially interested,' with a proper definition of the word 'substantially,' but the section observes a significant silence.

"Further, it is said that if the law be as suggested, the Legislature has, in effect, laid a trap for the unwary, for it offers limited liability conditionally on there being seven members, without a word as to 'beneficial' or 'substantial' holding; and yet, if the dicta be good law, a shareholder may find that he is under unlimited liability, because his interest, compared with that of the other members, is too large.

"Again, it is said that it is a well-settled rule in the interpretation of Acts of Parliament that what an Act does not prohibit may be done, or, rather, that a thing is either prohibited by the Act or is not prohibited, and that in the latter case there is no obligation not to do what the Legislature has not really prohibited (6 H. L. C. 338; L. R. 8 C. P. 64); and that it is the duty of the judges to interpret, and not to legislate or to provide for cases which the Legislature has not thought fit to provide for (1 C. D. 161); and it is said that the dicta in *Broderip v. Salomon* in effect go beyond the Act, and depart from this rule, and are therefore to be disregarded.

"Nor is it easy to answer these objections and arguments."

The event justified the author's criticisms, for the House of Lords, in November, 1896, reversed the decision of the Court of Appeal, and determined that the views expressed by the learned judges there were entirely erroneous and unsound. *Salomon v. Salomon & Co.*, (1897) A. C. 22. The noble and learned lords who heard the case were the Lord Chancellor (Lord Halsbury), Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris, and Lord Davey, and they were unanimously of opinion that a one-man company was not an abuse of the Act, and *à fortiori*, that two-men, three-men, or four-men companies were not open to objection.

In arriving at this conclusion, the law lords all laid stress on the well-settled rule of the common law, that the intention of Parliament is to be sought for in the words of the enactment. "I can only," said the Lord Chancellor, "find the true intent and meaning of the Act from the Act itself." "In a Court of Law or Equity," said Lord Watson, "what the Legislature intended to be done or not to be done can only be legally ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication." "I know," said Lord Herschell, "of no means of ascertain-

ing what is the intent and meaning of the Companies Act, except by examining its provisions and finding what regulations it has imposed as a condition of trading with limited liability.

And applying this elementary and time-honoured rule, the Lords held that all the Act required was that there should be seven members, each of whom should hold one share at least; that this was the condition imposed by the statute, and that there was no foundation for the suggestion that such a company was irregular because some or one of the seven members happened to hold a relatively small or a relatively large number of shares, or held them in trust for another member or members.

The statute," said the Lord Chancellor, "enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. One share is enough

If they are shareholders, they are shareholders for all purposes, and even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of the seven were *cestuis que trust* of the seventh, whatever might be their rights *inter se*, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities."

As to the objection that the formation of the company was a mere scheme to enable the founder to carry on business in the name of the company, the Lord Chancellor said: "I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself, and the Act appears to me to give the company a legal existence, whatever may have been the ideas or schemes of those who brought it into existence"; and as to the suggestion that the whole arrangement was, in the words of Lindley, L. J., "to do the very thing which the Legislature intended not to be done," the Lord Chancellor said: "It is obvious to inquire 'Where is that intention of the Legislature manifested in the statute?' It is, of course, easy to say that it was contrary to the intention of the Legislature—a proposition which, by means of its generality, it is difficult to bring to the test. . . . If the Legislature intended to prohibit something, you ought to know what that something is. All it has said is that one share is sufficient to constitute a shareholder, although the shares may be one hundred thousand in number. Where am I to get from the statute itself a limitation of that provision, that the shareholder must be an independent and beneficially interested person? . . . I must decline to insert in the Act of Parliament limitations which are not to be found there."

Lord Herschell said: "It was said that in the present case the six shareholders other than the appellant were mere dummies, his nominees, and held shares in trust for him. I will assume that this was so. In my opinion it makes no difference. The statute forbids entry in the register of any trust, and it certainly contains no enact-

ment that each of the seven persons subscribing the memorandum must be beneficially entitled to the share or shares for which he subscribes. . . . We have to interpret the law, not to make it; and it must be remembered that no one need trust a limited company unless he so pleases, and that before he does so he can ascertain, if he so please, what is the capital of the company and how it is held.

Many industrial and banking companies of the highest standing and credit have in recent years been, to use a common expression, 'converted' into joint stock companies, and often into what are called private companies, where the whole of the shares are held by the former partners. It appears to me that all these might be pronounced schemes to enable them 'to carry on business in the name of the company and with limited liability' in the very sense in which these words are used in the judgment of the Court of Appeal. The profits of the concern carried on by the company will go to the persons whose business it was before the transfer, and in the same proportions as before, the only difference being that the liability of those who take the profits will no longer be unlimited. The very object of the creation of the company and the transfer to it of the business is that whereas the liability of the partners for debts incurred was without limit, the liability of the members for the debts incurred by the company shall be limited. . . . It is said that the respondent company is a 'one-man company,' and that in this respect it differs from such companies as those to which I have alluded; but it has often happened that a business transferred to a joint stock company has been the property of three or four persons only, and that the other subscribers of the memorandum have been clerks or other persons who possessed little or no interest in the concern. I am unable to see how it can be lawful for three or four or six to form a company for the purpose of employing their capital in trading with the benefit of limited liability, and not for one person to do so, provided in each case the requirements of the statute have been complied with, and the company has been validly constituted."

Lord Macnaghten was equally clear, and said: "There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned judges seems to think (Kay, L. J.), or that there should be anything like a balance of power in the constitution of the company. In almost every company that is formed the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters, without intending to take any further part or interest in the matter." And with reference to the suggestion that the promotion of the company, with a view to obtaining limited liability and to the issue of debentures, was objectionable, his Lordship expressed his dissent, and said that "Among the principal reasons which induce persons to form private companies, as is stated very clearly by Mr

Palmer, in his treatise* on the subject, are the desire to avoid the risk of bankruptcy and the increased facility afforded for borrowing money. By means of a private company, as Mr. Palmer observes, a trade can be carried on with limited liability, and without exposing the persons interested in it, in the event of failure, to the harsh provisions of the bankruptcy law. A company, too, can raise money on debentures which an ordinary trader cannot do. Any member of a company acting in good faith is as much entitled to take and hold the company's debentures as any outside creditor. Every creditor is entitled to get and hold the best security the law allows him to take."

The Supreme Court of Appeal has thus happily removed what threatened to be a serious obstacle to the formation and working of private companies, as well as a danger to existing private companies, and has once for all disposed of the erroneous and impracticable views enunciated in the Courts below.

Wragg, Limited, (1897) 1 Ch. 796, dealt with the payment for shares. It was a case in which it was held that, where a private company without any independent executive had been formed to acquire a particular business on the terms of a specified agreement, and had acquired the same in part consideration of shares credited as fully paid up, such shares were to be treated as fully paid up accordingly; "provided," said Lord Justice Lindley, "in that case a limited company does so honestly and not colourably, and provided that it has not been so imposed upon as to be entitled to be relieved from its bargain. It appears to be settled by *Pell's case*, 5 Ch. 11, and the others to which I have referred, . . . that agreements by limited companies to pay for property or services in paid-up shares are valid and binding on the companies and their creditors. . . . Value paid to the company is measured by the price at which the company agrees to buy what it thinks it worth its while to acquire. Whilst the transaction is unimpeached, this is the only value to be considered."

And Rigby, L. J., says (at p. 841) in the same case: "I think that the series of authorities cited by Lindley, L. J., beginning with *Pell's case* (see *supra*, p. 61), have made it impossible, in such a case as above indicated, to inquire effectually into the value of the property taken in exchange for shares where the contract itself is not impeached. If those authorities are to be overruled, that must be done by the House of Lords."

Felix Hadley & Co. v. Hadley (1897), 77 L. T. 131 (Goodwill). In this case the defendant had converted his business into a private company. He held the bulk of the shares. Later on he parted with some of the shares to friends and others, and he gradually reduced his holding until finally only 200 shares stood in his name; the manage-

Re Wragg.
Paid-up
shares for
a business
or services,
and no
independent
executive.

*Felix Hadley
v. Hadley*.
One-man
company at
starting.
Late com-
plaints of
excessive
price charged
to company

* The author's "Private Companies," 27th ed., 1912.

ment fell into other hands, and later on the action was brought against the defendant claiming damage for excessive price paid for goodwill and repayment of sums taken by way of remuneration. The action was heard by Byrne, J., and that learned judge held that as the conversion was honestly effected there was no foundation for the action, which accordingly he dismissed with costs. It was contended that the price paid for the goodwill was excessive, and that as the vendor stood in a fiduciary position to the company he must be considered as having acted recklessly and improvidently in allowing the company to purchase at a price ascertained upon the footing of there being any value in goodwill; but the learned judge was not satisfied that an excessive price was paid for the goodwill, and observed that "goodwill is a property as to the value of which opinions may materially and honestly differ. It is worth more, if the old management is to be kept up, if the old servants are to be retained—assuming that the business has been well managed and well served—than if the management is to be new, and untried men are to be employed. But it is material to the value if the old manager and servants retain a substantial interest in the concern, and especially if the expenses of the management are to depend upon the will of the purchaser. It depends upon the nature of the business, the expenditure already made in advertisement and establishing the business, the reputation existing, and the probabilities of the market. It depends upon a hundred circumstances. It is worth more to one man than to another. As a matter of fact, in the present case, I am not satisfied that too large a value was put upon it."

Hirth, In re.
Vendor's
early bank-
ruptcy after
sale to
company.)

Hirth, In re. (1899) 1 Q. B. 612 (Effect of vendor's bankruptcy). A trader, who was liable under a judgment for the costs of an action, purported to sell his business to a company, which he had formed for the purpose, in consideration of fully paid-up shares and of the company undertaking to pay his debts. He was the chairman, managing director, and secretary of the company; he or his nominee held substantially the whole of the shares in it, and he had the complete control of it, including the power to draw cheques, which he exercised in his own favour. Within three months of this transaction a bankruptcy petition was presented against him, grounded on his non-compliance with a bankruptcy notice in respect of the costs in question, and a receiving order was made upon it. His liabilities exceeded 2,000*l.*, with assets *nil*. Between the presentation of the petition and the making of the order a resolution was passed for the voluntary winding-up of the company, and a liquidator was appointed. Upon a motion by the trustee in bankruptcy against the liquidator impeaching the validity of the transfer of the business, the Court of Appeal, reversing Wright, J., held that the transfer was fraudulent and an act of bankruptcy; that the title of the trustee to the business related back to the date of the

transfer, and overrode the claims of the creditors of the company in the winding-up; and that the liquidator was bound to hand over to the trustee the assets representing the business at the time of the transfer.

Lindley, L. J., at p. 620, said:—

"*Solomon's case* has decided a great deal, and people have not been slow to take advantage of it: it has decided that a company can be legitimately formed under the Companies Acts by one person, or one or two persons, with all the rest men of straw, and that there is at present no machinery except winding-up by which it can be extinguished. . . . But the question was never raised there whether the creditors of a sole trader who had converted himself into a company, and transferred all his assets to the company, could not impeach the transaction either as a fraud upon the creditors under the Statute of Elizabeth, or as an act of bankruptcy under the Bankruptcy Act, 1883. . . . To reach the transaction under the Statute of Elizabeth it must be shown that the sale was of the whole, or substantially the whole, of [the vendor's] property; and it must be shown that the company had notice that he was cheating his creditors." But sect. 4, sub-sect. 1 (b) of the Bankruptcy Act, 1883, "extends the Statute of Elizabeth enormously, because here the Court has not to consider whether the person who takes the property knows anything about the fraud, nor whether that which is transferred is the whole, or substantially the whole, of the debtor's property. It has to consider the debtor and what he has done; and if he has made a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof, he has committed an act of bankruptcy. . . . So far as Hirth was concerned, he had recourse to this scheme to defeat the people who were suing him, and who ultimately got an order against him for more costs than he could pay. . . . Having been adjudicated bankrupt upon a petition which was presented on May 12, 1898, his bankruptcy relates back to the transaction of March 7, 1898, if that was, as it clearly was, a fraudulent conveyance [to the company] within the meaning of the 4th section of the Bankruptcy Act of 1883. . . . Supposing that this company were an ordinary person, the title of the trustee would, in my opinion, be perfectly plain. What effect has the winding-up of the company? It appears to me that it really has none at all."

The essence of this case is that the transfer of the business to the company was a fraud on the vendor's creditors, and so an act of bankruptcy. The rights of the company in such a case are considered in *Re Slobodinsky*, p. 948, *infra*; and see *In re Goldberg; Ex parte Silverstone*, (1912) 1 K. B. 384, p. 954, *infra*.

In re Ely, Ex parte The Trustee (1900), 48 W. R. 693, C. A. In this case one, Ely, converted his business into a company. Subsequently he became bankrupt, and the sale to the company was set aside on the ground that the same was a fraudulent conveyance under sect. 4, sub-sect. 1 (b), of the Bankruptcy Act, 1883, and the company and the directors were ordered to account; but the Court of Appeal held that the judgment against the directors could not be supported. "The company," said Collins, L. J., "has been carrying on a business which belonged to the trustee which was

Id., In re, The Trustee, Ex parte.

(Fraudulent sale to company on eve of vendor's bankruptcy. What liability of directors.)

not their own at all. That being so, the trustee is at liberty to say, 'I am in a position to sue in *tort*, or, in the alternative, to call you to account for the proceeds as money had to my use.' If he chose to proceed in *tort* the facts would justify judgment against the company and its directors alike. If he chose to proceed by way of account, dealings which without his consent would be unlawful are not unlawful now. He has chosen to proceed by the latter course but at this point another fact is introduced into the discussion. It is admitted that the directors have paid over everything that they have received. To ask them to account for this now would be inconsistent with the alternative that the trustee has adopted: the two states of things cannot co-exist."

*Slobodinsky,
Re, Moore,
Ex parte.
(Another
sale on eve of
bankruptcy.)*

Re Slobodinsky, Ex parte Moore, (1903) 2 K. B. 517. In this case S., who was an insolvent trader, through the agency of N., in December, 1902, sold and transferred his business and book debts, the business of M. (which he had contracted to purchase), and stock bought on credit and not in the ordinary course of business, to a company which he promoted for that purpose. The purchase-money (35,539*l.*) was paid, as to 400*l.* in cash, as to 10,000*l.* in 100 debentures of 100*l.* each, and as to the balance in fully paid shares. The debentures, at the request of N., were issued as follows: seven to B., fifteen to Z., thirty to N., thirty to M., and eighteen to S. The fully paid shares were allotted to S., who had been appointed chairman of directors. The debentures issued to N. were the remuneration for his services to S. in the matter, and B. and Z. were cash creditors of S. The first acting directors of the company and N. were the mere instruments of S. in carrying through this transaction, which divested S. of substantially all his property, and left him with trade creditors to a large amount and some cash creditors totally unprovided for. M.'s business was genuine: he acted in good faith and without notice of any fraud, and accepted the 400*l.* in cash and his debentures in payment for his business. There were some *bona fide* shareholders of the company. Within three months S. was adjudicated bankrupt, and Wright, J., held (1) that the transfer of S.'s property to the company was fraudulent and an act of bankruptcy within sub-sect. 1 (b) of sect. 4 of the Bankruptcy Act, 1883; that the company had notice of the fraud; and that under sects. 43 and 44 of the Act the trustee in bankruptcy, as against the company, was entitled to the property of S.; (2) that N. was a party to the fraud, and that his debentures were not a charge upon the property of S. in the hands of the trustee; but (3) that M. was protected by sect. 49 of the Act, and that his debentures were a charge upon the property of S. in the hands of the trustee so far as the assets of the company might prove insufficient to satisfy the same. The point in this case was that the company, having notice that the transfer was fraudulent, could not claim to have it treated as a "protected

transaction" under sect. 49 of the Act. See also *Wheatley's Trustee v. H. Wheatley, Ltd.* (1901), 85 L. T. 491.

Re A. B., W. N. (1899) 233, dealt with the conversion of a lunatic's business. In this case it was held that there is no jurisdiction under sect. 117 of the Lunacy Act, 1899, to sanction the sale of the property of a lunatic or person of unsound mind in consideration of shares in a company. *Re Chaytor, W. N.* (1904) 195.

Borland's Trustees v. Steel Bros. & Co., Ltd., (1901) 1 Ch. 279. In this case the validity of a provision for compulsory retirement was impeached. The impeached article had been adopted by special resolution, with a view to ensure that the ordinary shareholders should be actively engaged in the business either as managers or assistants. The article empowered the directors to compel any person holding shares who was not engaged in the management to sell and transfer to a person so engaged at the fair value not exceeding par, to be ascertained as therein mentioned. The plaintiff, as trustee in bankruptcy of a shareholder, became entitled to certain ordinary shares and was served with the requisite notice to sell at par. The par value, calculated according to the articles, would be about 8,650l., whereas the real value, as the plaintiff alleged, would be about 34,000l. The plaintiff—the trustee—claimed an injunction to restrain the company from enforcing the transfer, and relied principally on three objections: first, that the provisions of the articles were repugnant to the legal conception of the nature of personal property, and were consequently invalid; secondly, that the provisions were invalid as transgressing the rule against perpetuity; and, thirdly, on the ground that the articles constituted a fraud upon the bankruptcy law; but Farwell, J., in a luminous judgment, disposed of all these objections. As to the two first objections, the learned judge considered that they involved an attempt to apply to company law a principle which is wholly inapplicable thereto.

"It is the first time that any suggestion has been made, and it rests, I think, on a misconception of what a share in a company really is. A share according to the plaintiff's argument is a sum of money which is dealt with in a particular manner by what are called, for the purpose of argument, executory limitations. To my mind it is nothing of the sort. A share is the interest of a shareholder in the company measured by a sum of money for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with sect. 16 of the Companies Act, 1862. The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but it is an interest measured by a sum of money made up of various rights contained in the contract, including the right to a sum of money of a more or less amount. That view seems to me to be supported by the authority of *New London and Brazilian Bank v. Bank of England*, 21 C. D. 302. . . . Then it is said that is contrary to the rule

*Re A. B.,
a lunatic.
Vendor.*

*Borland's
Trustees v.
Steel Bros.
(Validity of
compulsory
retirement
provision.)*

against perpetuity. Now, in my opinion, the rule against perpetuity has no application whatever to personal contracts. If authority is necessary for that the case of *Witham v. Vane*, Challis, 2nd ed. 401, is a direct authority of the House of Lords, and to my mind an even stronger case is that of *Walsh v. Secretary of State for India*, 10 H. L. C. 367. . . . I have said that these articles are nothing more or less than a personal contract between Mr. Borland and the other shareholders in the company under the 16th section of the Companies Act, 1862. Mr. Borland was one of the original shareholders, and he and his trustee in bankruptcy are bound by his own contract. I do not know that I am concerned to consider the case of other shareholders who come in afterwards but if I am, the answer, so far as they are concerned is, that each of them in coming in executes a deed of transfer which, in the terms in which it is executed makes him liable to all the provisions of the original articles. Mr. Borland cannot be heard to say there is any repugnancy or perpetuity in the covenant he has entered into, and his trustee in bankruptcy stands in no better position."

As to the third objection, the learned judge found, as a fact, that the articles were made *bonâ fide*, and constituted a fair agreement for the purpose of the business of the company; and that they were not obnoxious to the bankruptcy laws, or a fraud thereon

The validity of these special transfer clauses was also upheld in *Att.-G. Ireland v. Jameson*, (1904) 2 Ir. Rep. K. B. D. 644.

Morrison v. Morrison.
Conversion
by executors.

Re Morrison. Morrison v. Morrison, (1901) 1 Ch. 701. In that case it was proposed that the executors of one Morrison, deceased, should concur with the other partners of the deceased in converting into a limited company a business in which the deceased was interested as a partner. It was proposed that the partners and the executors of the deceased partner should receive shares and debenture stock in satisfaction of their interests. The will did not contain any special power. The executors applied to the Court to sanction the agreement, and for liberty to take the shares and debenture stock. They referred to the seventh edition of this work and the various cases therein referred to in which the Court had exercised jurisdiction; but, strange to say, Buckley, J., held that the Court had no jurisdiction, and that, although orders on the footing that there was jurisdiction had no doubt been made from time to time, they were to be considered "benevolent orders," in other words, that a jurisdiction which had, undoubtedly, been exercised in hundreds of cases by the most eminent judges was non-existent. This was indeed a startling conclusion. See, however, the next following case, in which this unfortunate decision was distinguished, if not in effect overruled.

Re New.
Reconstruction.
Sanction of
Court as to

Re New; Re Leavers; Re Morley, (1901) 2 Ch. 534. In this case shares in a limited company had been settled. The company had proved a great success, and the shares were at a premium of more than 100 per cent. It was proposed to reconstruct the company, and

to give to the shareholders largely increased holdings, partly in debenture stock, partly in preference shares, and partly in ordinary shares; but the will did not contain the requisite power. The trustees of the settlement applied to the Court for sanction and concurrence in the reconstruction; but Cozens-Hardy, J., in reliance on the decision in *Morrison*, above referred to, declined to sanction the same, holding that the Court had no jurisdiction. The case, however, was carried to the Court of Appeal, and the decision was reversed; and, indirectly, the views expressed by Buckley, J., in *Morrison* were dissented from. The judgment of the Court was delivered by Lord Justice Romer, and was in the terms following:—

trustees of
settled shares
concurring.)

"As a rule, the Court has no jurisdiction to give, and will not give, its sanction to the performance by the trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorized by its terms. The cases of *Crawshaw* (60 L. T. 537), decided by North, J., and *Morrison*, decided by Mr. Justice Buckley, are instances where the Court was asked to sanction steps to be taken by trustees which it thought unjustifiable, and which it declared it had no jurisdiction to authorize. But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate, and in the interest of all the *cestuis qui touchent*, that certain acts should be done by the trustees which, in ordinary circumstances, they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen, and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being *en l'age*, or in existence, then it may be right for the Court, and the Court in a proper case would have jurisdiction, to sanction, on behalf of all concerned, such acts on behalf of the trustees as we have above referred to. By way merely of illustration, we may take the case where a testator has declared that some property of his shall be sold at a particular time after his death; and then, owing to unforeseen change of circumstances since the testator's death, when the time for sale arrives it is found that to sell at that precise time would be ruinous to the estate, and that it is necessary or right to postpone the sale for a short time in order to effect a proper sale; in such a case the Court would have jurisdiction, and would authorize the trustees to postpone the sale for a reasonable time. It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the Court, has been constantly exercised, chiefly in Chambers. Of course, the jurisdiction is one to be exercised with great caution, and the Court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction; but it need scarcely be said that the Court will not be justified in sanctioning every act desired by trustees and the beneficiaries merely because it may appear beneficial to the estate; and certainly the Court will not be disposed to sanction transactions of a speculative or risky character. But each case brought before the Court must be considered and dealt with according to its special circumstances. As a rule, these circumstances are better investigated and dealt with in Chambers. Very often they

involve matters of a delicate and private nature, the publication of which is not requisite on any good ground, and might cause great injury to the trust estate.

"With these general observations we pass to the cases now before us. The circumstances and the evidence have been considered by us. We do not think it is necessary to refer to them in detail. We need only say that they relate to a prosperous limited company whose shares are fully paid up, and to a condition of affairs that has arisen which makes it desirable in the interests of the shareholders that by their consent the company should be reconstituted by the company being wound up and a new company formed to take over its assets. The new company is to be like the old company, except that the capital is larger and that the new company will have power to issue debentures. The shares in the old company will be represented by fully paid-up shares and debentures in the new company. Every shareholder who is *sui juris* agrees to the scheme, but some shares are held by trustees who wish the sanction of the Court to their assenting on behalf of beneficiaries not *sui juris* or not in existence, the other beneficiaries agreeing. We understand that Mr. Justice Cozens-Hardy was himself satisfied that the course proposed to be adopted by the trustees was one which, if it could be, should be sanctioned by the Court. We think, under the circumstances of the case, that the Court has jurisdiction to sanction, and ought to sanction, the proposed acts of the trustees. But the evidence should be supplemented so as to make clearer the points urged in the course of the argument before us as to the importance of further capital being provided by the proposed reconstruction of the company, the issue of debentures by the new company, and the difficulties that will arise if the trustees are obliged to stand aloof and to take no part in any reconstruction. Then, in the cases where the trustees are not by the terms of the trust instrument authorized to invest in the shares or debentures of such a company as the proposed new company, they must undertake to apply to the Court for leave to further retain the shares and debentures they will obtain under the scheme of reconstruction if they desire to retain them beyond one year from the time the reconstruction is carried out."

Accordingly the Court reversed the order in the Court below and sanctioned the agreement. In *Re Tollemache*, (1903) 1 Ch. 955, Cozens-Hardy, L. J., considered the above case the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts.

Smith v. Lewis,

(Trustees concurring in a reconstruction.)

Re Smith, Smith v. Lewis, (1902) 2 Ch. 667. In this case the testator held fully paid-up ordinary shares in a company which had no power to issue preference shares. By his will the testator authorized his trustee to retain any part of his estate in its present form of investment. After the testator's death the company was reconstructed, and each shareholder was given fully paid-up preference shares and fully paid-up ordinary shares. The trustees accepted the shares allotted to them in respect of their shares in the old company. The preference shares were within the terms of the investment clause in the will, and the question was whether the trustees had power to retain the ordinary shares in the new company. It was held by Buckley, J., that the ordinary shares in the new company came within the words "in its present form of investment," and that the trustees

were justified in retaining them. "The new shares," said his Lordship, "came to the trustees because the testator held the old shares, and for no other reason. The shares in the new company resulted from the shares in the old company without any act on the part of the trustees, simply because they held the testator's shares. To get anything else they would have had actively to do something, namely, to dissent under sect. 161. The trustees, therefore, have not made the investment in the new shares. The altered thing they have is the same investment in an altered form, resulting from qualities inherent in the investment which their testator had."

Re Sar, Barnard v. Sar (1893), 68 L. T. 849. The testator in this case bequeathed his business and the assets thereof to his three sons, on condition that they paid his wife during widowhood an annuity; and the will provided that if the testator's sons should cease to carry on the said business, the messuage or factory in which it was carried on should fall into and form part of his residuary estate. After the testator's death one of the sons retired, and assigned his interest to his brothers. Subsequently the two continuing sons converted the business into a company and became the managing directors thereof for life, and all the shares were issued to the sons or their nominees, but some debentures were issued to outsiders. The question arose whether the factory had or had not in the circumstances fallen into the residue. It was held by North, J., that the premises had fallen into the residue; that the assignment by the one son to the other two did not involve a ceasing to carry on the business, but that the assignment to the company did so. "The question," said his Lordship, "is whether, under these circumstances, the sons have ceased to carry on the business. I think they have. They have sold the business, and the agreement was that the company were to purchase it and carry on the business as their successors."

Barnard v. Sar.

Conversion into a company ceasing to carry on.

The Capital and Counties Bank v. The Governor and Company of the Bank of England (1889), 61 L. T. 516. In this case a company, originally formed and registered as a common law partnership under 7 Geo. 4, had gone through great changes—increased its capital enormously, changed its name more than once, become a body corporate by registration under Part VII. of the Companies Act, 1862, and none the less claimed payment of an annual composition under sect. 23 of the Bank Charter Act, 1844, payable by the defendants to the Hampshire Banking Company. It was held that, having regard to sect. 193 of the Companies Act, 1862, the company had not lost its identity, and, notwithstanding all its transformations and change of name, it still was in law the successor of the original bank, and therefore continued entitled to the composition.

Capital and Counties v. Bank of England.
(Continuing of company.)

Prescott, Dimsdale, Cave, Tugwell & Co. v. Bank of England, 1893) 1 Q. B. 351. This case is to be distinguished from the pre-

ceding case. Four firms of bankers by agreement transferred their business to a new company. That company claimed payment of the compositions due to the constituting firms, but it was held that the compositions ceased to be payable when such firms ceased to carry on business, and that, in selling their businesses to the new company, they had in fact ceased to carry on their businesses.

Goldburg.
Ex parte
Silverstone.
(Private
company
fraud.)

In re Goldburg, Ex parte Silverstone, (1912) 1 K. B. 384. In this case an insolvent trader registered a private company called "Rita Limited," with a capital of 2,000*l.*, divided into shares of 1*l.* each. It was practically a one-man company. The trader assigned his business to the company for shares and debentures, and induced a *bonâ fide* mortgagee of his business, who was no party to the formation of the company, to accept some of the debentures in substitution for his mortgage. Shortly afterwards the trader became bankrupt, and his assignment to the company was set aside as fraudulent under 13 Eliz. c. 5, and as an act of bankruptcy under sub-sect. (1) (b) of sect. 4 of the Bankruptcy Act, 1883. The company's debentures were worthless. The question thereupon arose, what was the position of the mortgagee? And it was held that he was not remitted by the avoidance of the assignment to his original position, and had no charge on the assets of the bankrupt, and that his only right was to prove in the bankruptcy of the trader for the damages he had sustained by reason of the trader's fraud in inducing him to accept worthless debentures in substitution for his security.

Darby.
Ex parte
Brougham.

In re Darby. Ex parte Brougham, (1911) 1 K. B. 95. In this case company A. was formed by D. and B., who promoted another company (C.), and made by the promotion illegitimate profits. It was held that in the bankruptcy of A. and B. the liquidator of the C. company was entitled to prove for the amount. *Salomon v. Salomon & Co.*, *supra*, p. 940, being distinguished.

See also *Trustee of Gonville (a Bankrupt) v. Patent Caramel Co., Ltd.*, (1912) 1 K. B. 599; *In re Goldburg* (No. 2). *Ex parte Page*, (1912) 1 K. B. 606.

PRECEDENTS.

AGREEMENT *by PARTNERS to convert their BUSINESS into a PRIVATE COMPANY (simple form)*.

AN AGREEMENT, &c., between A., of —, B., of —, and C. **Form 305.**

WHEREAS the sd A., B., and C. have, for many years past, carried on business in partnership together at —, under the firm or style of —. AND WHEREAS the sd A., B., and C. are desirous of converting their sd business into a coy., and with a view thereto have determined to enter into this agreement.

NOW THEREFORE IT IS DECLARED as follows:

1. A coy shall forthwith be formed under the Companies (Consolidation) Act, 1908, for the acquisition and carrying on of the sd business.

2. The memorandum of assent of the coy shall fix the capital at £ — divided into — shares of £ — each, and each of the parties hto shall subscribe the said memorandum for one such share, and four other subscribers, who shall each subscribe for one such share, shall be selected by the parties hto.

3. By the arts of assent of the coy (1) the sd A., B., and C. shall be appointed permanent directors, &c., &c. (*here insert any other special provisions which may be desired*).

4. The parties hto shall enter into an agreement (hereafter called "the sale agreement") with the coy for the sale and transfer to the coy of the business aforesaid, and all the assets thereof, as from the — day of —, in consonance of — fully paid-up £ — shares in the capital of the coy, and of the coy undertaking to pay and satisfy all the debts and liabilities of the parties hto in connection with the sd business, and such shares shall be allotted to the parties hto as follows, viz., to the sd A. — shares, to the sd B. — shares, and to the sd C. — shares.

5. The expenses of and incident to this agreement, and the formation of the coy and the conversion of the sd business, shall be borne by the parties hto in proportion to the shares to which they are to be entitled as aforesaid.

6. The sale agreement and the sd memorandum and arts shall be prepared by Messrs. E. & Co., of, &c., solicitors, on behalf of the parties hto, and if any of the parties hto shall have any difference as to the terms of the sale agreement and memorandum and arts aforesaid, such difference shall be referred to the arbitration of R. M., of, &c. (barrister-at-law).

AS WITNESS, &c.

SALE AGREEMENTS.

Form 306.

Agreement
for sale of
business.

AN AGREEMENT made the — day of —, between A., B., and C. all of — (hnfr called "the vendors"), of the one part, and A. B. & Coy, Limtd (hnfr called "the coy"), of the other part:

WHEREAS the vendors have for some time past carried on the business of —, in the county of —; AND WHEREAS the vendors recently determined to transfer the sd business to a coy, and with a view thereto they have caused the coy to be registered: AND WHEREAS the capital of the coy is 100,000L., divided into 10,000 shares of 10L. each.

NOW THESE PRESENTS WITNESS and declare as follows:

Sale.

1. The vendors shall sell and the coy shall purchase

The goodwill of the sd business heretofore carried on by the vendors at the — and elsewhere.

All and singular the freehold and leasehold hereditaments, trade marks, licences, copyright, plant, machinery, stock-in-trade, furniture implements, utensils, bills, notes, books of account, and fire insurance policies, to which the vendors are entld in connection with the sd business.

All debts owing to the vendors in connection with the sd business, and the full benefit of all securities for the same.

The full benefit of all contracts and engagements in connection with the sd business.

All other ppty whatsoever and wheresoever to which the vendors are entld in connection with the sd business.

The above-mentd assets are more particularly specified in the statement thof. which has been entered in a book marked "A," and for the purpose of identification subscribed by the parties hto of the first and second parts resply.

For the rest, Form 31 can be adopted with suitable modifications

As to stamp duty, sect. 59 of the Stamp Act, 1891, applies, on the footing that the agreement is for sale. See *supra*, p. 338; *Foster v. Inland Revenue*, (1894) 1 Q. B. 516.

Form 307.

Another.

AN AGREEMENT made the — day of —, 1912, between A., B., & C., all of — (hnfr called "the vendors"), of the one pt, and A., B. & Co., Limtd (hnfr called "the coy"), of the other pt. WHEREAS the vendors are the joint proprietors of an ironmongery business, now carried on by them in partnership, under the firm name of A., B., & Co., at —. AND WHEREAS the coy has been formed with a capital of 160,000L. divided into 16,000 shares of 10L. each to take over the sd business. NOW THEREFORE IT IS HBY AGREED as follows:—

1. The vendors shall sell, and the coy shall purchase—

Firstly, the leasehold hereditaments specified in the schedule hto,

upon which the *sd* business is now carried on, and the goodwill of the *sd* business. **Form 307.**

Secondly, the moneys, bills, notes, and other negotiable instruments and securities for money, and the book and other debts and choses in action of the *sd* partnership, and the full benefit of all contracts and agreements to which the vendors are enttd in relation to the *sd* business.

Thirdly, the plant, machinery, furniture, stock-in-trade and effects of the *sd* partnership in or about the *sd* leasehold hereditaments.

2. As part of the consen for the *sd* sale the coy shall allot to the vendors, or to such persons as they shall resply direct, 15,800 of its shares, to be numbered 8 to 15,807 inclusive, and such shares shall be deemed to be fully pd up, and shall be apportioned as follows, namely, to A. 7,900, and to B. & C. each 3,950.

3. As the residue of the consen for the *sd* sale the coy shall undertake pay, satisfy, and discharge all the debts and liabilities of the vendors in relation to the *sd* business, and shall indemnify the vendors and their respive heirs, exors, and admors, estates and effects against all actions, claims, and demands in respect thof.

4. The *sd* sale shall be completed on the ---- day of ---- next, when the *sd* shares shall be issued to the vendors. On or at any time after that day the vendors resply will, upon the request and at the cost of the coy, execute and do all such assurances and things as shall reasonably be required by the coy for vesting in it the ppty agreed to be hby sold, and giving to it the full benefit of this agreemnt.

5. Subject as aforesaid the vendors shall, as from the date hof, be deemed to be carrying on the business on the coy's behalf, and shall account to and be indemnified by the coy accordingly.

6. The coy shall accept, without investigation, such title as the vendors have to the ppty hby agreed to be sold.

As witness the hands of the vendors and the common seal of the coy, the day and year first above written.

THE SCHEDULE.

This will contain particulars of the leasehold hereditaments.

The Memorandum of Association.

This agreement, on allotment of the shares, will have to be registered under **Memorandum of association**
sect. 88 (1) (b) of the Act.

See *supra*, pp. 447, 504 *et seq.* Contemporaneously with the preparation of the draft agreement, the memorandum and articles of association must be settled for the intended company.

The memorandum of association of a private company needs only two subscribers (Companies (Consolidation) Act, 1908, s. 2), otherwise it does not differ from that of a public company; but where the company is to be formed for the purpose of converting an existing business, the acquisition of that business is usually specified as the first object. See *supra*, Form 85.

As to the Name. Upon the conversion of a business into a private company, the style under which the business, prior to the conversion, has been carried on is usually adopted, with the addition of the word "limited," in order to retain the goodwill attaching to the trade name.

Thus, J. Smith and Company becomes J. Smith and Company, Limited, and Brown and Jones becomes Brown and Jones, Limited. But, of course, the name can be altered if thought fit. Sometimes the company is called by the name of the principal works of the owner of the business, *e.g.*, the Padworth Ironworks, Limited.

The following show some of the different classes of names which may be adopted:—Barber's Patents, Limited; The Burnham Club Buildings, Limited; The Alpha Mining Syndicate, Limited; The Northern and Southern Corporation, Limited; The — — Association, Limited; The Sailing Ship Carmen, Limited; The Steamship Mogul, Limited; The Suburban News, Limited; Peter Robinson's, Limited; "Chic," Limited; The Wallpaper Manufacturers, Limited.

As to the Capital.—This is generally, in the case of a private company, fixed at a sum slightly exceeding the aggregate amount of the shares which under the agreement are to be issued to the vendors. It is generally, for convenience, fixed in round numbers. In the above case, for instance (p. 957), the vendors are to take 15,800 shares—158,000*l.*, and the capital is accordingly fixed at 160,000*l.*

If the members of the firm are seven or more in number, the capital can, if desired, be fixed at the exact amount of the shares which they are to have, and then they may either subscribe the memorandum for or agree to take from the company the shares in the usual way; but if they subscribe the memorandum for the shares, it will be necessary to express the agreement somewhat differently, *e.g.*, by providing that the sale shall be for cash, which shall be satisfied by crediting as paid up the shares subscribed for in the memorandum. If the vendors are less than seven in number there must be some extra shares for the persons who subscribe the memorandum other than the vendor or vendors.

These extra subscribers are only obliged to take one share apiece, but of course they may, if the vendors consent, subscribe for a greater number. However, they are rarely given many shares, lest they should interfere in the management. Sometimes the capital is divided into preference and ordinary shares. The following are cases in which such a division is sometimes stipulated for:—(1) A wealthy member of a firm is desirous of retiring, but at the request of his partners agrees to leave part of his capital in the business. He, however, stipulates that the business shall be converted into a company, and that his share in the assets of the firm shall be paid for in preference shares. (2) A capitalist is willing to bring additional capital into a business. It is agreed that the business shall, in the first place, be converted into a company, and that he shall bring in the additional capital by subscribing for preference shares. The rights of the preference shareholders will be defined by the articles of association. Ordinarily their right is, to receive out of the profits a fixed dividend, *e.g.*, 5*l.* per cent. per annum, before any dividend is paid to the other shareholders. Sometimes, in addition to this, it is provided that if the company is wound up the preference share capital shall be returned before any return of capital is made to the holders of ordinary shares. See *supra*, p. 820.

Sometimes the amount of the share is made a present to the extra subscribers by the owner or owners of the business; sometimes the shares of the extra subscribers are held in trust for the principal shareholders.

Articles of Association.

Framing of
the articles
of association.

In the case of a private company, Form 251 will generally serve as a basis for the articles of association.

The articles must, however, contain a clause as follows:

The company is to be a private company, and accordingly the following provisions shall have effect, namely:—

Form 307a.
Limiting
number of
members

- (a) The number of members for the time being of the company (exclusive of persons who are for the time being in the employment of the company) is not to exceed fifty, but where two or more persons hold one or more shares in the company jointly, they shall, for the purposes of this paragraph, be treated as a single member.
- (b) Any invitation to the public to subscribe for any shares or debentures or debenture stock of the company is hereby prohibited.
- (c) The right of transfer of shares shall be restricted as hereinafter provided.

The above clause is based on sect. 121 (1) of the Act of 1908. It is necessary to insert in paragraph (b) the words "or debenture stock" unless, indeed, the articles, like the Act of 1908, provide that the term "debenture" shall include debenture stock. Then the words of paragraph (a) follow the terms of sect. 121; but experience has shown that the presence of these words may be inconvenient, for, assuming the number of members to be fifty, plus some employees, and one of the employees ceases to be an employé without ceasing to be a member, the number of members would exceed the statutory maximum. It is, therefore, not uncommon to substitute the word "inclusive" for the word "exclusive," or to insert a clause enabling the directors to find a purchaser for the shares of an employé member who ceases to be employed.

Sometimes, where it is difficult to keep within the number fifty, several shareholders place their shares in their own names jointly on the trusts of a deed, and thus are to be treated as a single member. In such case it is desirable to alter the articles so as to enable each of the joint holders to vote in respect of his specified proportion of the joint holding as if he were the sole owner thereof.

All clauses in its articles inconsistent with the character of a private company must be omitted, *e.g.*, 39 and 40 (*supra*, pp. 680, 681), as to share warrants, and the right of transfer of shares must be restricted.

Various sections of the Act which do not apply to private companies will become applicable if the company should determine to abandon its character as a private company. See sect. 121 (2), and for example, sects. 80, 82, which provide for the filing of a copy of any prospectus inviting the public to subscribe for shares, debentures, or debenture stock, or if no prospectus is issued, of a statement in lieu of prospectus; and sect. 81, which provides for a number of matters which must be set forth in any such prospectus; and sect. 85, which renders it necessary, in the event of a prospectus offering shares for subscription being issued, that the company shall not proceed to allotment unless the minimum subscription specified in the articles and prospectus, or, if none be so specified, then the whole amount of the share capital offered, is subscribed and the application money paid.

So long as the articles contain the prescribed provisions (sect. 121 of the Act), the company will continue to be a private company, although it does not act in conformity therewith, *e.g.*, allows the number of members to exceed fifty. *Park v. Royalties Syndicate*. So held by King's Bench Division (Lord Alverstone, Hamilton and Bankes, JJ.), (1912) 107 T. 111.

The following clauses will afford some indication of the modifications of Form 251 which are commonly required in the case of private companies, even without reference to the Act of 1908.

Introductory Note.

Form 308.

Introductory note to.

Where an established business is converted into a private company the founders sometimes desire the insertion of a brief introductory note stating the circumstances under which the company is formed, *e.g.*—

"The business which the above-named coy is formed to take over was established by B. in the year 1870. On his death, in the year 1885, the business passed to his two sons, B. and C., and was carried on by them in partnership until the year 1895, when D. and E. were admitted to the partnership. Since then B., C., D. and E. have carried on the business, and, having regard to its present magnitude they have determined to convert it into a private coy. and these articles have been prepared with a view thereto."

Table A. is commonly excluded as unsuitable to a private company.

Allotment of Shares.

A private company is subject to sect. 88 of the Act of 1908, and accordingly whenever it makes any allotment of shares, it must, within one month thereafter, file with the Registrar of Companies proper returns, &c.

RESTRICTIONS ON ALLOTMENT OF SHARES.

Form 309.

Restriction on issue of shares.

1. The shares taken by the subscribers to the memorandum of association and those to be allotted pursuant to the preliminary agreement, shall be duly issued by the directors, but no further shares shall be issued without the authority of the company in general meeting.

2. Subject to any direction to the contrary that may be given by the meeting that authorizes the issue of further shares, all further shares authorized to be issued shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of the shares to which the member is entitled and limiting a time within which the offer if not accepted will be deemed to be declined, and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may allot or otherwise dispose of the same to such persons and upon such terms as they think fit.

A clause as above, or like the following, is not uncommonly inserted, in order to give the existing members the option of taking up the shares. It will be seen that the above clause does, but the following does not, confine the option

to a member's proportion. Sometimes the option is only given to the principal shareholders, *e.g.*, those holding more than 500% capital. Not uncommonly the following clause is preferred:

After the issue of — shares in the coy's capital, any further issue of shares shall be made on such terms and conditions, and either at a premium or otherwise as shall be determined by extraordinary resolution, and, unless otherwise determined by extraordinary resolution, all further shares authorized to be issued must in the first instance be offered to all the existing members for the time being. Such offer shall be made by notice specifying the number of shares authorized to be issued, and the terms of issue, and stating that the members are at liberty to tender for the same during a period to be specified in the notice, and not being less than seven days from the date thof. Each member shall be at liberty to make a tender in writing, delivered at the office within the period aforesaid, for such shares or any of them on the terms specified, and the directors shall allot the shares to the members who so tender; and in the event of more shares being tendered for than are authorized to be issued, the shares shall (as nearly as may be) be allotted to the tendering members in proportion to the capital already held by them resp'y. The directors shall decide by lot or otherwise any difficulty as to such allotment.

Form 310.

Another form

Classes of Shares.

Sometimes the capital of a private company is divided into several classes of shares. See forms, *supra*, pp. 820 *et seq.*; for cases in which preference shares may be desirable, see *supra*, p. 812.

Classes of shares.

Conversion of Shares into Stock, and Re-conversion into Shares.

These clauses are commonly omitted: in the case of a private company they are of little practical use.

Increase and Reduction of Capital.

See Form 252, cl. 33 *et seq.* Where the issue of shares is restricted, as in Forms 309, 310, *supra*, the new shares are usually made subject to the like restrictions.

Proceedings at General Meetings.

Sometimes it is provided that a poll may be demanded by any member, and that every poll shall be taken at the meeting without adjournment—which is quite practicable in the case of a private company—and occasionally that the chairman shall not have a casting vote.

Usually the quorum is small.

CLAUSE IN ARTICLES AS TO EXECUTION OF A DEED OF COVENANT BY MEMBERS.

Form 311.

Clause in
articles as
to deed of
covenant to
make certain
clauses in
articles
unalterable.

The subscribers hto shall forthwith execute an indenture, which has already been prepared, and is expressed to be made between the coy of the one pt, and the sd subscribers and the several other persons who shall hereafter sign their names and affix their seals thereto of the other pt, and no person shall at any time hereafter be registered as a member of the coy unless and until he shall have executed the sd indenture; and if at any time hereafter, by oversight or otherwise, any person shall be permitted to become a member before executing the sd indenture, such person shall be deemed to have agreed to execute such indenture forthwith, and unless he executes the same within seven days after he is registered as a member the coy shall be at liberty to authorize its secretary, or any other officer, to execute such indenture in the name and on behalf and as the attorney of such person, and execution by the person so authorized shall be effective for all purposes.

Sometimes it is desired to make certain arrangements between the shareholders which it is not necessary or expedient to set forth in the articles, e.g., options to purchase shares; restrictions on the power to alter articles without specified covenants. In such cases a deed of covenant may be desirable as above.

Transfer and Transmission.

A restriction on the right to transfer the shares is now an incident of a private company, as defined by sect. 121 (1) (a) of the Companies (Consolidation) Act, 1908. The clause runs thus:—"For the purposes of this Act, the expression 'private company' means a company which by its articles (a) restricts the right to transfer its shares."

The restriction—to comply with the section—must be general: some shares must not be exempt from the restriction. It is sufficient for the purpose of the section to provide—in the terms of the common clause—that "the directors may refuse to register any transfer of shares," but usually the clause is supplemented.

In *Borland's Trustee v. Steel Brothers & Co.*, (1901) 1 Ch. 279, it was held that provisions in a company's articles compelling a shareholder, at any time during the continuance of the company, to transfer his shares to particular persons at a particular price was not void, either as being repugnant to absolute ownership or as tending to a perpetuity. See p. 949, *supra*.

Form 312.

Restricted
right of
transfer.

1. A share may be transferred by a member or other person entitled to transfer to any member selected by the transferor; but save as aforesaid, and save as provided by clause 6 or 8 *h*of, no share shall be transferred to a person who is not a member so long as any member [or any person selected by the directors as one whom it is desirable in

the interests of the coy to admit to membership] is willing to purchase the same at the fair value.

Sometimes it is provided that these restrictive clauses shall not apply to certain shareholders, *e.g.*, the founders of the concern, or to part only of the shares held by them, or only to a certain class of shares, *e.g.*, those which are to be issued to the employés or the ordinary shares. In such cases the wording must be modified accordingly, *e.g.*, "An ordinary share may be transferred, &c. to any member holding ordinary shares selected by the transferor," &c.

2. Except where the transfer is made pursuant to clause 6 or 8 Notice, the person proposing to transfer any shares (hnftr called the proposing transferor) shall give notice in writing (hnftr called the transfer notice) to the coy that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value, and shall constitute the coy his agent for the sale of the share to any member of the coy [or person selected as afsd] at the price so fixed, or, at the option of the purchaser, at the fair value to be fixed by the auditor in accordance with these articles. The transfer notice may include several shares and in such case shall operate as if it were a separate notice of each. The transfer notice shall not be revocable except with the sanction of the directors.

The words "proposing transferor" cover the shareholders and also executors and other persons taking by transmission and having power to transfer. Sometimes, instead of providing as above, it is provided that a member who desires to transfer to a stranger must send in the name and address of the proposed transferee, and that the directors may approve or disapprove; and, if they disapprove, the member may require them to find a purchaser, and if they do not within a given time he is to be free to transfer.

3. If the coy shall, within the space of twenty-eight days after being served with such notice, find a member [or person selected as afsd] willing to purchase the share (hnftr called the purchasing member), and shall give notice thof to the proposing transferor, he shall be bound, upon payment of the fair value, to transfer the share to the purchasing member. Company's power.

Sometimes it is desired to provide that the company itself shall purchase the share, but in the case of a company limited by shares this is not allowable. *Treor v. Whitworth*, 12 App. Cas. 409. See *supra*, pp. 477, 478. Sometimes the foregoing provisions are modified, thus:-

"A person, whether a member of the company or not (hereinafter called the proposing transferor), who desires to transfer any share to a person who is not a member of the company must serve the company with notice in writing (hereinafter called the transfer notice) that he desires to make such transfer. The transfer notice must specify the name and address of the proposed transferee, and the sum at which the proposing transferor fixes the fair value of the shares, and within fourteen days after the service of such notice the directors shall give the proposing transferor notice of their approval or disapproval of the transfer,

Form 312.

and if they approve, the proposed transfer may be forthwith carried out (subject only to clauses -- hereof). But if they disapprove, the transfer notice shall be deemed to constitute the company the agent of the proposing transferor for the sale of the share to any member of the company or person selected by the directors as aforesaid at the fair value, and such authority shall not be revocable and if the company shall, within the space of twenty-eight days," &c.

**Auditor's
certificate**

1. In case any difference arises between the proposing transferor and the purchasing member as to the fair value of a share, the auditor shall, on the application of either party, certify in writing the sum which, in his opinion, is the fair value, and such sum shall be deemed to be the fair value, and in so certifying the auditor shall be considered to be acting as an expert, and not as an arbitrator; and accordingly the Arbitration Act, 1889, shall not apply.

Sometimes it is provided that "the fair value," or "the current transfer price," shall be a sum equal to the amount paid up on the share, or a sum to be fixed at the ordinary general meeting in each year, *e.g.*:

"At the ordinary general meeting in each year the company shall, by resolution, declare what is the fair value of a share, and upon any sale pursuant to clause -- hereof the amount so declared, with the addition thereto of five per cent. per annum from the date of the meeting to the date of the completion of such sale (less any dividend in the meantime paid), shall be deemed to be the fair value for the purpose of clause -- hereof."

Another form is to strike out of the above clause the words "the auditor," and all subsequent words, and to substitute for the same the words "the difference shall be referred to two arbitrators, one to be appointed by each of the parties in difference."

But there is this objection to such a form, that it commits the parties to an arbitration which may involve full discovery of all books and documents and not a little worry and inconvenience.

Sometimes the clauses are framed so that a member must offer at a price to be fixed by him, with a provision that, if the price is not agreed to, he shall not sell to any one at a lower price. If this is desired, alter clause 1 by substituting for "at the fair value" the words "at a price to be fixed as hereinafter provided"; and in clause 2 substitute "price he fixes" for "fair value", and in clause 3 "price so fixed" for "fair value," and omit clause 4; and in clause 6 1, the last four words substitute the words "but so that the price paid shall not be less than the price fixed by the retiring member in his notice to the company under clause 2 hereof. Before passing any transfer under this clause, the directors may require the transferor and transferee respectively to make declarations pursuant to the Statutory Declarations Act, 1835, that the consideration mentioned in the transfer is the true consideration paid by the transferee for the transfer of the share, and is not subject to any deduction or rebate. When the retiring member cannot find a purchaser at the price so fixed, he may give a fresh notice under clause 2 hereof."

For other alternative forms as to fair value, see Forms 313 and 313a, *infra*.

**Default by
proposing
transferor.**

5. If in any case the proposing transferor, after having become bound as aforesaid, makes default in transferring the share, the coy may receive the purchase-money, and shall thereupon cause the name of the purchasing member to be entered in the register as the holder of

the share, and shall hold the purchase-money in trust for the proposing transferor. The receipt of the coy for the purchase-money shall be a good discharge to the purchasing member, and after his name has been entered in the register in purported exercise of the aforesaid power the validity of the proceedings shall not be questioned by any person.

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6. If the coy shall not, within the space of twenty-eight days after being served with the transfer notice, find a member willing to purchase the shares, and give notice in manner aforesaid, the proposing transferor shall at any time within three calendar months afterwards be at liberty, subject to clause 9 hof, to sell and transfer the shares (or those not placed) to any person and at any price.

Default by company.

7. The coy in general meeting may make and from time to time vary rules as to the mode in which any shares specified in any transfer notice given to the coy pursuant to clause 2 hof shall be offered to the members, and as to their rights in regard to the purchase thof, and in particular may give any member or class of members a preferential right to purchase the same. Until otherwise determined, every such share shall be offered to the members in such order as shall be determined by lots drawn in regard thereto, and the lots shall be drawn in such manner as the directors think fit.

How shares to be offered to members.

Sometimes it is provided that the shares shall be offered (a) as in Form 321, or (b) to the shareholders successively, according to the number of shares held by them, or (c) to some particular shareholder, *e.g.*, the founder, or (d) to the members whose names are entered in a register of applicants in rotation. See for example Forms 317, 318, *infra*.

8. Any share may be transferred by a member to any child or other issue, son-in-law, daughter-in-law, father, mother, brother, sister, nephew, niece, wife, or husband of member, and any share of a deceased member may be transferred by his executors or administrators to any child, or other issue, son-in-law, daughter-in-law, father, mother, brother, sister, nephew, niece, widow, or widower of such deceased member [to whom such deceased member may have specifically bequeathed the same], and shares standing in the name of the trees of the will of any deceased member may be transferred upon any change of trees to the trees for the time being of such will and the restrictions in clause 1 hof shall not apply to any transfer authorized by this clause.

Right to transfer to son, &c.

Sometimes power is also given to transfer, with the approval of the board, to the trustees of any settlement made by a member, or to any person who has been appointed or elected a director.

9. The directors may refuse to register any transfer of a share, (a) where the coy has a lien on the share; or (b) where the directors are not of an opinion that it is desirable to admit the proposed trans-

General power to refuse transfer.

Form 312. force to membership. But paragraph (b) of this clause shall not apply [where the proposed transferee is already a member holding more than — shares], nor] to a transfer made pursuant to clause 8 hof.

Sometimes the words in brackets are inserted so as to exclude small share holders from the benefit of the exception. But in such cases clause 1 will require modification.

Form 313. The fair value asfd shall be ascertained as follows:

Fair value of
ordinary
shares to be
declared by
general
meetings.

- (a) The coy in general meeting may from time to time, by resolution passed by a majority of not less than three-fourths in value of the holders of ordinary shares, declare the fair value of ordinary shares to be thereafter dealt with in accordance with clause 31 hof.
- (b) Such resolution shall remain in force until the expiration of one year after the passing thof, or for such less period as shall be specified therein, or until by simple resolution of a general meeting it shall be annulled.
- (c) If at the time when a transfer notice is given as asfd, any such resolution fixing the fair value is in force, the fair value fixed thereby shall be deemed to be the fair value of the shares comprised in such transfer notice.
- (d) If at the time when a transfer notice is given as asfd, no such resolution is in force, it shall rest with the proposing transferor and the purchasing member to fix by agreement the fair value of the shares comprised in the transfer notice, and any difference in regard thereto shall be referred to two arbitrators, one to be appointed by each of the parties in difference, and the Arbitration Act, 1889 shall apply.

See clause 4 of Form 312, *supra*, p. 964, and notes thereon.

Form 313a. The following is another form:

Fair value
of share
estimated by
reference to
amount paid
up and to past
dividends.

For the purposes of these clauses the fair value of a share shall be the amount for the time being pd up thereon plus a premium (if any), regulated as follows:—*I.e.*, if the dividend and bonus for the financial year immediately preceding shall not exceed $7\frac{1}{2}$ p.c.p.a., the shares shall be offered at the amount for the time being pd up thereon; if such dividend and bonus shall exceed $7\frac{1}{2}$ p.c.p.a., but not exceed 10 p.c.p.a., the premium shall be 10 p.c. on the amount pd up, and if such dividend and bonus shall exceed 10 p.c.p.a., but not exceed 15 p.c.p.a., a premium of 20 p.c. on the amount pd up, and if such dividend and bonus shall exceed 15 p.c.p.a., &c., &c.

See clause 4 of Form 312, *supra*, and notes thereon

All shares comprised in a transfer notice shall, unless the directors think fit to offer them to any person selected as aforesaid, be first offered by the company to the directors themselves, and so that in case of any difference between them as to the disposal or distribution of a share or shares, the mode of disposal or distribution shall be determined by lot, and any shares not taken by the directors, or some or one of them, shall then be offered to the other members in such order as shall be determined by lot. And in each case the person to whom the offer is made (whether a director or not) shall have the option of buying at the price fixed in the transfer notice, or, at his option, at the fair value, to be fixed by the auditors as aforesaid, such option to be declared in accepting the offer. Where the shares comprised in a transfer notice stand in the name of a deceased member, the directors shall have three calendar months from the service of the transfer notice within which to determine whether they will themselves purchase them or not.

Sometimes provision is made for placing the shares with the highest bidders. Thus:—

"Where the company is served with a transfer notice as aforesaid, the company shall forthwith give notice thereof to all the members (other than the party giving the transfer notice), and the notice shall specify the price fixed by the intending transferor, and each member shall be at liberty, within fourteen days from the time such notice is served on him, to deliver to the company an offer in writing bidding for all or some of the shares comprised in the transfer notice, and agreeing to take, at the price he bids, the whole or any of the shares he bids for; and as between those who so bid the highest bidders shall be selected as purchasers in the order in which their bids stand as regards magnitude; and as between those who bid the same figure the selection shall be determined by lots, which shall be drawn in such manner as the directors determine. Nevertheless, if the selected bidders include any who bid less than the price specified in the transfer notice, the company shall call on the auditor to certify what sum is, in his opinion, the fair value per share, and shall notify the same to such last-mentioned bidders, and unless they forthwith bid such price, their bids shall be disregarded."

See note to clause 7 of Form 312, p. 965, and next form.

Shares comprised in any transfer notice shall be dealt with as follows:— **Form 315.**

- (a) Where the transfer notice is given in respect of shares standing in the name of the sd A., the shares comprised therein shall in the first place be offered to the sd B.
- (b) Where the transfer notice is given in respect of shares standing in the name of the sd B., the shares comprised therein shall in the first place be offered to the sd A.
- (c) In every other case the shares comprised in any transfer notice shall be offered in the first instance to the directors, and if and so far as the same shall not be accepted by the directors, or some or one of them, such shares or those not

Form 314.

Preferential offer of shares to directors and then to other members.

Preferential offer of shares to specified individuals and then to directors.

Form 315.

accepted shall be offered to the other members in such order as shall be determined by lots drawn in regard thereto, and the lots shall be drawn in such manner as the directors think fit.

- (d) Shares offered to the directors as aforesaid shall be offered to them collectively and individually, but so that in case of competition they shall rank *pari passu* for acceptance, and any difference shall be settled by lot.

See last form and notes, and also clause 7 and note thereto of Form 312, *supra*, p. 965.

Form 316.

The following is another form:—

Another form.

"Until otherwise determined, every such share shall be offered in the first place to the sd A., and any not accepted by him shall then be offered to the sd B., and any not accepted by him shall be offered to the other members in such order as shall be determined by lots drawn in regard thereto under the supervision of the governing directors."

Form 317.

Preferential offer of shares to larger holders and then to other holders.

Until otherwise determined by extraordinary resolution of the coy, the shares comprised in any transfer notice shall be offered in the first place to the principal shareholders (which expression in this clause means and includes those members who resply hold at least 10 p.c. of the issued capital), and such offer shall be made to them collectively and individually, but so that in case of competition they shall rank for acceptance *pari passu* in proportion to the shares held by them, and so that if any shares cannot be so apportioned, such shares shall be offered to them in order determined by lot, and the directors shall cause lots to be drawn accordingly, and any shares not taken up by the ppal shareholders as aforesaid shall be offered to the other members in such order as shall, &c

See also clause 7, and note thereto, of Form 312, *supra*, p. 965. and also Forms 314, 315 and 316, *supra*.

Form 318.

How shares to be offered.

The shares specified in any transfer notice given to the coy as aforesaid shall be offered by the coy in the first place to the members, other than the proposing transferor, as nearly as may be in proportion to the existing shares held by them resply, and the offer shall in each case limit the time within which the same, if not accepted, will be deemed to be declined, and may notify to the members that any member who desires an allotment of shares in excess of his proportion should in his reply state how many excess shares he desires to have; and if all the members do not claim their proportions the unclaimed shares shall be used for satisfying the claims in excess. If

any shares shall not be capable, without fractions, of being offered to the members in proportion to their existing holdings, the same shall be offered to the members, or some of them, in such proportions or in such manner as may be determined by lots to be drawn under the direction of the directors.

Form 318.

Any shares in the coy may be transferred by the holders thereof to any privileged connections of such holder or to trees upon trust for the benefit exclusively or otherwise of any privileged connections of such holder, and any shares standing in the name of a deed member may be transferred by his legal personal representatives to any privileged connections of the deed or to any trees upon trust for the benefit exclusively or otherwise of any privileged connections of the deed, and any shares standing in the names of the trees for the time being of the will of a deed member may be transferred upon any change of trees to the trees for the time being of such will, whether they be members of the coy or not, and para. (1) c' of this clause shall not apply to any such transfer or to a transfer by any director to any employe of the coy approved by the directors. In this clause the expression "privileged connection," when used in relation to any member or deceased member, means any ancestor, issue, son-in-law, daughter-in-law, brother, sister, half-brother, half-sister, step-brother, step-sister, brother-in-law, sister-in-law, wife or husband, widow or widower.

Form 318a.

Special
transfer
clauses.

Sometimes certain shares are transferable only to the descendants and connections of A. B., and the rest to the descendants and connections of C. D.

Transmission.

The transmission clauses are usually framed as above (p. 677), and, where the right of transfer to strangers is restricted, as in Form 312, the executors and others claiming by transmission will be bound thereby. See *Borland's Trustee v. Steel Bros. & Co.*, (1901) 1 Ch. 279, 290. Sometimes it is desired, in the event of death, to provide for paying out part of the capital of the deceased. This cannot be effectually provided for in the case of a limited company, since it would amount to a reduction of capital. To meet this difficulty it is not uncommon, where a business is converted into a company, to provide that the vendors shall take part of the consideration in debentures, which can, if desired, be framed so that the interest shall only be payable out of profits (see Part III.), and so that the principal shall not be called in till the death of the person to whom they are issued.

As regards lunacy, see *supra*, p. 667.

As regards marriage, it is sometimes provided that on the marriage of a female shareholder the company may compel the transfer of her shares to its nominee at the fair value.

Form 319.

Executors
or adminis-
trators to
transfer to
approved
nominees or
be deemed to
serve transfer
notice.

The directors may call on the executors or administrators of a deceased member to transfer the shares of the deceased to some person to be selected by such executors and administrators and approved by the directors, and if the executors or administrators do not comply forthwith with such call they shall be deemed to have served the company with a transfer notice, under paragraph 3 of Art. 17, and to have specified therein a sum equal to the amount paid up on the shares as the fair value, and the subsequent provisions of that clause shall take effect.

Compulsory Retirement.

Provisions for compulsory retirement are becoming very common. Such a power is convenient, for example, where a member ceases to be employed by the company or becomes interested in some rival concern. And it is frequently deemed desirable to enable a large majority of the shareholders (e.g. ten tenths in value) to exercise the power without assigning any reason. Such a power seems peculiarly desirable where the great mass of the capital is likely to be vested in a few persons.

Suppose, for example, that a shareholder who has been brought into a company merely to keep the number up to seven, or because he appeared to be a deserving employé, is found to be objectionable, he cannot, in the absence of such a power, be got rid of against his will except by winding up the company.

The power is commonly vested in the directors, see Form 320 *et seq.*

Sometimes, however, the power is vested in the original owner of the company's business and his executors, so long as a specified number of shares stand in his name, and is so framed that he or they may take the shares at a fair value or at a specified price, e.g., par.

Form 320.

Retirement
of dismissed
employé.

Whenever any member of the company holding less than ——— shares, who is employed by the company in any capacity, is dismissed from such employment for breach of faith, misconduct, or other offence which the directors [deem prejudicial to the interests of the company, they] may at any time within ——— days after his dismissal, resolve that such member do retire, and thereupon he shall be deemed to have served the company with a transfer notice pursuant to clause ——— of Art. 17, and to have specified therein the amount paid up on his shares as the fair value. Notice of the passing of any such resolution shall be given to the member affected thereby.

The transfer notice is intended to be a notice to the company in accordance with para. 2 of Form 312, *supra*, p. 963.

Form 321.

Another.

Whenever any holder of any U shares ceases to be employed by the company, the directors may at any time within ——— days afterwards resolve that, &c. See last preceding form.

Sometimes the power is not confined, as in Form 320, to dismissal, but is framed as above, or is exercisable only as regards a particular class of shares. Occasionally the holder is given a limited time to retire, and only in default of his doing so is deemed to have given the notice.

No member of this coy shall, without the consent in writing of all the members for the time being of this coy, be interested as a shareholder, partner, director, manager, lender, or otherwise, in any concern carrying on any business in competition with the coy, or having interests opposed to those of this coy; and if it shall be proved to the satisfaction of the directors that any member has committed a breach of this clause, they may serve him with notice in writing requiring him to retire from or otherwise determine his interest in such concern, and stating that, in the event of non-compliance with such requisition within twenty-eight days, his shares will be liable to forfeiture, and unless within twenty-eight days after the service of such notice it shall be proved to the satisfaction of the directors that the requisitions that have been complied with, the whole or any of the shares of such member may be forfeited by resolution of the directors to that effect. Provided always, that nothing herein contained shall prevent any member from holding stock or shares in a railway or canal coy.

Form 322.

Forfeiture where member interested in competing concern.

In a private company a clause as above is not usual. Sometimes it is confined to directors, and occasionally provision is made for notice before forfeiture. Sometimes provision for liquidated damages for breach is inserted.

1 The majority of the directors may at any time serve the coy with a requisition to enforce the transfer of any particular shares not held by the requisitionists, and when a member dies the majority of the directors may serve the coy with a requisition to enforce the transfer of the shares of the deceased.

Form 323.

Another variation of last form.

2 The coy shall forthwith give to the holder of such shares, or where the holder is dead, to his exors or admors, notice in writing of the requisition (with a copy of this clause subjoined), and unless within fourteen days afterwards the holder, or, as the case may be, the exors or admors, shall give to the coy a transfer notice in respect of the said shares, in accordance with paragraph (2) of clause — hereof, such holder, or such exors or admors, as the case may be, shall be deemed, at the expiration of that period, to have given to the company such a transfer notice, and to have specified therein the amount of the capital paid up on the shares as the sum he fixes as the fair value thereof, and the subsequent proceedings may be taken on that footing. For the purposes of this clause any person entitled under this transmission clause to transfer shall be deemed to be the holder.

See p. 967.

The holders for the time being of nine-tenths of the issued capital may at any time serve the coy with a requisition to enforce the transfer of any particular shares not held by the requisitionists. The coy shall forthwith give to the holder of such shares notice in writing

Form 324.

Compulsory retirement

Form 324. of the requisition (with a copy of this clause subjoined), and unless within fourteen days afterwards the holder shall give to the coo a transfer notice in respect of his shares in accordance with clause hof, he shall be deemed, at the expiration of that period, to have actually given such notice, and to have specified therein the amount of capital pd up on the shares as the sum he fixes as the fair value. For the purposes of this clause any person entd under the transmiss-ion clause to transfer shall be deemed the holder of such share.

Form 325. Another. A member who holds less than 50% nominal of the capital shall be bound, upon the request in writing of the holders or holder of nine-tenths of the issued shares, to sell and transfer his shares to the nominee of such holders or holder in conson of the payment of a s equal to the capital pd up on his sd shares, and the sale shall be carried into effect at the coo's office on a day appointed by the part or parties making such request, and if the member makes default the coo may receive the amount on his behalf and may authorize some director of the coo, on his behalf, to transfer the shares to such nominee, and such transfer shall be effective.

Form 326. 1. The founder or the founder's directors shall have the option, to be exercised at any time, by notice in writing to the coo (here called the optional notice), of purchasing, at the fair value, the whole of the outstanding shares in the coo's capital not held by the persons exercising such option, provided that the persons who give the optional notice at the time of giving the same are entd, as the registered holders thof, to more than one-half of the issued capital.

Option in founder or his directors to purchase outstanding shares.

Fair value, how estimated.

2. The fair value afd shall, for the purposes of this clause, be deemed to be the capital pd up on the shares to be purchased respd with a bonus equal to 10% p.c.p.a. since the last preceding dividend thereon was declared, and with interest at the rate of 5% p.c.p.a. on such capital and bonus as from the giving of the optional notice to the payment of such fair value.

Notice to owners of shares.

3. Notice of the giving of the optional notice shall be given by the coo to the respive owners of the shares there referred to, and such owner shall, as from the giving of the optional notice, be deemed to have agreed to sell, and the persons who gave the optional notice shall be deemed to have agreed to purchase, the shares of such member at the fair value.

Sale, how effected.

4. Every such sale shall be carried into effect: the owner of the shares in each case shall transfer the same to the nominees of the persons giving the optional notice, who shall upon pay the fair value ascertained as afd; and if the owner makes default, &c. [Form 325.]

The following provisions shall have effect:

Form 327

- (a) In the event of the death of A or B, any of the subscribers hereto, or either of them, the said C shall have the option of purchasing the shares of the deceased and no transfer of such shares shall be registered until such option has been exercised or waived.

Option in favour of surviving partner to purchase shares of deceased partner.

- (b) The executors or administrators of the deceased must give notice to the said C, if their names be obtained probate of the will or letters of administration of the estate of the deceased, within twenty-eight days after such notice C shall, and at any time within three calendar months after such probate or administration is obtained he may, notify to such executors or administrators his willingness to exercise the said option, or that he waives the option, and in default of any such notification he shall be deemed to waive the option.

- (c) If the said C notifies his willingness to exercise the option, the executors or administrators of the deceased shall sell, and the said C shall purchase, the shares of the deceased at the value to be ascertained as hereinafter provided.

The value to be ascertained shall be the value of the shares as appearing in the last annual balance-sheet of the company, or if the death occurs before any balance-sheet, then the par value, with interest in lieu of dividends at the rate of 5 p.c.p.a.

- (d) The purchase shall be completed at such time and place as the said C shall direct, the executors or administrators, who shall thereupon transfer the shares of the deceased, and upon such transfer being made the said C shall pay the value ascertained.

If the executors or administrators make default in transferring the shares, the company may remove the name of the deceased from the register, and insert the name of the said C as the holder of the shares, and the validity of the proceedings shall not be questioned.

As regards all the ordinary shares specified in the schedule hereto of the persons who shall be the respective holders thereof on the day of — shall be entitled to continue to hold the said shares then held by him until he shall die, or shall voluntarily transfer the same in accordance with the provisions of these presents, or shall become bankrupt.

Form 328

Compulsory retirement in case of bankruptcy.

A clause (Art. 47) to the above effect was introduced by the *Companies Act, 1900* in *Borland's Trustee v. Steel Bros. & Co.* (1901) 1 Ch. 279, in conjunction with other clauses providing for compulsory retirement. A shareholder having become bankrupt, the company, in accordance with the articles, served his trustee in bankruptcy with notice requiring him to give a transfer notice, and

Form 328.

that in default he would be deemed to have given a transfer notice and stated the price fixed by the articles. The value of the shares as fixed by the transfer notice was considerably less than the actual value of the shares, and it was contended that the articles were a fraud on the bankruptcy law, but Farwell, J., held that that was not so. At p. 291 he said: "If I once arrive at the conclusion that these provisions were inserted *bona fide*—and that is not disputed—and if I also come to the conclusion that they constitute a fair agreement for the purpose of the business of the company, and are binding equally upon all persons who come in, so that there is no suggestion of fraudulent preference of one over another, there is nothing obnoxious to the bankruptcy law in a clause which provides that if a man becomes bankrupt he shall sell his shares." "Then the question of price arises. Now I find the price is a fixed sum for all persons alike. No difference in price arises in case of bankruptcy: the effect of bankruptcy is merely to except the bankrupt from the privileges of Art. 47. . . . If I came to the conclusion that there was any provision in these articles compelling persons to sell their shares in the event of bankruptcy at something less than the price that they would otherwise obtain, such a provision would be repugnant to the bankruptcy law; but it is not so. They all stand on the same footing, and the proper value is to be ascertainable for all alike."

Form 329.

The following provisions shall have effect:—

On death
survivors to
buy ordinary
shares of
deceased.

- (a) In the event of the death before January 1, 1930, of any member holding ordinary shares, such shares shall be purchased and taken at their fair value by the members holding ordinary shares at the time of such death in proportion between them as nearly as may be to the amount of the capital paid up on the ordinary shares held by them respectively, and contracts for sale and purchase on the footing of this clause shall be deemed to have been made accordingly immediately before the death of the deceased and the members who are to purchase as aforesaid.
- (b) The fair value of any particular ordinary shares shall for the purposes of this clause be deemed to be a sum bearing the same ratio to the aggregate fair value of all the ordinary shares for the time being issued and outstanding as the capital paid up on such particular ordinary shares shall bear to the aggregate capital paid up on such outstanding ordinary shares.
- (c) The aggregate fair value of all the outstanding ordinary shares aforesaid at any particular time shall for the purposes of this clause be the balance ascertained by means of an account on the credit side of which shall be entered (a) a sum equal to the value of the company's assets (exclusive of goodwill) as shown in the books of the company as on December 31 next preceding the day of the death, and (b) a sum for goodwill equal to five-sixths of the amount of the profits of the whole business of the company for the three

years ending with such December 31 after deducting from such profits in respect of each year a sum equivalent to interest at the rate of 5*l.* p.c.p.a. on the amount of the capital for the time being pd up on the preference shares in the coy's capital. And on the debit side of which account shall be entered (a) a sum equal to the amount of the coy's debts and liabilities as shown in the ad books as on such December 31, and (b) a sum equal to the capital pd up on all the coy's issued preference shares.

Form 329.

- d) The certificate of the auditor of the coy as to the fair value of any such ordinary shares and as to such value having been estimated pursuant to the foregoing provisions shall be conclusive.
- (e) Where any member dies before 1st January, 1930, entitl to any ordinary shares, the directors shall forthwith give notice of the death to the members holding ordinary shares, and the notices shall specify the proportions in which they have to purchase such ordinary shares, and notices shall at the same time be given to the legal personal representatives (if any) of the deceased specifying the names and addresses of the purchasers and the proportions in which they are to purchase.
- f) The purchase-money of any ordinary shares to be purchased under this clause shall be the amount of the fair value thof ascertained as aforesaid, less the amount of any lien or charge for the time being subsisting thereon, and shall, unless the parties concerned otherwise determine, be payable by twenty equal half-yearly instalments, the first of which shall be pd at the expiration of six months from the date of the death of the deceased member, together with interest on the amount for the time being unpaid at the rate of 5*l.* p.c.p.a. from such death. And when and so soon as the purchase-money afovd or the first instalment thof shall have been pd, together with interest as afovd, the legal personal representatives of the deceased shall forthwith, upon the request of the purchasers, transfer the shares to the purchasers resply, and in default the coy may register the purchasers as the holders of the shares, and their legal title thereto shall thereby be completed, but subject to the proviso next hnftr contained and to the subsequent paragraphs of this present clause. Provided always, that if while any of such instalments shall remain unpaid the undertaking of the coy shall be sold, the unpaid instalments, together with interest up to the time of actual payment thof, shall immediately, upon the owner of the ordinary shares so purchased becoming

Form 329.

entitled to payment of his share of the surplus assets of the company in the winding up thereof, be paid by the company or its liquidators or directors (as the case may require) forthwith out of such share of assets to the executors or administrators of the deceased member, and so far as such share shall be insufficient such owner shall forthwith make up the amount of such insufficiency.

- (g) So long as any instalment or interest is unpaid, the company, its liquidators or directors (as the case may require), shall be entitled to and shall receive and hold the certificate or certificates of title to the ordinary shares on behalf of all parties interested therein until the completion of the purchase of such shares, when the same shall be cancelled and (except in the case of the company being in liquidation) a new certificate or certificates in respect of such shares shall be issued to the owner of such shares.
- (h) For securing the payment of such instalments and interest and (in the case of any ordinary shares not having been fully paid up to the company) for indemnifying the estate of such deceased member, the purchaser of any such shares shall give to the executors or administrators of such deceased member his bond in a penalty of double the aggregate amounts of such instalments and sums (if any) remaining unpaid on any of such shares.
- (i) The executors or administrators of such deceased member shall also, in addition to the fair value of his said ordinary shares sold as aforesaid, be entitled to a share of the dividend (if any) on such shares for the current year ending on the December 31 next preceding the day of his death to and inclusive of the day of his death, but any interim dividends paid to such deceased member in such year in respect of such shares shall be deducted by the company from the share of dividend payable under this paragraph. Provided, however, that if such death shall occur in the year 1910, the date of the incorporation of the company shall be deemed substituted for the said last day of December for the purposes of this paragraph.
- (j) Provided always, that if the company shall be insolvent at the date of the death of any member holding ordinary shares, the obligation to purchase such shares imposed by sub-paragraph (1) of paragraph (a) of this present clause shall not apply to such ordinary shares.

Lien on Shares.

It is usual to provide that a private company shall have a lien on the shares of each member for all moneys due from him, and that if he makes default in paying the same, after due notice, the shares may be sold, and the proceeds applied in satisfying the lien, and the balance paid to him. See p. 662. Where

a private company has trade dealings with its members in their own business, such a lien presents obvious advantages for securing payment of indebtedness to the company. **Form 329.**

Forfeiture of Shares.

The forfeiture clauses are important for the purpose of enforcing the payment of calls. When a call made on a member is not duly paid, the directors can bring an action in the name of the company for the amount, but this privilege is one which involves expense, risk and delay. Instead, therefore, of doing this, the directors give notice to the member that if he does not pay the amount due his share will be forfeited. This generally secures the payment of the amount and prevents litigation, but in pursuing this remedy directors must be very careful to strictly observe the provisions of the articles as to notice, &c., the law regarding forfeiture with disfavour. See p. 658. Sometimes, however, in a private company forfeiture clauses are not inserted, or, if inserted, they are made not to apply to shares held by the original owner or owners of the business.

Restrictions on Members.

A member of the coy shall not [without the coy's consent] either solely or jointly with, or as manager or agent for, any other person, directly or indirectly carry on or be engaged or concerned or interested as a shareholder or otherwise in any business which the coy is authorized to carry on, and the directors may by resolution forfeit the shares of any member who acts in contravention of this provision, and clause 30 [see *supra*, p. 665] shall apply. **Form 330.**

Forfeiture where interested in rival concern.

A person who ceases to be a member of the coy shall not at any time within five years, to be computed from the time when he so ceases to be a member, either solely, &c. [Form 31, cl. 12], in the business of a — within 100 miles of the city of —. **Form 331.**

Retiring member not to compete.

Provisions as above are very common. Sometimes they are restricted to the persons who have held a particular class of shares intended for employés.

As to the effect of winding-up in such an agreement, see *Measures Brothers, Lim. v. Measures*, (1910) 2 Ch. 248.

The holders for the time being of two-thirds of the issued shares may at any time, and from time to time, as and when they think fit, to all or any of the following things, that is to say:— **Form 332.**

- (1) They may, by notice in writing to the coy, appoint any persons to be directors of the coy.
- (2) They may, by notice in writing to the coy, remove any director of the coy from office.

Overriding powers of two-thirds majority in value of shareholders. Appointment of directors. Removal of directors.

Form 332.

Remunera-
tion of
directors.
Convene
general
meetings.
Regulate
conduct of
business.

Bills, notes,
&c.

- (3) They may, by notice in writing served on the coy, fix the remuneration of the directors, or any particular director or directors.
- (4) They may at any time convene a general meeting of the coy.
- (5) They may, by notice in writing to the coy, make any regulations in regard to the conduct of the business of the coy, or directors thereof, and in like manner may vary and annul any such regulations.
- (6) They may, by notice in writing to the coy, make any regulations declaring who shall be entitled to sign, on the coy's behalf, cheques, bills, notes, acceptances and indorsements, and for what purposes and in what cases, and may in like manner annul and vary such regulations, and no signature to any such document shall be binding on the coy unless it is in accordance with such regulations for the time being in force, and filed with the Registrar of Companies.
- (7) Whatsoever is done under this clause shall have full effect, save that as regards any notice under paragraphs 5 and 6 of this clause it shall not have full effect until it is filed with the Registrar of Companies.
- (8) A notice in writing under this clause may be signed by the person giving the same, or any attorney or other agent of such person authorized in writing to give the same, or generally or specially.

The above may be found useful where Table A. is not adopted (in its entirety at least), and short articles are desired; but only in the case of a company with a small number of members, who are usually within easy personal reach of each other.

Conversion of Ordinary into Preference Shares and vice versa.

Form 333.

Conversion of
ordinary into
preference
shares and
vice versa.

1. When any member of the coy who has been actively engaged in the management of the affairs of the coy, whether as a director, assistant director, or otherwise, ceases by reason of resignation, removal, incapacity, or otherwise, to be so engaged, the directors may at any time within six months after such cesser by resolution convert all or any of the ordinary shares held by such member at the time of such cesser into preference shares carrying as from the date of conversion a cumulative dividend at the rate of 6 p.c.p.a. on the capital paid up thereon, and ranking for dividend *pari passu* with the preference shares from time to time created under clause 10 hereof, and such resolution shall have effect, and where any member holding ordinary shares dies, such ordinary shares shall *ipso facto* be converted into like preference shares. But the shares so converted shall be treated as carrying dividend as ordinary shares up to the time of conversion, and, accordingly, the member, or the executors

Form 333.

or administrators of the deceased member, shall be entitled as and when the profits of the current year shall have been ascertained and the rate of dividend on the ordinary shares for the year determined to such an amount of such profits as shall represent the dividend on the shares so converted calculated at the rate aforesaid up to the time of conversion less any interim dividend paid before conversion.

2. Where the shares of any member have been so converted during his life, and afterwards such member again becomes actively engaged in the management of the affairs of the company as a director, assistant director, or otherwise, the directors may at any time by resolution passed at his request reconvert any such preference shares for the time being held by him into ordinary shares, and such resolution shall have effect.

2a. Where any member of the company, being actually engaged in the management of the affairs of the company, or being employed in any capacity in the business of the company, is the owner of any preference shares in the company, the directors may at any time by resolution passed at a board meeting duly convened convert all or any of the preference shares into ordinary shares, and such resolution shall have effect.

3. A resolution under this clause shall not be effective unless a majority of the directors for the time being in the United Kingdom concur therein.

4. Where any such resolution for conversion or reconversion is passed, notice thereof shall forthwith be given to the holder or owner of the shares, and he shall thereupon deliver up to the company the certificate relating to the shares so converted or reconverted, and the directors shall alter the register of members of the company, and issue to him a new certificate duly framed.

The above form was drafted for a case in which it was desired that the general profits should go to the active workers, and that the other members should take a fixed preferential dividend. Several other important concerns have adopted a similar form.

Annual Summaries.

A private company is subject to the provisions of sect. 26 of the Act of 1908 (consolidating sects. 26 and 27 of Companies Act, 1862, and sect. 19 of Companies Act, 1900). The summary and list must be so framed as to distinguish between the shares issued for cash and the shares issued otherwise than for cash, or only partly for cash, and must, in addition to the particulars required by that section, also specify

- (a) The total amount of debt due from the company in respect of all mortgages and charges which require registration under the Act, or which would require such registration if created after the commencement of this Act; and
- (b) The names and addresses of the persons who are the directors of the company at the date of the summary.

See pp. 624, 762, 763, *supra*, and for form, pp. 622, 623, *supra*

Borrowing.

A private company is subject to the provisions contained in sect. 93 of the Act of 1908, which provides that every mortgage or charge created by a company registered in England or Ireland after the 1st July, 1908, and being either—

- (a) A mortgage or charge for the purpose of securing any issue of debentures; or
 - (b) A mortgage or charge on uncalled share capital of the company; or
 - (c) A mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or
 - (d) A mortgage or charge on any land, wherever situate, or any interest therein; or
 - (e) A mortgage or charge on any book debts of the company; or
 - (f) A floating charge on the undertaking or property of the company;
- shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company unless duly registered as required by sect. 93 of the Act. See pp. 616-618, *supra*.

Requisition for General Meeting.

A private company is subject to the provisions of sect. 68 of the Act of 1908 which in effect provides that, notwithstanding anything in any regulations of a company, the directors of a company shall, on the requisition of the holders of not less than one-tenth of the issued share capital of a company upon which all calls and other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting, and in default enables the requisitionists to call the meeting. See p. 690, *supra*.

Votes of Members.

Form 334.

Restrictions
on preference
shares.

A member holding less than 1,000*l.* of ordinary shares shall not be entitled to vote, and the preference shares shall only confer on the holders the right to vote at a general meeting upon some or one of the questions following (that is to say), as to reduction of capital, as to winding up the coy, as to sanctioning a sale of the undertaking, or as to altering the regulations of the coy so as to affect directly the rights of the preference shareholders, but subject as aforesaid the following provisions shall have effect (that is to say):

1. Upon a show of hands every holding of at least 1,000*l.* of ordinary shares shall confer on the holder the right to one vote.
2. Upon a poll every holding of at least 1,000*l.* of ordinary shares shall confer on the holder the right to one vote for every 1,000*l.* of ordinary shares held by him.
3. Upon a show of hands as regards any question on which the preference shareholders are entitled to vote, every holding of at least 1,000*l.* of preference shares shall confer on the holder the right to one vote.

- 4 Upon a poll as regards any question on which the preference shareholders are entld to vote, the preference shares shall collectively confer on the holders the right to as many votes as shall be equal to the number of votes at a poll conferred by all the other issued shares on the holders thof, and each holding of preference shares shall confer the right to a rateable proportion of the votes thus collectively conferred. **Form 334.**

(a) A proxy may be appointed generally to vote for and on behalf of the appointor, as in the form in clause 97 hof indicated, and in such case the proxy shall not be entld to vote on any question if the appointor attends and votes thereon. **Form 335.**

Power to give irrevocable proxies in respect of particular shares.

(b) But a member or other person entld to vote may appoint a proxy to vote for and on behalf of the appointor in respect of any specified shares, and may by the instrument declare the appointment irrevocable or irrevocable for any specified period, and such declaration shall be effective save only that if the appointor, by transfer, death, or otherwise, loses his right to vote in respect of the shares specified therein, the appointment shall thereupon become null.

(c) And where a proxy is irrevocably appointed as aforesaid to vote for and on behalf of the appointor in respect of shares specified in the instrument of appointment, the proxy shall, whilst the appointment remains irrevocable, be exclusively entld to vote in respect of such shares even though the appointor be present, and whether the appointor does or does not vote on the question in respect of any other shares.

(d) Any such appointment as aforesaid, whether revocable or irrevocable, may be made in favour of one person or of several persons in the alternative, as in the form set forth in clause 97 hof.

Directors.

Companies are, as a rule, managed by directors. They can only act by agents; and where a business is converted into a private company the most natural persons, by reason of their interest, to fill the office, as well as the most competent, are generally the original owners of the business, and accordingly the articles of a private company commonly provide that some or one of such owners shall be the directors. The terms of their tenure of office vary. Sometimes it is provided that the owner or owners shall be entitled to hold office, for instance, for so many years, or for life, provided he or they continue to hold a certain number of shares; sometimes an owner is empowered at any time, and from time to time, to act, so long and whenever he chooses, as sole director, and at his discretion to appoint and remove other directors. Occasionally an owner is empowered to authorise his executors or trustees, whilst holding a certain number of shares, to appoint directors, and to define and restrict their powers and give them their share qualification. Where the owner or owners hold office on special terms like the above, with other directors appointed by themselves or otherwise, they are generally described, by way of distinction, in the articles

Form 335.

as "the governing directors," or "the permanent directors," or "the life directors," whilst the other directors are called "the ordinary directors." A "governing," "permanent," or "life" director, as his title implies, retains his place on the board, but with respect to the "ordinary" directors provision is generally made for some or one of them retiring—by rotation—each year. The vacancies so created the company in general meeting is authorized to fill up, the retiring directors being made eligible for re-election. The practical effect of this is that the choice rests with the larger shareholders, who control the company by their voting power. In the case of single-ship companies (*supra*, p. 558), the original owners, or some of them, or some firm in which they are interested, are usually appointed managers upon special terms, and subject to the control of the company in general meeting. Where this is done the articles generally provide that the company may at any time appoint directors, and determine their rotation, qualification, remuneration, &c., but directors are often found unnecessary. So in the case of a syndicate it is not uncommon to have a manager or managers instead of directors.

Of course, the articles need not contain any qualification clause in the case of a private company. Moreover, in nearly all private companies the directors hold the bulk of the shares.

If there is a qualification clause in the articles, the director must qualify within the time specified in the articles, not being more than two months after appointment, or if no time is specified then within the two months; otherwise at the end of the period he will vacate office, and if any unqualified person acts as a director after the period he will have to pay the company 5*l.* for every day between the expiration of the period for qualifying and the last day on which it is proved that he acted as a director during which he so acts. See sect. 73 of the Companies (Consolidation) Act, 1908; and pp. 718 *et seq.*, *supra*.

A private company must also comply with sect. 75 of the Act of 1908, and accordingly must keep at its registered office a register containing the names and addresses and occupations of its directors or managers, and must send to the Registrar of Companies a copy of such register, and must from time to time notify to him any change that takes place in such directors or managers, and in default penalties are imposed on the company and every director and manager who knowingly and wilfully authorizes or permits the default.

Governing Director.**Form 336.**

(Governing
director.

The following provisions shall have effect:—

- (1) The *ad A. B.* shall be the governing director of the *coy* until he resigns the office, or dies, or ceases to hold at least 20,000*l.* of the shares to be allotted to him pursuant to the agreement in clause 3 *hof*, and whilst he retains the *ad* office he shall have authority to exercise all the powers, authorities and discretions by these presents expressed to be vested in the directors generally, and all the other directors, if any, for the time being of the *coy*, shall be under his control, and shall be bound to conform to his directions in regard to the *coy's* business.
- (2) The *ad A. B.*, whilst he holds the office of governing director, may from time to time, and at any time, appoint any other

Form 336.

persons to be directors of the coy, and may define, limit, and restrict their powers, and may fix and determine their remuneration and duties, and may at any time remove any director howsoever appointed, and may at any time convene a general meeting of the coy. Every such appointment or removal must be in writing under the hand of the sd A. B.

- (3) If the sd A. B. shall resign the office of governing director, or shall cease to hold at least 20,000*l.* of the shares to be allotted to him as afd, he shall become an ordinary director.
- (4) If the sd A. B. dies whilst he holds the office of governing director, the execs for the time being of his will, so long as 20,000*l.* of the share capital stands in his name, or in the names of such execs, may exercise the powers vested in the sd A. B. by para. (2) *hcf*; or
- (4) If the sd A. B. dies whilst he holds the office of governing director, he may by his will or any codicil thereto appoint any person to be governing director in his place, and direct and determine what shall be the powers, authorities, and discretions of such governing director, and what his remuneration and qualification, and how long he shall be entld to hold office, and in default of such direction and determination such appointee shall only have the powers of an ordinary director.
- (5) The remuneration of the sd A. B. whilst he holds the office of governing director shall be at the rate of £— per annum when the dividend declared by the coy amounts to 10*l.* p.c.p.a., and £— p.a. when the dividend declared amounts to 15*l.* p.c.p.a., with such additional sums as the coy in general meeting shall from time to time determine.
- (6) If and when there is not a governing director, which event is *hntfr* referred to as the termination of the original management, the other directors, if any, then in office shall forthwith convene a general meeting of the coy for the purpose of electing a board of directors, and if they do not convene such meeting within fourteen days after the termination of the original management, any five members may convene such meeting.
- (7) On the termination of the original management, the directors shall have power from time to time, and at any time, to appoint any other persons to be directors, but so that the total number of directors shall not at any time exceed seven, and so that no appointment under this clause shall have effect unless two-thirds at least of the directors in the United Kingdom concur therein.

Form 337.

Another.

1. The *sd* A. B. shall be the first governing director of the *coy*. Subject as *hinftr* provided the governing director for the time being shall hold that office for life, and whilst he is governing director the government and control of the *coy* shall be vested in him, and he may exercise all the powers, authorities, and discretions *hby* expressed to be vested in the governing director and all those *hby* expressed to be vested in the directors.

2. The governing director for the time being may from time to time and at any time appoint any other persons to be directors of the *coy*, and may define, limit, and restrict their powers, and may fix and determine their remuneration and duties, and may at any time remove any director, however appointed, and may at any time convene a general meeting of the *coy*. Every such appointment or removal must be in writing under the hand of the governing director.

3. The governing director shall *ipso facto* vacate office—

- (1) If by a resolution of the *coy* in general meeting he is requested to resign.
- (2) If at any time, by notice in writing to the *coy*, he resigns the office.

4. Whilst and whenever there are directors of the *coy*, but no governing director, the directors may exercise all the powers and perform all the duties *hby* expressed to be vested in the directors, and all those *hby* expressed to be vested in the governing director, except those specified in clauses — and — *hof*.

5. Whenever the governing director vacates office, whether under clause 3 hereof or by death, the vacancy may be filled up—

- (a) by resolution of a general meeting; or
- (b) by writing signed by the holders of at least two-thirds of the issued shares in the *coy*'s capital.

6. If and whenever the governing director vacates office, the directors in office shall call a general meeting to consider and determine whether the vacancy shall be filled up, and who shall be appointed, or whether the business may be managed by directors, and who shall be the directors, and, if there are no directors in office, or if they do not convene a general meeting as *afsd*, then fourteen days after the vacancy the holders of two-thirds at least of the issued shares may convene a general meeting for the purposes *afsd*. Any meeting so convened may determine as *afsd*, and its determination shall have effect.

7. Whilst and whenever there shall be directors of the *coy* in office, and no governing director, the following provision shall have effect, that is to say:—

- (1) The number of the directors shall be not less than — and not more than —.
- (2) The *coy* in general meeting, or the holders of at least two-

thirds of the issued shares, may at any time appoint any **Form 337.**
persons to be directors.

(3) The directors shall have power, &c.

When the *sd* D. ceases to be a governing director, the coy in general meeting may appoint any persons to be directors of the coy, and may fix the maximum and minimum number of directors, and a general meeting shall forthwith be convened for the purpose, and such meeting shall be convened by the *sd* D. (if living), or if he is dead or does not convene the same within seven days after he ceases to be governing director, then the meeting shall be convened by the directors (if any) in office under clause 84 *h*of; and if there are none or if they do not convene the meeting within seven days after the power so to do arises, then the provision of sect. 66 (4) of the *Consolidation* Act, 1908, shall have effect. The executor or administrators of a deceased holder of shares shall, for the purpose of this clause, be deemed to be the holders of any shares standing in the name of the deceased.

Form 338.

Appointment of directors when governing director vacates.

The *sd* A. and B. shall be the first governing directors of the coy, and shall both be enttd to hold office so long as they between them hold one-half of the ordinary share capital of the coy, and in the event of one of them vacating office by death, resignation, or otherwise, the other shall be the sole governing director, and shall be enttd to hold office so long as he holds one-third of the ordinary share capital of the coy.

Form 339.

Two governing directors.

The *sd* A. and B., whilst holding office as governing directors, and after one of them vacates the office of governing director, the other, whilst holding office as governing director, shall have full control of the business of the coy, and one of them shall be the chairman of the board of directors, and they, or the survivor of them, shall have power to appoint and remove any other director or directors, and may appoint any person in addition to any existing directors, and may from time to time, and at any time, appoint, define, limit, and restrict the powers and duties, and fix the qualification and remuneration of any other directors, and may remove any director howsoever appointed, and may at any time convene a general meeting of the coy.

So long as the *sd* A. and B., or one of them, shall be governing directors or director of the coy, no other director or directors of the coy shall be appointed without the consent of such governing directors or director.

In case the *sd* A. and B. shall cease to hold one-half the ordinary share capital of the coy, each of them shall be deemed thereupon to be elected to office as an ordinary director, unless under clause — he becomes the sole governing director.

Form 339. When both the sd A and B shall have ceased to be governing directors (which event is hitherto referred to as the termination of the original management), then and from thenceforth the directors shall have power from time to time, and at any time, to appoint any other persons to be directors, but so that the total number of directors shall not at any time exceed five.

After the termination of the original management the qualification of every director shall be the holding of shares of the coy of the nominal value of 500*l.* A director may act before acquiring his qualification.

The remuneration of the governing directors, when there are two, shall be at the rate of 850*l.* p.a. each, and when there is only one at the rate of 1,200*l.* p.a. The remuneration of the other director or directors (if any) shall be fixed by the governing director or directors, or in default of them or him shall from time to time be determined by the coy in general meeting.

Form 340.

Permanent directors.

A., B., and C. shall be the first directors, and each of them shall be entitled, subject to clauses --- and --- hereof, to retain office so long as he holds not less than --- of the shares specified or to be allotted to him pursuant to the agreement referred to in clause --- hereof, and whilst holding office by virtue of this provision shall be called a permanent director, and if by resignation he ceases to be a permanent director, he shall, if qualified, be deemed to have been thereupon elected to be an ordinary director.

Sometimes the following words are added:—"And shall be entitled to hold office as such so long as he lives [or until the second ordinary meeting next following the date when he ceases to be a permanent director]."

Form 341.

Founders, while specially qualified, to be directors, with power to appoint new directors.

The following provisions shall have effect:—

- (1) Each of them, the sd A., B., and C., shall be entitled to hold office as a director so long as he holds a special qualification.
- (2) Each of them, the sd A., B., and C., in case he resign his directorship whilst holding a special qualification, may appoint two directors.
- (3) Each of them, the sd A., B., and C., who dies whilst holding a special qualification, may by his will or codicil appoint any two persons to be directors, and in default of any such appointment, or so far as the same does not take effect, the legal personal representatives of the deceased shall be entitled to exercise the power.
- (4) Notice of every such appointment as aforesaid must be served on the coy within the period of three calendar months after

the resignation or death of the director, and the notice must be accompanied by the consent in writing of the appointee to act, and the appointment shall only take effect from the service of such notice, and in the event of the same being served within such period.

Form 341.

- (5) The appointees must be sons, brothers, sons-in-law, grandsons, or nephews of the resigning or deceased director
- (6) The appointment shall have effect notwithstanding that it shall raise the number of directors beyond the maximum number in clause 83.
- (7) Any such appointment as aforesaid shall take effect without prejudice to clause — of [directors' qualification], save that a director or directors appointed by the will of a deceased director, or by the legal personal representative of a deceased director, shall be deemed to hold the requisite qualification for office so long as a special qualification stands in the name of the deceased, or in the names of the trustees for the time being of his will.
- (8) For the purposes of this clause a special qualification means ordinary shares of the nominal value of £30,000/ at the least.
- (9) Each of them, the said A., B., and C., who ceases to hold a special qualification specified in para. 8 of this clause, shall be deemed thereupon to be elected to office as an ordinary director.
- (10) Each of them, the said A., B., and C., and any appointee as aforesaid, shall, whilst holding office with a special qualification as aforesaid, be termed a permanent director.
- (11) No appointee as aforesaid shall have a power of appointing any person to be a director under this clause

The Permanent Governing Directors.

The said A. B. shall be the governing director of the company, and, subject as hereafter provided, the governing director for the time being shall hold that office for life, or until he ceases to hold a special qualification, and whilst he holds the same the government and control of the company shall be vested in him.

Form 342.

Permanent governing director, power to resign and resume office.

The governing director for the time being may from time to time and at any time appoint any other persons to be directors of the company, and may define, limit and restrict their powers, and may fix and determine their remuneration and duties, and may at any time remove any director, however appointed, and may at any time convene a general meeting of the company. Every such appointment or removal must be in writing under the hand of the governing director.

Form 342. The following provisions as to a governing director shall also have effect:—

- (1) He shall vacate the office of governing director if and when he ceases to hold a special qualification as hereafter defined, and is requested by the company in general meeting to resign.
- (2) If he resigns the office of governing director whilst holding a special qualification, he may appoint some other person to be the governing director in his place, subject as next hereafter provided.
- (3) If he resigns office and appoints a successor as aforesaid, he may whilst holding a special qualification, by notice in writing to the company, declare that he resumes the office of governing director, and he shall thereupon, to the exclusion of his appointee, again become the governing director, and the above provision in this paragraph shall apply as often as the governing director resumes office as aforesaid.
- (4) If he shall die whilst holding a special qualification, he may by his will, or any codicil thereto, appoint some other person to be the governing director, and in default of any such appointment the legal personal representatives of the said A. B. may make the appointment.
- (5) Every such appointment must be made by writing under the hand or respective hands of the appointor or appointors.
- (6) Notice of an appointment under para. 2 or para. 4 of this clause must be served on the company within two calendar months after the resignation or death of the governing director, and the notice must be accompanied by the consent in writing of the appointee to act, and the appointment shall only take effect on service of such notice, and in the event of the same being served within such period.
- (7) For the purposes of this clause, any person appointed a governing director under para. 2 aforesaid shall be deemed to hold a special qualification if and during such time as a special qualification is registered in his name, or as his appointor holds a special qualification; and if appointed under para. 4 aforesaid, shall be deemed to hold the same if and during such time as a special qualification is registered in the name of such appointee, or if and so long as such representatives or other the legal personal representatives for the time being of the appointor, or the trustees of his will, shall hold a special qualification.
- (8) For the purposes of this clause, a special qualification aforesaid means shares or stock in the capital of the company to the nominal value of £—.

The following form was used in a very important case where it was desired to preserve as far as possible the *status quo* under the partnership deed:—

The following provisions shall have effect (that is to say):

Form 343.

- (1) Each of the first five directors shall, subject to para. (7) of this clause, have power from time to time by deed to appoint as director a son, and in like manner to remove any son so appointed.
 - (2) Each of the first five directors shall, subject as aforesaid, have power from time to time by will or codicil to appoint as director any person, but so that no appointment of a person not being a son of the appointor shall have effect unless and until the appointee shall be approved in writing by three-fourths at least of the directors.
 - (3) None of them the said A., B. and C., shall be capable of exercising the power of appointment conferred by para. (1) of this clause until one of the three shall have died. And the power of appointment conferred by para. (2) of this clause shall not be exercisable by such one of them, the said A., B. and C., as shall first die.
 - (4) Not more than one person appointed by the same appointor, or his executors or administrators, under this clause shall at the same time be entitled to hold office by virtue of this clause.
 - (5) Where any appointee under this clause is under the age of twenty-one, the appointment shall not take effect until he attains the age of twenty-one years.
 - (6) As regards each of them, the said first five directors, if he dies whilst a member of the company, his executors or administrators shall have power to appoint a director in the cases following (that is to say):
 - (a) Where there is not any person appointed by the deceased under para. (1) of this clause in office at the time of the decease, and by his will or codicil the deceased has not exercised the power conferred by paragraph (2) of this clause.
 - (b) Where at the death of the deceased an appointee of the deceased, whether under paragraphs (1) or (2) of this clause, is under the age of twenty-one years.
 - (c) Where an appointee of the deceased, under paragraph (2) of this clause, being of full age, is not approved in writing by three-fourths at least of the directors within three weeks after the death of the deceased.
- Provided that the executors or administrators of such one of them, the said A., B. and C., as shall first die shall not be entitled to appoint under sub-sect. (a) of this para-

Power for governing directors to appoint successors

Form 343.

graph, and provided also that no appointment under this paragraph of a person not being a son of one of the first five directors shall have effect unless and until the appointee shall be approved in writing by three-fourths at least of the directors.

- (7) Each of the *sd* first five directors and each director appointed by virtue of this clause shall be entld to hold office so long as he remains a member of the *coy* subject only to clause - and to the following provisions:-

(First.) If appointed under sub-sect. (b) of paragraph (6) he shall vacate office if and when the appointee referred to in that sub-section attains the age of twenty-one years and takes office.

(Second.) If he is appointed under sub-sect. (c) of paragraph (6) he shall vacate office if and when the appointee referred to in that paragraph is approved by the board of directors and takes office.

Form 344.

Permanent directorship in right of shares held by another party.

The *sd* J. B. shall be entld to hold office as a permanent director in respect of the shares held by the *sd* F. D. until he the *sd* J. B. resigns or dies, and whether or not he holds shares in his own right or otherwise; and if and when the *sd* J. B. resigns or dies the *sd* N. D. or the exors or trees of his will shall hold ordinary shares in the *coy* of the nominal value of at least 50,000*l.*, then the *sd* N. D., if living, or the exors or trees of his will if thereby authorized in that behalf, may appoint any person to be a director in the place of the *sd* J. B., and any such appointment shall be effective.

Form 345.

Directors to be appointed by trustees of will

The trees or tree for the time being of the *sd* A. B. may from time to time, and at any time, while trusts of such will continue, appoint any person to be a director of the *coy*, and in every such case the appointee shall be entld to hold office as a director until the expiration of five years from his appointment or until the trusts of the *sd* will shall be determined or until he resigns or dies, whichever event first happens, and upon the happening of any such event the appointee shall *ipso facto* vacate office, but may be re-appointed.

An appointment under this clause to be effective must be made in writing signed by all the trees for the time being of the *sd* will, and not more than one person shall at any one time be in office as a director under this clause

Form 346

Power for directors to act separately.

Until otherwise determined by special resolution, each of the directors shall, as provided by the agreement in clause - be at liberty, without the concurrence of the others, to exercise all the powers, authorities, and discretions hereby vested in the directors generally.

The permanent directors or permanent director for the time being may at any time, and from time to time, by instrument in writing, appoint any persons to be ordinary directors, and may remove any persons so appointed. Every such appointment or removal shall be recorded in the coy's minute-book. **Form 347.**

Power to
appoint other
directors

1. A director who is not in the United Kingdom may appoint any person in the United Kingdom to act as his proxy at meetings of the directors, and to sign resolutions under clause — hof. Such appointment must be made in writing under the hand of the appointor, and may at any time be revoked in like manner, and may be general or for a specified period, or for specified meetings, or for specified resolutions, and may authorize and direct the appointee to be chairman if the appointor would, if present, be entitled to preside, and notice of every such appointment or revocation must be given to the coy, and the appointee need not be a director or member of the coy, but he must furnish the coy with his address in the United Kingdom. **Form 348.**

Directors'
proxies

2. It shall not be necessary to give to any director who is not within the United Kingdom notice of a meeting of the directors to be held there, but where such director is represented by a proxy appointed under clause — hof, due notice of such meeting shall be given to such proxy, either personally or by sending the same through the post, addressed to him at his last known place of address in the United Kingdom. Where a meeting is to be held in the United States afd, it shall not be necessary to give notice thof to any director who is not for the time being in the United States afd.

Managing Director.

The coy, in general meeting, may at any time appoint a managing director to conduct the business of the coy, and may make such appointment on such terms, and may from time to time vest in or assign to any managing director such powers, discretions and duties, and may impose on him such regulations as may seem expedient, and may remove any managing director so appointed, and may fill up any vacancy in the office of managing director; and for the purpose of exercising any of the powers conferred by this clause, any managing director, and any member or members holding not less than shares, may convene a meeting. **Form 349.**

Power for
meeting to
appoint
managing
director.

Sometimes no directors are appointed by the articles, but a clause appointing a "manager" on the lines of the above is inserted. In such case the clause as to directors will be considerably shortened, and the word "manager" will be substituted throughout for "directors."

Remuneration.**Form 350.**

Remuneration of directors

The directors shall be paid for their services out of the funds of the coy the remuneration following, that is to say, the sd A. and B., each at the rate of 500*l.* p.a. and the sd C. at the rate of 300*l.* p.a., and each of the other directors such sum as the coy in general meeting, or the permanent director shall from time to time determine.

The provisions as to remuneration of directors of private companies vary considerably. In some cases the principal directors take no remuneration, but have power to remunerate the ordinary directors. In others they take a fixed salary as above.

Sometimes it is deemed to provide, as in an ordinary partnership, that a member shall be at liberty to draw out a fixed allowance, with the obligation to recoup, if at the end of the year it appears that his share of profits does not amount to what he has drawn, but in a company there is more difficulty in making any such provision, inasmuch as dividends can only be paid out of profits. However, the difficulty is sometimes met, where the member is a director, by giving him the fixed allowance as remuneration for his services as director with liability to recoup as aforesaid. For there is no rule that directors' remuneration is to be paid only out of profits. *Re Lumley Granite Co.; Harrow Levens' case*, 36 L. T. 453.

Form 351.

Another.

The governing director shall be entitled to receive out of the funds of the coy such sums as he shall from time to time determine, not exceeding at the rate of £—— p.a.

Form 352.

Another.

The permanent directors shall be entitled to receive out of the funds of the coy such sums, not exceeding £—— p.a., as they shall from time to time determine, and the other directors shall be entitled to receive such remuneration as the permanent directors shall from time to time think fit to pay them.

Employment of Directors.**Form 353.**

Employment of directors.

The directors may from time to time employ any director to perform any work or labour, or to supply any goods required by the coy, or to serve the coy in any professional capacity, or as head of a department, or in any other capacity or character, and may remunerate him for such work or labour or goods or services as the directors may think proper, and may enter into contracts with him for the purposes aforesaid, but no director shall vote at any directors' meeting upon any question affecting his own employment as aforesaid, or any contract relating thereto. A director shall not be accountable for any profit arising from such employment.

Each of them, the said A., B., and C., whilst he remains a permanent director, shall be entitled, without charge, to have his son, or any one of his sons, instructed at the company's works in the business or businesses for the time being carried on by the company. **Form 354.**
Instruction of son.

This clause varies a good deal in form. Sometimes power is given to nominate by will a son for instruction. Sometimes any holder of a specified number of the shares is given the power.

Attention to Business.

Each of the ordinary directors shall devote the whole of his time and attention to the business of the company, but the said A. and B. shall not be bound to devote more time and attention to the company than they respectively may think fit. **Form 355.**
What time directors to give

Some such provision as above is not uncommon.

Rotation.

Unless otherwise determined by extraordinary resolution, the directors for the time being shall continue to hold office, subject only to disqualification and power to remove. **Form 356.**
Continuance of directors in office.

In a private company a clause as above is very common, the intention being that the directors shall not retire by rotation, but shall remain in office until they become disqualified by bankruptcy, &c., or are removed. When such a clause is inserted, the usual rotation clause will be omitted. When rotation clauses are inserted, it is usual to provide that they shall not apply to "the managing," "permanent," or "life" directors.

Proceedings of Directors

It is sometimes provided that (as in an ordinary partnership) each director may do various things without a board meeting. It is also not uncommon to provide for special voting power as follows:

At any meeting of the directors a director shall have one vote for every share held by him, and votes may be given either personally or by proxy, but a proxy must be one of the directors, and must be appointed in writing under the hand of the appointor. **Form 357.**
Voting at directors' meetings.

Sometimes no resolution is to be valid if a particular director dissents, or certain business is only to be transacted with the concurrence of a particular director.

Form 358.

Chairman
and deputy-
chairman.

The sd A. B. shall be chairman of the board so long as he remains a director and is willing to act, and the sd C. D. shall be deputy chairman. When the sd A. B. ceases to be chairman, the sd C. D. shall, if then a director, become chairman, and shall be entitl to retain the office so long as he remains a director, and is willing to act. Subject as aforesaid the board may appoint a chairman and deputy-chairman of their meetings, and determine the period for which they resply retain office.

Form 359.

When chair-
man absent
at meeting.

All meetings of the board shall be presided over by the chairman, if present, and, in his absence, by the deputy-chairman, and if at any meeting of the board neither of the sd persons shall be present at the time appointed for holding the same, the directors present may choose one of their number to preside at the meeting.

Form 360.

How ques-
tions at board
meetings
decided.

Any question which shall arise at any meeting of the board shall be decided by the votes of the directors present, but each of them, the sd A. B. and C. D., shall be at liberty, so long as he shall be a director, by writing under his hand to authorize any other member of the board to vote for him at any meeting or meetings of the board and such authority may be general or may be limtd to any one or more meetings, or to any specified question or questions, and must, if required, be produced at any meetings at which the holder of the authority proposes to vote. No resolution of the board shall be binding if two or more directors, either in person or by proxy, at the meeting at which such resolution is proposed, or at the next subsequent meeting, dissent therefrom in writing.

Form 381.

How ques-
tions to be
decided at
board
meeting.

Questions arising at any meeting shall, subject as herein otherwise provided, be decided by a majority of votes, and in case of an equality of votes the chairman shall have a second or casting vote, but each of them, the sd A. B. and C. D., shall be at liberty, so long as he shall be a director, by writing under his hand, to authorize any other director to vote for him at any meeting or meetings of the board. Such authority may be general or may be limtd to any one or more meetings, or to any specified question or questions. No resolution of a meeting of the directors shall be binding if the sd A. B. and C. D., whilst directors, either in person or by proxy, at the meeting at which such resolution is proposed, dissent therefrom in writing; and if at any time any director hold not less than two-fifths of the nominal amount of the issued capital, no resolution of the directors shall be valid unless it is passed with his concurrence; but if no director hold two-fifths of the nominal amount of the issued capital, and two of the directors collectively hold three-fifths of the nominal amount of the issued capital, no resolution of the directors shall be valid unless it is passed with the concurrence of both of such directors.

Questions at any meeting of the directors shall be decided as follows, that is to say:— **Form 362.**

- (1) If all the directors are present in person or by proxy, the decision of the majority of those who vote shall be binding, unless at least two directors, present in person or by proxy, demand a poll, and in such case a poll shall be taken then and there, and the result of the poll shall be binding.
- (2) If all the directors shall not be present in person or by proxy, the decision of the majority of those who vote shall be binding unless at least two directors, present in person or by proxy, demand a poll to be taken at an adjourned meeting, and, in such case, the meeting shall, so far as regards the taking of such poll, be adjourned for three days or such other longer time as the meeting may determine, and notice shall, if practicable, be sent by telegraph, or otherwise, to those directors who, being in Europe, shall not have been present in person or by proxy at the original meeting, and the notice shall specify the time and place at which the adjourned meeting is to be held, and shall state either in general terms the nature of the business to be dealt with thereat, or that the adjourned meeting is to be held for a board meeting poll, and at the time so fixed the question shall be further considered and the poll shall be taken, and the result of the poll shall be binding.
- (3) Where a poll is to be taken under this clause, every director present in person or by proxy shall be entld to such number of votes as he would have been entld to if the poll were a poll duly demanded at a general meeting of the coy, including any votes to which he would be entld as appointee under an irrevocable proxy executed pursuant to clause 94 hof.

Another.
Provisions for
votes as per
shares held

A director may attend and vote at any meeting of the directors, either in person or by proxy, but the proxy must himself be a director; and any appointment under this clause of a proxy may be general, or for a specified period, or for specified questions, and, unless otherwise expressed therein, may be revoked at any time, and notice of every such appointment or revocation must be given to the coy, and, in the case of an appointment, the instrument effecting the same, and the power of attorney, if any, under which it is signed must be deposited before the meeting with the coy, along with the notice, and a general proxy may attend and vote by a substituted proxy at any specified meetings of the directors or for specified questions. **Form 363.**

Provisions
for proxies.

Form 364.

Absence
from board
meetings.

Where a director has, without special leave of absence, absented himself from his duties for a period or periods exceeding — months in any one year, he shall not be enttd to any remuneration for the period in excess of — months, and his remuneration shall be proportionately reduced.

Powers of Directors.

See pp. 746 *et seq.*, *supra*. Sometimes the powers of directors are limited as regards certain things, e.g., borrowing money, entering into contracts beyond a certain value, increasing capital, &c.

Form 365.

Powers of
director
limited.

The powers of the directors shall be limited to the following

- (1) To, &c
- (2) To, &c
- (3) To, &c

Dividends.

See Form 251, clause 116.

Occasionally it is provided that profits shall be applied as in Form 251. Where there are preference shares, provision will be made accordingly. See Forms 261 *et seq.*

Form 366.

Interest
on unpaid
share.

So long as any C. share is not fully pd up, the holder shall only be pd out of the dividends from time to time declared thereon such a sum as, with the amount (if anything) previously pd to the holder of such share pursuant to this clause, shall be equal to interest at the rate of 5 p.c.p.a. on the capital pd up thereon, computed from the time when such capital was pd up, and the excess shall be retained by the directors and applied in paying up such share.

This plan is not uncommonly confined to shares issued to employees. Sometimes the retention is only to operate until the share is paid up to the extent of 80 per cent.

Accounts.

These are generally in common form. See Form 251, clause 129 *et seq.* But sometimes a clause as follows has been inserted:

Form 367.

Balance-
sheet.

A copy of such account, balance-sheet and report shall, for seven days previously to the meeting, be kept at the office open for the inspection of members, but the same shall not be circulated, and no copy of, or extract from, the same shall be taken.

The object is in some cases to save the expense, and in others to avoid disclosure of facts which might lead to the establishment of rival undertakings. Sect. 113 of the Companies (Consolidation) Act, 1908, notwithstanding, the

clause appears to be valid, for the section does not require any balance-sheet to be laid before the company in general meeting, and the "report" which the section requires to be read before the company in general meeting is not the report referred to in the clause (which is the *directors'* report under clause 132 of Form 251), but the report of the *auditors* on the accounts examined by them and "on every balance-sheet laid before the company in general meeting" that is, to the balance-sheet, if any, laid before the meeting.

Form 367.

A private company is specially exempted from including in its annual list of members and summary a statement in the form of a balance-sheet. Companies (Consolidation) Act, 1908, s. 26 (3).

Audit.

The provisions as to audit contained in sects. 112, 113 of the Act of 1908 also apply to a private company, and accordingly the company must, at each annual general meeting, appoint an auditor or auditors to hold office until the next annual general meeting. A director or officer of the company is not to be capable of being appointed. A remuneration for the auditors is to be fixed by a general meeting, and the auditors are to have access to the books, and are to make a report to the shareholders as provided in the Act. See *supra*, p. 774; and *Squire Cash Chemist, Lim. v. Ball*, 27 T. L. R. 269; affirmed 28 T. L. R. 81.

This section cannot be evaded in the case of any company under the Act, and therefore nothing is gained by inserting a clause that

"The accounts relating to the company's affairs shall be audited in such manner as the company in general meeting shall from time to time determine."

Such a clause was, before 1901—the date of the Companies Act, 1900—sometimes inserted instead of the usual provision

Registration of a Private Company.

On the formation of a private company it will be necessary to produce to the Registrar of Companies the statutory declaration required by sect. 17 (2) of the Act, by a solicitor of the High Court, and in Scotland by an enrolled law agent, engaged in the formation of the company, or by a person named in the articles as a director or secretary of the company, of compliance with the requirements of the Act in respect of registration and of matters precedent and incidental thereto. This is a simple matter involving but little extra trouble; and see pp 605, 606, *supra*.

Statutory and other Meetings.

The first meeting required to be held, in the case of all companies under the Act of 1862, by sect. 39 of the Companies Act, 1862, was abolished by the repeal of that section by sect. 33 of the Act of 1900. In lieu thereof, in the case of "every company limited by shares and registered" on or after Jan. 1st, 1901, the "statutory meeting" referred to in sect. 65 of the Act of 1908 must be held within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business. This,

in the case of a *private* company, will be the date of its incorporation, unless the articles of association otherwise provide. But though a private company must hold the statutory meeting it is exempted by sect. 65 (10) from the obligation of forwarding and filing the statutory report preliminary to the meeting. As to the general meetings to be held once a year, see sect. 61 of the Act of 1908.

Minutes of Meetings of Shareholders and Directors.

The Act of 1908 (sect. 71) requires every company to cause minutes of all proceedings of general meetings, and where there are directors or managers of its directors or managers to be entered in books kept for that purpose. Accordingly, books must be provided by the directors, and minutes entered. The following will give some idea of the mode in which minutes are entered:

Form 368.

Minutes of
first meeting
of directors

Meeting of the directors of the — Coy, Limited, held at — on the — day of —.

Present:—A., B., C., and D., directors, and E., the solor.
Mr. A. took the chair, pursuant to the arts of asson.

The solor reported that the coy had been duly incorporated, and he produced the certificate of incorporation, and a print of the memorandum and arts of asson as registered.

It was resolved that Mr. G. be appointed secretary of the coy at a salary of £— p.a. or, at a salary to be hereafter determined.

It was resolved that Messrs. A. B. and C. D., of the firm of —, chartered accountants, be appointed auditors of the coy to act as such until the first annual general meeting of the coy, and that their remuneration should be the sum of £—.

It was resolved that Messrs. — be appointed bankers of the coy, and be requested to open an account in the name of the coy, and to honour cheques drawn on that account signed by any two of the directors, and that the bank be furnished with specimens of the signatures of the directors.

It was resolved that Mr. — be appointed solor to the coy.

It was resolved that the registered office of the coy be at —, and that the secretary do give to the Registrar of Companies the requisite notice.

A seal for the coy ordered by the chairman on its behalf was produced and approved, and it was resolved that such seal be adopted as the common seal of the coy.

The chairman stated that he had, on behalf of the coy, ordered certain books for the purposes of the coy, and the order was approved and ratified.

The draft agreement referred to in clause 3 of the arts of asson of the coy was read and considered, and it was resolved that the coy do enter into an agreement with A. and B. in the terms of the sd draft.

The solor having produced an engrossment of the sd draft, such engrossment was sealed with the common seal of the coy, and was

signed by the sd A. and B., and the solor was instructed to have it stamped, and to bear in mind that it would have to be filed with the Registrar of Companies under sect. 88 of the Cos Act, 1908.

Form 368

It was resolved that the solor do prepare the requisite conveyances for vesting in the coy the freehold and leasehold ppty agreed to be sold to the coy by the above-mentd agreement, and that he be requested to advise what steps should be taken to carry such agreement into effect.

It was resolved that the subscribers to the coy's memorandum of association be registered as shareholders in the register of members of the coy.

It was resolved that Mr. --- be appointed manager of the coy's works upon the terms of an agreement submitted to the meeting, and such agreement was thereupon executed in duplicate.

It was resolved that the quorum for a meeting of the directors should be two, and that until otherwise determined a meeting of the directors should be held at the registered office every Tuesday at --- o'clock in the forenoon.

It was resolved that the common seal of the coy be not affixed to any document except in the presence of two of the directors and of the secretary, who are to attest the sealing.

It was resolved that Mr. --- be appointed a committee, with full power to negotiate with Mr. --- as to the terms on which he will supply the coy with, &c., and to make a contract with him accordingly.

A letter from --- was read containing an offer to, &c.; and it was resolved that the offer contained in that letter be accepted, and that the secretary do write to the sd --- accordingly.

Meeting of the directors of the --- Coy. Limited, held at --- on the --- day of ---, 19 --- Form 369.

Present: A., B., C., and D., directors, and E., the solor

Minutes
of second
meeting

The minutes of the board meeting held on --- day of --- were read and confirmed.

The solor reported that the agreement between the coy and Messrs A. and B., executed at the last board meeting, had been duly stamped and was ready for filing with the Registrar of Companies.

A letter was also read from the solor, dated, &c., and advising as to the steps to be taken to carry the sd agreement into effect.

The solor produced the requisite conveyances for carrying the agreement into effect, as advised in such letter, and it was resolved that those conveyances should be executed and the seal should be affixed thereto; and thereupon such conveyances were sealed with the common seal, and were executed by the vendors, Messrs. A. and B.

Messrs. A. and B. stated that the coy had been placed in possession



Form 389. of the works and of all the ppty capable of manual delivery, and that the bank balance had been transferred to the coy's account.

It was resolved that, in accordance with the agreemt of the — day of —, — shares in the capital of the coy of £— each, numbered — to — inclusive, be allotted as follows: that is to say, to Mr. A. — of such shares, numbered — to — inclusive, and to Mr. B. — of such shares, numbered — to — inclusive; and that such shares be credited as fully pd up in accordance with the sd agreemt; and that — shares of the like amount, numbered, &c., should be allotted to — as his qualification shares as a director; and that [as to other directors' qualification shares]; and that the names of the above-named allottees be entered in the register of members accordingly, and that certificates be issued to them pursuant to the arts of asson.

The certificates of title to the above-mentd shares were thereupon sealed and handed over to Messrs. A. and B., C. and D.

Applicons for — shares by the under-mentd persons were then handed in by Mr. A., and at his request it was resolved, that shares be allotted in response to such applicons, that is to say, to — 100 shares, to — 100 shares, and to — 100 shares, and that the secretary do give notice of allotment to such persons accordingly, and do request them forthwith to pay into the coy's account at its bankers the full nominal amount of the shares allotted to them resply.

The returns of the above allotments, produced by the secretary, were approved, and the solor was instructed forthwith to file the same and the above-mentd contract with the Registrar of Companies.

It was resolved that the statutory report produced by the secretary, comprising the particulars required by sect. 65 of the Companies Act, 1908, should be approved.

The provisions of sect. 65 of the Act as to forwarding and filing the statutory report are not applicable to a private company, so omit the above clause if the company still continues to be a private company.

It was resolved that the notice convening the statutory meeting of the coy for the — day of —, 19—, should be approved, and the secretary was ordered to issue the same to the members of the coy, and to make all necessary arrangements for holding the meeting.

It was further resolved that the list referred to in sect. 65 (6) should be approved, and the seal of the coy was duly affixed thereto, and the same list was handed to the secretary, who was directed to produce the same at the commencement of the statutory meeting, and to cause the same to remain open and accessible to any member of the coy during the continuance of the meeting.

It was resolved, that the secretary do forthwith issue to customers of the coy a circular-letter stating the conversion of the business into a coy, and that he do take the necessary steps to procure the insertion in the following newspapers of a statement that such conversion has

been effected, and that none of the shares are to be issued to the public:—"The Times," &c.

Form 369.

The bankers' pass-book was produced, and it appeared that the balance to the credit of the coy was £—, being the amount transferred from the vendors' account to the coy's account pursuant to the agreement for sale.

The following cheques were drawn, that is to say, in favour of — for £—, in favour of — for £—, and in favour of — for £—.

DEEDS OF SETTLEMENT.

Some years since a very convenient mode of converting a business into a company was devised by the writer. It involved the execution of a deed called "Articles of Association," which embodied the provisions as well of a memorandum as of articles of association, and constituted a common law joint stock company, consisting of not less than seven nor more than twenty members. This company then passed a resolution for registration, under Part VII. of the Act of 1862 (Companies Act, 1908, ss. 249, 266), as a company limited by shares, and in due course a certificate of incorporation was issued, and in the result the company obtained incorporation in a simple and satisfactory manner, free from some of the complications attendant on conversion in the ordinary way by sale and transfer.

Registration
under Pt. VII.
of C. A. 1862.
of newly-
formed
companies.

This mode of conversion was largely approved by business men, for it dispensed with what appears to them the circuitous and absurd formality of an agreement by the partners to sell to the company, consisting of themselves, and enabled them so to frame their partnership deed that, on passing a resolution to register, and taking in a copy of the deed, registration would follow as of course, without any need for sales or conveyances, and without any breach in the continuity of the concern. Accordingly, a considerable number of companies, including many of the leading brewery companies, were so registered; but unfortunately for the scheme it had the additional merit of avoiding the *ad valorem* duty on sales which attached when conversion was effected in the ordinary way. This was an unpardonable offence in the eyes of the Revenue Authorities, and at their instance the Registrar was directed to refuse to register any further companies so constituted. It is believed that the Registrar had been advised that this mode of constitution was perfectly regular, and the then most eminent lawyer of the Chancery Bar, afterwards Lord Davey, had repeatedly so advised. However, the refusal was persisted in, and no one was found ready to engage in litigation with the Crown in order to test the question, until 1891, when an application

for a mandamus was made by some persons who desired to register what they represented to be a company constituted in accordance with this scheme. The so-called company was, however, formed not to carry on a business, but to wind up; it was a burlesque of the scheme, and the attempt to enforce registration of the company an absurdity, if, indeed, it was ever seriously contemplated.

It is therefore not surprising that the Court of Appeal, reversing the decision of the Court below, held that there was no right in that case to a mandamus. *Reg. v. Registrar of Joint Stock Companies*, (1891) 2 Q. B. 598.

There are, in the judgments, some doubts expressed as to whether any company formed by deed after the commencement of the Act of 1862 is a company "duly constituted by law," and so entitled to register in accordance with this scheme; but these doubts were mere *obiter dicta*, and in *George Newman & Co.*, *supra*, p. 939, where the company had been formed and registered in this way, the Court of Appeal recognized it as duly incorporated.

Powers in Wills for Conversion by Trustees of Businesses into Companies.

Powers in wills for conversion.

Where persons are possessed of concerns, or shares in concerns, and desire the businesses carried on after their deaths, it has now become usual for them to make provision in their wills for the conversion of the concerns into private companies. Sometimes persons who are solicited to act as trustees of an intended will, or settlement, urge the insertion of such a provision in the will or settlement. In other cases the testator or settlor is advised to convert, or concur in converting, his business into a private company before his death, but he may prefer to leave power in his will for that purpose.

Prima facie—that is, apart from such an authority—trustees or executors have no power to convert, or concur in converting, a concern into a company. See *Morrison*, (1901) 1 Ch. 701, *supra*, p. 950. But sometimes a conversion may be supported as a compromise under sect. 37 of the Conveyancing Act, 1881 (or under the Trustee Act, 1893). See *West of England Bank v. Murch*, 23 C. D. 138, where a sale of a testator's share in a business, in consideration of cash and of shares and debentures in a company, was held valid, on the ground that the vendor, who was the executrix, was enabled thereby to make an arrangement with the testator's creditors, and, accordingly, that the transaction amounted to a compromise within the meaning of sect. 30 of 23 & 24 Vict. c. 145. The following form is a specimen of a power in a will for enabling conversion.

Form 370.

Power for trustees of will to convert testator's business into a company.

I authorize my trustees or trustee at any time within [twelve calendar months] after my death, to convert my business into a coy, limtd by shares, upon such terms and in such manner as my trustees or trustee, in their or his uncontrolled discretion, shall think fit; and without limiting such general authority, I expressly declare that my trustees or trustee—(a) may accept fully or partially pd up shares or debentures, or any other interests in or securities of any such coy as

the consen or part of the consen for the transfer of the sd business; **Form 370.**
 (b) may settle the terms of any memdum and arts of assen, deed of settlement, or other documents for use in relation to such conversion, and may sign or execute the same; (c) may act as directors or director of such coy, and either alone or in conjunction with others, without being accountable for any remuneration payable to them as such; (d) may procure the appointment of any other persons to be directors, either alone or otherwise; (e) may, for the purpose of securing or preserving the limtd liability of the members after registration, vest any of the shares in the sd coy, constituting part of my estate, in such persons and upon such trusts as they or he think fit; (f) may lend money forming part of my residuary estate to any such coy upon such terms as they or he may think fit, and may concur in winding up, reconstructing, and amalgamating any such coy, or in the modification of any of the regulations thereof, and may exercise any powers which by the regulations of such coy shall be vested in my trustees as members or directors thereof, or otherwise, and generally may act in relation to any such coy in such manner as they think best calculated to benefit my estate: And I declare that all shares, debentures, or other interests in or securities of any such coy acquired by my trustees or trustee shall be deemed to be authorized as investments by clause — hereof, and to have been purchased by my trustees or trustee out of moneys arising from a sale under clause — hereof; And I declare that for the purpose of this clause the expression, "my business," shall be deemed to include the goodwill of the business of a — carried on by me at —, and the whole of my ppty and rights in connection with such business.

Application to Court where Will defective.

Where the trustees of the will have not the requisite power to convert the testator's business into a company, it may nevertheless be possible to effect a conversion by obtaining the sanction of the Chancery Division, or of a Chancery Palatine Court, to the conversion. There appears to be no doubt that the Chancery Division has jurisdiction to give the requisite sanction in a large number of cases. As the circumstances of each case differ, it would be useless here to attempt to specify the cases in which the jurisdiction of the Court may be invoked with a fair prospect of success. Suffice it to say that the jurisdiction was repeatedly exercised by Chitty, Stirling, and Kekewich, J.J., and by Sir George Jessel, M. R., and many other Chancery judges. North, J., in *Crawshaw*, 60 L. T. 357, considered that, in the circumstances of that particular case, he had not jurisdiction. But the Court of Appeal has now decided that there is jurisdiction in a proper case. See the subject further discussed and the instructive judgment of Romer, L. J., *supra*, p. 951.

Where the sanction of the Court is required for the conversion of a business into a company, a provisional agreement should be made between the trustees and some person as trustee or agent on behalf of the company for sale of the business, subject to the sanction of the Court being obtained. Form 40, *supra*, can be utilized with the following special clauses in modification thereof. Another mode is shown in Form 306, *supra*.

The agreement will provide—

Form 371.

Special
clauses, where
sanction of
Court
requisite.

1. If this agreement is not adopted by the coj in manner afsd within calendar months after the same shall have been sanctioned by the Court as hnfir provided, any of the parties hto may, by notice in writing to the others or other of them, determine this agreement.

2. This agreement is conditional on the same being sanctioned in the Chancery Division of the High Court of Justice, and unless an order shall be made within — calendar months from the date hereof sanctioning the same and authorizing [the vendors] to carry the same into effect, then this agreement may at any time after the expiration of such period and before such sanction is obtained, be determined by notice in writing given by any party or parties to the other or others of them.

Practice by
originating
summons.

In the High Court the requisite sanction is usually obtained by originating summons under R. S. C., Ord. LV. r. 3. See *infra*.

Form 372.

Originating
summons to
obtain sanc-
tion of Court
to conversion.

In the High Court of Justice.
Chancery Division.

Mr. Justice —.

In the Matter of the estate of A. B., deceased.

Between J. P. Plaintiff.

and

J. G. (widow)
M. M. (a married woman), and } Defendants.
A., B., and C. (infants) }

Let *names and addresses of defendants*, all of them persons claiming to be beneficially interested under the will of the above-named A. L., within eight days after service of this summons upon them, exclusive of the day of such service, cause an appearance to be entered for them to this summons, which is issued upon the application of J. P., of L., in the county of —, chemical manufacturer, who claims under the will of the sd A. B. to be the legatee in trust of the share of the sd A. B. in the business of chemical manufacturers carried on under the style of — at L. afsd, for the determination of the following questions or matters, namely:

1. Whether the plaintiff may concur with X. and Y. in selling the sd business upon the terms of a provisional agreement, dated, &c., and made between, &c., or with any and what modification thof.

2. If and so far as may be necessary, that the trusts of the will of the said A. B. may be administered by the Ct.

3. That the costs of this applicon may be provided for.

Dated, &c.

This summons was taken out by, &c.

The following is an outline of a case in which the Court sanctioned the sale of land by trustees for shares in a company to be formed, although the trust deed gave no power to invest in shares:

By the trust deed the trustees were to hold a certain building estate, thereby conveyed to them, upon the trusts declared by an indenture of even date, namely, to manage the same, and sell it for cash or perpetual chief rent, or partly in each mode. Afterwards a conditional agreement was entered into by the trustees with a person on behalf of the proposed company for the sale of the land to the company for paid-up shares, with an option for the trustees to take shares or debentures of the company, and by the agreement the trustees were to pay the cost of registering and floating the company. The agreement was conditional on the sanction of the Court being obtained and on a certain minimum amount of debentures being subscribed. The trustees then took out an originating summons under R. S. C., Ord. LV. r. 3, which was in the following form:

That the following questions or matters arising in the administration of the trusts of such indenture may be determined under the Rules of the Supreme Court, Ord. LV. r. 3, and relief given in respect thereof without the administration of the trusts of such indenture, that is to say—

1. That a provisional agreement, dated, &c., and made between the plaintiffs of the one pt and A. M. of the other pt. for the sale of the sd estate, may be approved, and that the plaintiffs may be at liberty to carry the same into effect.
2. That in the event of the proposed sale not being carried to completion, the plaintiffs may be at liberty to raise and pay out of their trust estate so much of such costs and expenses under clause — of the sd agreement referred to as shall have been paid or incurred by them.
3. That the costs of this application may be provided for.

Dated, &c.

This summons was taken out by, &c.

Form 373.

Form of originating summons to obtain sanction of Court to conversion.

That directions may be given with respect to the whole disposal or winding up of the business of hat manufacturers carried on under the firm of J. K. & Co., with the freehold and leasehold hereditaments used in connection therewith, and the trade marks used therein, forming part of the residuary estate of the above-named testator K., and in particular that the plaintiffs may be at liberty, if so advised, to bring proposals into chambers for the conversion of the sd business into a company limited by shares, and that in the meantime the plaintiffs may be authorized to carry on the sd business, or permit the same to be carried on, and that the sd S., or some other proper person, may be appointed receiver and manager of the sd business and premises, that all necessary and proper directions may be given in that behalf, and if and so far as may be necessary for the purposes aforesaid that the

Form 374.

Another.

Form 374. trusts remaining unperformed on the will of the sd K. may be carried into execution, and that all necessary and proper accounts may be taken, inquiries made, and directions given, and that, if necessary, pursuant to Ord. LV. r. 6, such other persons, if any, may be directed to be served with this summons as the judge may think fit, and that such further or other order may be made in the premises as to the judge shall seem meet.

Dated, &c.

This summons was taken out by —, of —, solor for the above-named plts.

The defts may appear, &c.

Note.—If the defts, &c.

Form 374a. Let the dfts —, —, —, and —, all of —, in the county of —, infants, within eight days after service of this summons on them, inclusive of the day of such service, cause an appearance to be entered for them to this summons, which is issued upon the applicon of — of —, — of —, and — of —, who are exors of the will of the above-named W., for the determination of the following questions, namely: whether, under the terms of the testator's will, the plaintiffs are empowered to form the business of W. & Co. therein mentd into a joint stock coy, and become directors thof, and to exercise their voting power in favour of giving to each of the plts as a director of the coy such remuneration, not exceeding 150*l.* per annum, as they may from time to time think fit, and to retain the same for their own use, and that the costs of this applicon may be provided for.

Another.

Summons.

Dated, &c.

Form 375.

Affidavit in support of application to sanction a reconstruction.

I, —, of —, make oath and say as follows:—

1. By an indenture of settlement dated — of —, and made between, &c., — shares of £— each in the X. Manufacturing Coy, Limtd, numbered, &c., and certain other shares and debentures which had been vested in the sd — and —, were settled on trust either to permit the whole or any of the sd shares to remain in their actual state of investment or at any time or times at the discretion of the trustees or trustee for the time being to sell the same or any of them, and to invest the moneys produced thereby in or upon any of the public stocks or funds or Government securities of the United Kingdom or India, or any colony or dependency of the United Kingdom, or stock of the Bank of England, or upon the debentures or debenture stock or guarantee or preference stock or mortgages of any coy in the United Kingdom paying dividends on its ordinary shares or stock at

the time of the investment, or upon freehold or leasehold or copyhold property in England, with power to vary investments at discretion, and upon trust to pay the income, &c., and after the death of, &c., then to stand possessed in trust for all the children, &c.

Form 375.

2. The sd —, settlor, died on the — of —, at —.

3. The settlor's daughter — above named has been once married, namely, to —, and they have issue of the sd marriage — children and no more, namely, — and —, both of whom are *sui juris*, and are defendants in this action.

4. The settlor's daughter — above named has been once married, namely, to — on the — of —, and there have been issue of the sd marriage — children, and no more, namely, the above-named dft —, who is *sui juris*, and — and —, who are resply infants and dfts in this action, and —, who is *sui juris* and now in South Africa out of the jurisdiction of this [honourable] Court, &c.

5. [Deceased — trustee, leaving deponent sole trustee.]

6. There is — standing in my name as such trustee afd, and in the name of my deed co-trustee, the sd — shares in the — Manufacturing Coy, Limtd, and the sum of £— in cash in my name representing some debentures of the said coy which were allotted in 19— by way of bonus, and which were pd off in the month of —.

7. I have made inquiries in various directions, and in the result I verily believe the capital value of the sd — shares in the — Coy, Limtd, taken at the present market price, is the sum of £— each. The dividends and bonuses received in respect of such shares for the last five years have been resply as follows:

8. [Statements as to incorporation of the coy, as to the character of the property owned by it, and as to its general position: circular with a view to reconstruction.]

9. The statements in the sd circular, a copy of which is now produced to me marked —, are correct, and, as regards the statement therein that reconstruction is, in the interests of all concerned, a necessity, the following facts support that view, &c.

10. The said circular contained a scheme for the reconstruction of the said coy, a copy of which is now produced to me marked —; and also a copy of a provisional agreement, a copy of which is now produced to me marked —, and the draft of a confirmatory agreement, a copy of which is now produced to me marked —, by means whereof it is proposed that the said existing coy shall be wound up voluntarily and dissolved and a new coy under the name of The — Manufacturing Coy, Limtd shall be incorporated under the Companies (Consolidation) Act, 1908, with a capital of £—, divided into, &c.

11. The shares in the existing coy are proposed to be exchanged in accordance with the sd scheme for fully pd-up preference shares and

Form 375. ordinary shares and debentures of the new coy on the footing that each shareholder shall be entld in exchange for each of his existing £—— shares to, &c.

12. It is proposed that the sd preference shares shall carry, &c

13. The debentures aforesaid are to be part of a series, &c., and are to be secured, &c.

14. I am desirous of obtaining the sanction of the Ct to my concurring in the proposed scheme of reconstruction, as, to the best of my knowledge, information and judgment, the sd scheme is advantageous to the shareholders, and I submit to the directions of the Ct as to retaining permanently or otherwise the preference and ordinary shares and debentures of the new coy, or any of them, to be issued in exchange for the shares in the existing coy, as a trust investment.

15. I am advised and verily believe that, although there is a market for the shares of the existing coy, it would be disastrous to attempt to realise any large proportion of the shares or debentures of the new coy when issued by placing them on the market at once, and accordingly I desire to obtain leave to retain such shares and debentures when obtained subject to the direction of the Ct as to realisation after a period of postponement or otherwise as may be deemed expedient.

16. I depose to the above facts of my own knowledge except where otherwise expressed; and as to the facts deposed to, which are not within my own knowledge, I believe the same to be true, and that belief is grounded on information obtained from members of the family and from the managers of the sd business.

Form 376.

Another affidavit in support of a scheme of conversion.

We, —— of ——, —— of ——, and —— of ——, severally make oath and say as follows:—

1. The plt A. is the surviving tree and exor appointed by the will of, &c., and the plts B. and C. are, with the sd A., the present trees of the sd will, the sd B. and C. having been appointed such trees by an indenture dated, &c.

2. The sd testator was at the time of his death (which took place on, &c.), in conjunction with his then partners, L., M., and N., carrying on the business of —— manufacturers under the style, &c., which business under the same style was, with various partners, pursuant to the power in that behalf in the sd testator's will contained, carried on by the testator's widow, and on the death of the sd M., on, &c., the then existing partnership came to an end.

3. Before and at the time of the testator's death and ever since the whole of the capital, including, &c., belonged to and formed part of the sd testator's estate.

4. The capital, including the value of the plant and machinery, stood at the testator's death, and has always since stood and still stands, in the firm's books at the sum of £——.

5. The goodwill of the business has never been valued, nor is it in

our opinion advisable in the interests of the business to call in an expert valuer, who must necessarily be some person in the business of and well known and experienced as a — manufacturer. **Form 376.**

6. The freehold property, &c., which has been valued by —, a duly qualified valuer, is of the value of £—.

7. [The leasehold property at rack-rents of no value.]

8. Copies of past balance-sheets of firm exhibited.

9. We are advised and believe that neither the sd A., as such surviving exor, nor he and the sd B. and C., as such present trees of the will of the sd testator, has or have any power under the sd testator's will to carry on the sd partnership business

10. A dissolution and winding-up of the partnership assets and business is a matter of great moment to all parties interested in the testator's estate, and, after due consideration, we have come to the conclusion that the magnitude and special character of the business precludes all prospect of a sale to individuals, and that as none of the persons beneficially interested in the testator's estate are able to take it over, the only available mode of realisation is to form a joint stock coy for the purpose of purchasing and taking over the business. The question of the time when this may be done has also had our serious attention, and it has been deemed proper, with the sanction of the Court, to effect the conversion at once. We have accordingly prepared proposals, and the drafts of an agreemt and memdum and arts of assen for the sale to a coy to be formed for the purpose of acquiring the partnership business and assets as from the 1st January last, including any balance accrued since that date which may be in the hands of the receiver and manager appointed in this action by order dated —, but subject to the debts and liabilities of the sd business, for 73,000*l.*, to be wholly satisfied by the allotment to us or our nominees of fully pd-up shares in the coy, subject to the approval of the Ct. The sd proposals and drafts of the sd provisional agreemt and memdum and arts of assen are now produced to us marked resply, &c. The draft of the agreemt, also prepared by us, which it is proposed the coy (when incorporated) should enter into with the sd —, is now produced and shown to us marked F. and the sd proposals and drafts in our opinion are fair, reasonable and proper in all respects, and have been settled after much conson and consultation, not only between us, but between us and the beneficiaries of the estate.

11. The estate of the testator to be divisible into 30 parts, and distributable as follows: $\frac{7}{30}$ to the dfts — —, as exors of — the younger, decd, &c.

Form 370.*(Statements as to the various titles of the beneficiaries.)*

12. All the dfts having limited interest so far as they possibly can, and we as such exors of the sd A. as afd, approve of the sd proposals, draft agreemt, and memdum and arts of asson, and desire that the same may be approved and carried into effect. In our judgment the terms of the sd proposed agreemt are for the benefit of all parties interested, and we are of opinion that it is fit and proper that they be sanctioned and approved by this honourable Ct, and we do not see any other way, or how the sd business can be realised or sold or disposed of on more favourable terms.

Form 377.**Order.**

Upon applicon by originating summons, dated, &c., of A. B., of, &c., and upon hearing counsel for plts and dfts, and upon reading an afft of L., filed, &c., and the exhibits therein referred to, it is ordered that the plts be at liberty to carry on the business of J. K. & Co. until the 31st of January, 1897, subject to the appointment of receiver and manager hntfr mentd, and the judge having approved of N. as a fit and proper person to be appointed receiver and manager as hntfr mentd, and the sd N. having given security as such receiver and manager by entering into his recognizance on the 8th of August, 1896, and by entering into a bond of even date, together with the — Guarantee Asson, Limtd, as his sureties, which sd recognizance and bond having been approved by the judge and duly enrolled, the judge doth hby appoint the sd N., as and from the 27th of January, 1896, to collect, get in, and receive the debts now due and outstanding, and other assets, ppty and effects belonging to the business of — manufacturers, carried on under the style of J. K. & Co., and also to receive the rents and profits of the freehold and leasehold hereds used in connection therewith forming part of the residuary estate of the testator, J. K., decd, and out of the first moneys to be received to pay the debts due from the sd business, and to manage the same, but the sd N. is not to act as such manager beyond the 31st of January, 1897, without the further leave of the judge, and it is ordered that the remuneration of the sd N. as such receiver and manager be one-fourth of the profits of the sd business; and it is ordered that the sd N. do, on the 10th of August, 1897, and the same do in each succeeding year, leave in the chambers of the judge his accounts as such receiver and manager, and do, within fourteen days after the allowance of each such account, pay the balance that shall be certified to be due from him as the judge shall direct, and it is ordered that the rest of the sd applicon . . . and over. (Chitty, J., *Re J. K. & Co.*, 4th August, 1896.)

The proposal taken into chambers was headed in the action:—

Form 378.

"Proposals for conversion of the business of J. K. & Co. into a private coy to be incorporated under the Cos. Acts, 1862 to 1893."

Proposal taken into chambers for conversion of business

For some years prior to the death of Mrs. K., the widow of the above testator, the business of — manufacturers carried on by J. K. & Co. was carried on by her in partnership with the plts K. and S. under the terms of certain articles of partnership, dated, &c.

But on Mrs. K.'s death, on the — of —, the partnership was determined. The plt K. and one S. were interested solely in profits of the business—the whole of the capital employed therein belonging to the testator's estate. The capital employed in the business at the date of Mrs. K.'s death was £—. The returns of the business from the year 1891 to the 25th of January, 1897, were as follows. —[Put above statement in columns headed:—year, sales, gross profits, net profits.]

The trees have carefully considered the best course of disposing of the business in pursuance of the trusts of the testator's will: and although the business has been and continues to be profitable, yet looking to the gradual diminution in the annual returns at the end of 1896, they have come to the conclusion that it would be impossible to find a purchaser at an adequate price, and that to attempt to effect a sale to a public joint stock coy would result in failure and occasion considerable damage to the business.

The trees therefore submit the following proposal for conversion of the business into a private joint stock coy:

- (a) The coy to be formed to acquire the goodwill and assets of the business, together with, &c., subject to the debts and liabilities thof as from the 25th January, 1897, with a nominal capital of 100,000£., divided into 10,000 shares of 10£. each.
- (b) The purchase price to be 73,500£. to be wholly satisfied by the allotment to the trees or their nominees of fully pd-up shares in the coy. The whole share capital will then be held by the trees, with the exception of the shares to which the trees of the will of the sd K. the younger will be entld as pt of the investments of the trust funds subject to the testator's will.
- (c) The board of the proposed coy to consist of three directors, namely, &c., the latter being appointed manager for a term of seven years from the 26th January, 1897, and the remuneration of Messrs. — to be such sum as may be fixed by the judge in chambers, and that of S. to be the sum of 1,000£. p.a. with a commission of 10 p.c. upon the profits.

Form 378.

- (d) That each of the directors other than the first directors should hold as his qualification so many shares.
- (e) That the arts shall provide that the directors shall be entld to refuse registration of shares to any person they do not approve as transferee without being called upon to assign any reason for such refusal.

The draft agreemt for sale and the memdum and arts of assen of the proposed coy to be settled by the judge in chambers.

There was affidavit evidence in support, and an order was made by the learned judge sanctioning the conversion.

Form 379.

Order on
above
originating
summons.
Form 373.

Upon the applicon by originating summons, dated, &c., and upon hearing counsel for the applicants and for the dfts, and upon reading, &c., it is ordered that the conditional agreemt dated, &c., and made between, &c., for the sale to the coy of the hereditaments and premises therein described at the sum of £—, be varied in the manner following, viz.:—

- (1) That the option given to the vendors by clause 2 to take a further part, not exceeding £—, of the purchase-money in shares or debentures of the coy, be confined to fully paid-up shares or debentures, and that such option be not exercised without the leave of the Court; and
- (2) That the sum of £— be substituted for the sum of £ mentd in clause —.

And the judge doth approve of the sd agreemt as so varied, and doth order that the plts be at liberty to carry the same into effect; and it is ordered that it be referred to the taxing master to tax, as between solor and client, the costs of the plts and dfts of this applicon and incidental thereto, including therein the costs of the sd affts hnbefore read; and it is ordered that the plts, as trees of the above-mentd indenture, dated —, 1886, do pay and satisfy such costs, when taxed out of the estate of the sd testators, and any parties are to be at liberty to apply as to exercising the before-mentd option, or otherwise as they may be advised. *Stirling, J., Lord v. Seddon*, 4th August, 1890

Kekewich, J. in sanctioning a conversion where infants were interested required provision to be made which should prevent the infants' *whole* fortune being embarked in one company.

Upon the petition of the plaintiff on the — day of — preferred unto this Court, which, upon hearing counsel for the plaintiff and for the defendants on the — day of —, was adjourned for further consideration in chambers, and upon hearing counsel for the plaintiff and for the defendants in chambers, and upon reading the said petition, the probate of the will of the above-named testator, A. B., deceased, granted by the — District Registry, on the — day of —, to —, an assent of, &c., &c., all filed the — day of —, and the exhibits therein respectively referred to, and an assent of the defendant, X., filed the — day of —:

Form 380.

Order on
petition for
the sanction
of a con-
version.

And this Court being of opinion that the terms of compromise in the petition mentioned are for the benefit of those parties who are not *sui juris*, doth order that the defendants, X., Y., and Z., the trustees of the testator's will, be at liberty to accept and retain, in lieu of the several legacies intended for their several *cestuis que trustent*, debentures and shares in the company in the petition referred to when formed, and to join in making over the real and personal estate of the said testator (other than the landed property at, &c., and the shares in local companies, and the debt owing by the defendant Z., forming part of such estate) to such company when formed in accordance with the schedule in the petition mentioned, and all parties interested are to be at liberty to apply in chambers with respect thereto as they shall be advised. *Re Sir Titus Salt, Bart., deceased, Salt v. Wright.* Jessel, M. R., 27th July, 1881.

Upon the application by originating summons, dated —, of the plaintiffs, and upon hearing counsel, &c., it is ordered that it be referred, &c., tax costs as between solicitor and client, and that such costs be paid as provided for in the agreement hereinafter mentioned; And the judge being of opinion that it will be for the benefit of the infant defendants that under a proper scheme the testator's business in the summons mentioned shall be converted into a limited company, of which the plaintiffs shall act as directors, and that the plaintiffs shall be allowed to vote and retain for their own benefit a proper remuneration as such directors, and that the scheme proposed in the said assent of the plaintiffs filed, &c., and in the draft memorandum and articles of the proposed company and draft agreement for sale when signed by the Master is a proper scheme, doth order that the nominal capital of the proposed company be 40,000*l.* instead of 50,000*l.*, and that the said draft memorandum and articles of association be altered accordingly, and with this alteration the judge doth hereby sanction the formation of the said proposed company with the said draft memorandum and articles of association, the said draft agreement, and doth order that the plaintiffs be at liberty to carry the same into effect; and it is ordered that, until the testator's estate shall have become distributable under the provisions of his said will, the plaintiff or other the trustees or trustee for the time being of his said will and codicils are not without the sanction of the Court, to be obtained by them or him as such trustees or trustee, to make, or consent to the making of, any

Form 380a.

Another
order.

Form 380a. alteration of any of the sd arts of assen of the sd proposed coy or any increase in the capital of the sd proposed coy, or any appointment of managing directors thof, and liberty to apply. *Warner v. Marriage*, Swinfen Eady. J., 8th Dec., 1902.

Later on it was found that the order did not sufficiently provide for putting in an extra 6,000*l.* required for the effectual working of the business, and a further summons was taken out accordingly, and a further order was obtained, 19th May, 1903, modifying the scheme as follows, that is to say:--

1. The plts, all trees of the will of the sd W., are to be at liberty before the promotion of the proposed coy to set aside out of his residuary estate the sum of 6,000*l.*, or investments of the value of 6,000*l.*, and to place the same to a separate account in the names of the trees for the time being of the will of the sd W. for the purpose of meeting the expenditure recommended by the report of L., being the exhibit --- to the afft of the sd --- filed, &c.

2. The fund proposed as afsd is to be included in the sale to the proposed coy, and the draft sale agreemt is to be modified accordingly: but the sale is to be subject to a provision to the effect that the fund is to be retained by the trees of the sd will, and is to be pd over to the new coy by instalments as and when required from time to time for the purposes of the expenditure afsd.

3. The sd draft agreemt is to contain a covenant by the coy to carry out the recommendations contained in the sd report.

4. The purchase consideration to be specified in the draft agreemt for sale is to be increased accordingly by the sum of 6,000*l.*, and the sd agreemt for sale is to provide that this sum of 6,000*l.*, shall be satisfied by the issue to the plts as such trees of 6,000*l.* first mortgage debentures of the coy, and that such debentures are to be secured by a specific first mortgage to trees of all the lands, buildings and fixed machinery of the coy, and by a floating charge in their favour on all the other ppty and undertaking of the coy.

5. The sd agreemt is also to provide that the sd debentures shall be issued from time to time to trees of the sd will in exchange for similar amounts of the sd fund as and when pd over for expenditure as afsd.

6. A corresponding modification shall be made in the sd draft memdum and arts of assen.

And it is ordered that the sd scheme as so modified be sanctioned, and it is ordered that all documents requiring modification and all new documents required for effecting the same be settled by Mr F. B. P., barrister-at-law; and it is ordered that it be referred to

the taxing master to tax the costs of all parties of and incident to this applicon as between solor and client, and that such costs be pd as provided by the draft agreemt hnbefore mentd. Liberty to apply.

Form 381.

Upon the applicon of the plt, H. A., of, &c., who claims to be the legatee in trust of the share of the above-mentd testator, A. B., in the business of, &c., carried on under the style of, &c., at, &c., and upon hearing counsel for the applicant and for the dfts, and upon reading, &c., &c.

Another order
on originating
summons
sanctioning
conversion.

And the judge being of opinion that it is for the benefit of the infant dfts that the sd business should be sold to a coy as hnfr provided:

It is ordered that the plt be at liberty to execute the draft deed of dissolution, being the exhibit — to the afft of, &c., filed on, &c., and to assist in the promotion of a coy to be formed to take over the sd business, with a memdum and arts of asson in the form of the exhibit — to such afft, and subject to the whole of the preference shares being subscribed for at par, or allotted to creditors of the existing firm at par, in discharge of their debts, to join in selling the sd business to such coy when formed, on the terms of the draft contracts, being the exhibits — and — to such afft, and to carry out such contracts and give effect to such sale, and to retain any shares in the sd proposed coy to be allotted to him as the tree of the will of the sd A. B. for a period of two years, or until further order.

And it is ordered, that the costs of the plt and dfts of this action be taxed by the taxing master as between solor and client.

And it is ordered, that the plt be at liberty to pay and retain such costs when taxed out of the estate of the sd A. B., except so far as the same may be pd by the sd proposed coy.

And any of the parties are to be at liberty to apply as they may be advised. *Boyce v. Bullard*, Stirling, J., 25th March, 1895, Reg. Lib. A. 1365.



EMPLOYÉES' BENEFITS.

CHAPTER XI.

INTRODUCTORY NOTES.

WHERE companies employ much labour, it is often found expedient to provide for the employes certain benefits and advantages beyond their ordinary wages, so that by being interested in the fortunes of the company they may have special inducements to use their best energies and abilities in its service, and to abstain from the ruinous warfare involved in strikes and agitation.

Special inducements to employes.

There seems good reason for anticipating that profit-sharing in some form will play an important part in the industrial system of the future, and may even prove the true solution of the problems arising out of competing claims of labour and capital.

The following are some of the various schemes which have, from time to time, been adopted for the purpose:—

Examples of schemes.

Profit-sharing Schemes.

(a) One scheme is for the company to make regulations declaring that a certain portion of its annual profits shall be divided amongst its employes, or selected employes, in proportion to their wages, or in some other proportion.

Profit-sharing.

(b) Another scheme is to create an issue of a special class of employes' shares, and to allow employes to take them up and to hold them whilst in the company's employment].

(c) Another scheme is to establish a fund, which is placed in the hands of trustees, who are empowered to invest the same in shares of the company, to be sold on easy terms to employes, all dividends going in part payment of the purchase-money until, by means thereof, the whole price of the shares has been paid. Thus an employe, in effect, saves up his share of profits until he obtains with the amount a share in the company.

(d) Another scheme some times adopted is for the principal shareholders to make over to a trustee a specified number of paid-up shares in the company, on the footing that certificates, conferring a right to the dividend declared on such shares, shall be issued to selected

employés, such certificates to be retained so long as they remain in the company's employment. This scheme possesses many advantages, and this in particular, that whilst giving a share in the profits, it does not render the employés members of the company.

Superannuation and Pension Funds.

Super-
annuation
and pension
funds.

Such funds are very attractive to employés where the business of the company is well established and likely to be permanent, and, as the benefits are usually confined to employés dying or becoming incapacitated by ill-health whilst in the employment of the company, the scheme affords a strong inducement to employés to continue in the service of the company. Such schemes generally vest a discretion in the administrators of the fund as to the amount of the allowance or pension, and this enables the most deserving cases to be discriminated and specially favoured.

Moreover, the provisions of such a scheme are generally more liberal than those offered by insurance companies, mainly because the company itself largely contributes to the fund, either by donations out of profits or otherwise. The employés are sometimes required to contribute to the fund, but as a rule it is better not to exact such contributions.

Life Assurance Schemes.

Life assurance
schemes.

Occasionally a company adopts a scheme of life assurance for the benefit of its employés. Unless the company be a life assurance company conforming to the requirements of the Assurance Companies Act, 1909, it cannot itself insure its employés, but there is no difficulty in finding an insurance company ready to give effect to any such scheme, and as a general rule the company itself, under the powers of its memorandum of association, may pay or contribute towards the premiums payable under any such scheme. If desired, a life assurance scheme can be effectuated by means of an industrial and provident society constituted under the Acts of 1893 and 1895, to be formed and worked by the company's employés with or without supervision; and this course is sometimes preferred, on the ground that the persons interested are thus enabled to frame the scheme as they choose, and to work it without reference to any outside body.

Sick and Accident Fund Schemes.

Sick and
accident fund.

Such funds are very common. They can be worked by a committee appointed, or in part appointed, by the employés, or by means of a friendly society registered under the Friendly Societies Acts, 1896, 1898, and 1908. In either case the company contributes to the fund,

and in most cases the employes also contribute a small sum weekly. But since the Workmen's Compensation Act, 1897, repealed and replaced by the Workmen's Compensation Act, 1906, accident funds are rarely adopted.

Guarantee Fund Schemes.

Where the employes of a company, or a considerable number of them, are required to give security, it is not unusual to establish a guarantee fund to which employes and employers both contribute, and thus in effect insure each other's interests. In such cases the rules sometimes provide that any surplus from time to time shall be carried over to the provident fund.

Deposit Scheme.

Occasionally a scheme is established for encouraging employes to save a proportion of their wages by depositing the same with the company, or with trustees, the company allowing interest at a higher rate than can be obtained elsewhere, and the right to withdraw the deposits being more or less fettered.

Encouragement of employes to save by depositing with company.

Truck Acts.

In framing and working any scheme which involves contribution by employes, the Truck Acts (1831 to 1896) must be borne in mind, namely, 1 & 2 Will. 4, c. 37 (Truck Act, 1831); 50 & 51 Vict. c. 46 (Truck Amendment Act, 1887); and 59 & 60 Vict. c. 44 (Truck Act, 1896); and the Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48).

The Truck Acts.

The main object of these Acts was and is to prevent employers from taking an unfair advantage of their workmen by paying wages in goods, or orders for goods, or insisting on workmen applying their wages, or part thereof, in purchasing goods at stores kept by employers or their agents, or in which employers are interested.

The operation of the Acts of 1831 and 1887 was considered by the House of Lords in *Hewlett v. Allen*, (1894) A. C. 383. In that case, A., the appellant, upon entering the firm's service, signed an agreement whereby she agreed to conform to all the rules of the firm's works, one of which provided that all firm's servants should become members of a sick and accident club, to the funds of which weekly subscriptions were payable. A deduction was made each week by the firm from the appellant's wages, with her consent, and paid to the club. The appellant brought an action to recover this deduction, relying on the Truck Acts, but it was held that the payments so made

were not deductions within the meaning of the Act, and therefore could not be recovered. Lord Herschell, L. C., in that case, after referring to sects. 3 and 4 of the Act of 1831, said: "The contrast in those sections is between payment in current coin of the realm and payment in some other fashion; and I can myself entertain no doubt that a payment made by an employer at the instance of a person employed to discharge some obligation of the person employed, or to place the money in the hands of some person in whose hands the person employed desires it to be placed, is in the sense and meaning of those sections a payment to the person employed as much as if the current coin of the realm had been placed in his or her hands."

In the case last cited the contract did not provide that the employee should pay the contributions out of her wages, and the majority of the learned lords laid stress on this fact. See also *Lamb v. Great Northern Rail. Co.*, (1891) 2 Q. B. 281.

In *Owner v. Hooper* (1903), 89 L. T. 130, fortnightly wages were paid in full, and a slip was at the same time handed to the workman indicating a sum which he thereupon repaid to the master. This sum was to cover insurance premium paid by the master, and it was held that the wages were paid in full in current coin as required by the Act.

The deduction by an employer from the wages of a workman of damages awarded by a Court of competent jurisdiction to be paid to the employer for breach of contract is a violation of sect. 3 of the Truck Act, 1831, which requires payment of the entire amount of wages in coin. *Williams v. North's Navigation Co.*, (1906) A. C. 136.

So, where a man was employed as a journeyman machinist at 2s. a week, and his contract with his employers (a company) was on the basis that 2s. per week was to be satisfied by shares in the employing company, the Court of Appeal in Ireland held that the agreement as to the shares was void under the Truck Acts, although his fellow-workmen had acquiesced. *Glasgow v. Independent Printing Co.*, (1901) 2 I. R. 278, C. A.

But where a workwoman was employed at 8s. per week of 55½ hours, with a bonus of 2s. a week for full attendance, and that alone, and printed rules posted in the factory and admittedly read by the workwoman provided (*inter alia*) that "any person absent without reason and not assigning satisfactory reason shall lose bonus," and the workwoman was absent for a quarter of a day without sufficient reason, it was held that it was not an offence under the Truck Acts for the employer to deduct the bonus. *Deane v. Wilson*, (1906) 2 Ir. R. 405, K. B. D.

With regard to the Truck Acts, the following observations may be made:—

By sect. 1 of the Act of 1887, the Acts of 1831 and 1887 only extended to workmen as defined by the Employers and

Workmen Act, 1875 (38 & 39 Viet. c. 90), s. 10, that is to say—"The expression 'workman' does not include a domestic or menial servant, but save an aforesaid means any person who, being a labourer, servant in husbandry, journeyman artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years, or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

Manual labour is the test. *Grainger v. Aynsley* (1880), 6 Q. B. D. 182; *Morgan v. London General Omnibus Co.* (1884), 13 Q. B. D. 832, C. A.

Therefore the Acts of 1831 and 1887 were held not to apply to clerks or shop salesmen, overseers, or drivers of omnibuses and other vehicles (*Morgan v. London General Omnibus Co.*, 13 Q. B. D. 832; *Cook v. North Metropolitan &c. Co.*, 18 Q. B. D. 683; *Bound v. Lawrence*, (1892) 1 Q. B. 226), or to railway guards (*Hunt v. Great Northern Ry.*, (1891) 1 Q. B. 601), or to a manager of coal mines (*Simpson v. Ebbw Vale Co.*, (1905) 1 K. B. 153), or to a working partner (*Ellis v. Joseph Ellis & Co.*, (1905) 1 K. B. 324), or to lace clippers who took home from the factory lace which they were not bound to work on personally. *Squire v. Midland Lace Co.*, (1905) 2 K. B. 448.

- (2) They did not prevent an employer from insisting on his employees making contributions to any fund for the benefit of the employees, provided the employer was not to benefit thereby.
- (3) It is desirable to avoid providing for deduction from wages.

The Truck Act, 1896, does not make lawful any contract or payment which was illegal under the previous Act, or certain other Acts referred to which relate to particular industries (sect. 9). And the Secretary of State may grant exemptions from its provisions in certain areas, &c., when they are found to be unnecessary (sect. 10). Certain exemptions under this section have been made in favour of the cotton weaving trade and iron ore and limestone quarries. See *London Gazette*, March 9th, 1897; June 18th, 1897. On the other hand, contracts for the payment or deduction of fines are invalidated unless made under the conditions specified in the Act (sect. 1; as to which, see *Squire v. Bayer & Co.*, (1901) 2 K. B. 299), and this provision applies both to workmen and to "shop assistants."

The Act also places restrictions on contracting with reference to

deductions or payments in respect of (a) damaged goods (sect. 2), (b) the use or supply of materials, &c., in relation to the work or labour of the workman (sect. 3). These provisions, however, are not in terms applied to "shop assistants," and apparently only apply in the case of workmen.

The Shop Clubs Act, 1902 (2 Edw. 7, c. 21), bears some analogy to the Truck Acts. Under sect. 2 of the Act, it is provided that it shall be an offence under the Act if an employer shall make it a condition of employment that any workman shall join a shop club or thrift fund, unless the shop club or thrift fund is registered under the Friendly Societies Act, 1896, subject to the provisions of the Shop Clubs Act, 1902, and certified under that Act by the Registrar of Friendly Societies; and there are certain restrictions on the registration of the shop club or thrift fund, and provisions for compensation in certain cases of workmen dismissed. The Act does not retrospectively invalidate shop club rules. *Balchin v. Lord Ebury*, 20 L. T. R. 60. And see *Macdonell, Master and Servant*, 2nd ed. 331—353, 560.

Workmen's Compensation Act, 1906.

This important statute, 6 Edw. 7, c. 58, which replaces the Workmen's Compensation Acts, 1897 and 1900, and came into operation on July 1st, 1907, must not be forgotten, especially as the term "employer" as used in its clauses expressly "includes any body of persons corporate or unincorporate" (see sect. 13).

That it was competent for a workman to contract with his employer not to claim compensation for personal injuries under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), was clearly decided in *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357; but contracts entered into on the faith of that decision should be carefully examined with reference to the provisions of the Act of 1906, for by sect. 15 of that Act "any contract (other than a contract substituting the provisions of a scheme certified under the Workmen's Compensation Act, 1897, for the provisions of that Act) existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act." The Workmen's Compensation Act, 1906, therefore terminates all then existing contracting out agreements between employer and employed as if notice to terminate had been given at the date of the Act.

Starting thus with a clear field, so to speak, sect. 1 of the Act renders the employer liable to pay compensation, in accordance with the first schedule to the Act, where "personal injury by accident

arising out of and in the course of the employment is caused to a workman." And the power of contracting out is very considerably modified. The Act is to "apply notwithstanding any contract to the contrary made after the commencement of this Act," *subject to this*, that "if the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that *any scheme of compensation, benefit, or insurance* for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favourable to the workmen and their dependants than the corresponding section contained in the Act, and that where the scheme provides for contributions by the workmen the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under the Act, and that a majority (to be ascertained by ballot) of the workmen to whom the scheme is to apply are in favour of the scheme, the employer may, whilst the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme" (sect. 3, sub-sect. 1). But no scheme is to be certified "which contains an obligation upon the workmen to join the scheme as a condition of their hiring," or which does not contain provisions enabling a workman to withdraw from the scheme (sect. 3, sub-sect. 3). The same section provides for limiting the duration of certificates, for renewing them with or without modification, for revoking them, and for the distribution of funds on such revocation or expiration.

A workman's contract that the provisions of a certified scheme shall be substituted for the provisions of the Act of 1897 is a bar to a claim by his personal representatives to recover damages for fatal injuries under the Employers' Liability Act, 1880. *Taylor v. Hamstead Colliery Co.*, (1904) 1 K. B. 838.

Sect. 5 vests in workmen entitled to compensation the rights of the employer against the assurer in respect of his liability under the Act when the employer becomes bankrupt, or, *if a company*, commences to be wound up.

Sect. 7 applies the Act to masters, seamen, and apprentices to the sea service, but (by sub-sect. (2)) is not to apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or gross earnings of the working of such vessel, and (by sub-sect. (3)) the section is extended to pilots to whom Part X. of the Merchant Shipping Act, 1894, applies, as if a pilot when employed "on any such ship as aforesaid" were a seaman and a member of the crew. Sect. 8 applies the Act to industrial diseases mentioned in the third schedule. By sect. 13, unless the context otherwise requires, "employer" includes any body of persons corporate or unincorporate, and the legal personal representative of a

deceased employer, and where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall for the purposes of the Act be deemed to continue to be the employer of the workman whilst he is working for that other person; "Workman" does not include any person employed otherwise than by way of manual labour whose remuneration exceeds 250*l.* a year, or a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an out worker, or a member of the employer's family dwelling in his house, but save as aforesaid means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing, any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or his dependants, or other person to whom or for whose benefit compensation is payable; "Dependants" means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would, but for the incapacity due to the accident, have been so dependent, and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, or being an illegitimate child leaves a parent or grandparent so dependent upon his earnings, shall include such an illegitimate child, and parent or grandparent respectively; "Member of a family" means wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half brother, half sister. See also the definition of "Ship," "Vessel," "Seaman," and "Port."

As to the Powers of the Company in regard to Employé's Benefits.

How far companies have power to carry out schemes.

In framing, for the benefit of employé's, any scheme for establishing funds to which the company is to contribute, it is necessary to consider, besides the Truck Acts, whether such contributions are within the powers of the company, for a company cannot expend the funds on any scheme, however excellent, which is outside the scope of its objects. Very commonly the memorandum of association contains express powers to make such contributions as in Form 103, *supra*, p. 507; but even without any such express powers a company employing labour may do whatever is reasonably necessary to encourage its employé's to use their best endeavours on its behalf. Thus a company may grant a pension to its employé's out of profits, for

this is calculated to incite them to special exertions. *Henderson v. Bank of Australasia*, 40 Ch. D. 170. So, too, it may give them an excursion or entertainment, and it may deal liberally with incapacitated employes (*Hampson v. Price's Patent Candle Co.*, 24 W. R. 754), and with persons dependent on deceased employes.

In all these cases the important point is, is the scheme devised *bonâ fide* with a view to benefiting the company by enabling it to obtain the best services from its employes? As was said by Bowen, L. J., in *Hutton v. West Cork R. Co.*, 23 C. D. 672: "You cannot say the company has only got power to spend the money which it is bound to pay according to law, otherwise the wheels of business would stop; nor can you say that directors who have got all the powers of the company given to them . . . are always to be limited to the strictest possible view of what the obligations of the company are. They are not to keep their pockets buttoned up unless they are liable in a way which could be enforced at law or in equity. Most businesses require liberal dealings. The test there, again, is not whether it is *bonâ fide*, but whether, as well as being *bonâ fide*, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit. Take this sort of instance: A railway company, or the directors of the company, might send down all the porters at a railway station to have tea in the country at the expense of the company. Why should they not? It is for the directors to judge, provided it is a matter which is reasonably incidental to the carrying on of the business of the company; and a company which always treated its employes with Draconian severity, and never allowed them a single inch more than the strict letter of the bond, would soon find itself deserted—at all events, unless labour was very much more easy to obtain in the market than it often is. The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company."

On the same principle Sir George Jessel, M. R., in *Hampson v. Price's Patent Candle Company*, 24 W. R. 754, held that the company might lawfully expend a week's wages as gratuities for their servants, because that sort of liberal dealing with servants eases the relation between masters and servants, and is in the end a benefit to the company.

So again in *Henderson v. Bank of Australasia*, 40 C. D. 170, it was held to be within the power of a company to grant to the family of a deceased officer a pension of 1,500*l.* a year for a period of five years. North, J., referred to the two last-mentioned cases, and said: "I do fail to notice that the sums which were the subject of discussion in the two last cases were considerably less than the sum which is the subject of the present application, but that is a matter with which I conceive I have nothing to do. It is not for a judge to express any

opinion upon such matters as whether the amount is too large or too small. In the first place he has no means of forming any opinion about that."

But the benefit to the company being the measure of its powers in such dealings, where a company is in liquidation, it loses its power to pay gratuities, for no benefit can accrue to it—its business having ceased—from the exercise of such liberality. *Hutton v. West Cork Rail. Co.* (1883), 23 C. D. 654. Accordingly, where a company had recently sold its undertaking to the Wesleyan body, and at two general meetings resolutions were passed and confirmed by large majorities for the voluntary winding-up of the company and for the distribution of the sum of 7,800*l.* among the directors and other officers and servants of the company as a mere gratuity, Joyce, J., held that the majority of the shareholders had no power to vote gratuities to officials so as to bind the minority in a case where the company was being wound up. *Stroud v. Royal Aquarium and Summer and Winter Garden Society, Ltd.* (1903), W. N. 146; 89 L. T. 243; 19 T. L. R. 656.

In *Cyclists Touring Club v. Henderson*, (1910) 1 Ch. 179, the club, which was formed to protect the rights and promote the comfort of cyclists on tour, was registered with the sanction of the Board of Trade without the word "Limited" as an association not for gain, but one of the conditions of incorporation allowed payment in good faith of remuneration to officers or servants of the club, or to any member in return for services actually rendered. The duties of the secretary of the club were multifarious and difficult, and on his retirement after many years' service from the secretaryship of the club, though he still remained a member, the club voted him a pension, and the Court held that it was within its powers to do so, it being important to the club, by generous treatment of old servants, to secure the best assistance in furtherance of its work.

PRECEDENTS.

Clauses in ARTICLES OF ASSOCIATION as to EMPLOYEES' SHARES.

The following provisions shall have effect:—

Form 362.

1. The 1,000 shares of 1*l.* each mentd in the coy's memdum of asson shall be called "employés' shares."
2. The directors may allot the employés' shares, or any of them, from time to time, to such employés of the coy as they think fit. Before the allotment of an employés' share is made, the full nominal amount thof must be pd up to the coy in cash.
3. Each of the employés' shares shall, whilst it is held by an employé of the coy, rank for dividend as if it were an ordinary share of 10*l.* fully pd up; and whilst not held by an employé of the coy it shall not carry the right to any dividend. An employés' share shall not confer the right to vote, or to attend at general meetings.
4. An employés' share shall not be transferable except as provided by para. 5 of this clause.
5. Whenever an employés' share is allotted, or, pursuant to this clause, is transferred to any employé of the coy, such employé shall be entld to retain and hold the same so long as he remains an employé of the coy; and if by death, resignation, withdrawal, dismissal, or otherwise, he cease to be an employé of the coy, he or his exors or admors shall be bound, upon the request in writing of the directors, to transfer such share to such person as the directors may nominate; and, if such person is not an employé of the coy, such person shall at any time, on the request of the directors, transfer such share to any employé of the coy.
6. If any person who ought, in conformity with the last preceding para. of this clause, to transfer any shares makes default in transferring the same, the directors may, by writing under the common seal, appoint any person to make the transfer on behalf of the person in default, and a transfer by such appointee shall be as effective as if it were duly

Form 382.

executed by the person so in default. A certificate under the common seal that such power of appointment has arisen shall be conclusive for all purposes.

7. In this clause "employé of the coy" means and includes any manager, departmental manager, foreman, clerk, or workman, but the term does not include directors or auditors.

Form 383.

Co-operative
fund.

Subject as aforesaid the profits of each year available for division shall be applied as follows:—

- (a) Such part not exceeding one-half thereof as shall be determined by the co-operative scheme hereinafter mentioned shall be set aside and applied to the purposes of that fund as hereinafter mentioned.
- (b) The remainder thereof shall be paid as dividends to the holders of ordinary shares rateably and *pari passu* on the amounts paid thereon respectively.

The co-operative fund shall be paid and distributed among all the directors, servants, and workpeople of the company for the time being in such proportions and generally in such manner as shall be determined by a scheme to be made for that purpose, called "The Co-operative Scheme," and such payments may either be in addition to or substitution for the other remuneration, salary, or wages of the recipient, or partly one and partly the other, as shall be determined by the co-operative scheme. The co-operative scheme shall also determine the proportion of the divisible fund (within the limits aforesaid) of which the co-operative fund shall consist. No co-operative scheme shall come into force until it has been previously approved by a resolution of the company in general meeting, and when once in force shall not be repealed or altered save by such a resolution.

Clauses in ARTICLES as to DEPOSITS.

Form 384.

Provisions
as to deposits
made by
employees
with the
company.

1. Any employé of the company may, with the consent of the company, open a deposit account with the company, and, until the same is closed, may from time to time pay into such account such sum as such depositor may think fit; and, subject as hereinafter provided, may withdraw all or any of the moneys from time to time standing to the credit of such account.

2. Every payment in to a deposit account opened as aforesaid, must be made to the deposit treasurer of the company, or his deputy, at such place as shall from time to time be fixed by notice posted up in the company's registered office.

3. Each depositor will be furnished with a deposit account book and such book must be produced whenever any sum is deposited on

withdrawn, and every deposit or withdrawal, and all interest allowed, shall from time to time be entered in such book by the deposit treasurer aforesaid; and every such pass-book must be left at the office of the deposit treasurer, to be made up when required. **Form 384.**

4. When a depositor desires to make a withdrawal, he must give at least one calendar month's notice in writing to the deposit treasurer, specifying the amount he desires to withdraw and the day he fixes for withdrawal; but the deposit treasurer may, if he thinks fit, in any particular case, abridge or waive this notice.

5. The day fixed for withdrawal of any sums must be an ordinary working day, and at any time during business hours on that day the depositor, on application to the deposit treasurer, will be entitled to be paid the amount specified in his withdrawal notice aforesaid, and if on the day so fixed he omits to make such withdrawal, or withdraws less than the sum specified, his withdrawal notice shall be deemed to be cancelled, wholly or partially, accordingly.

6. Interest will (subject to clause 7 hereof) be allowed by the company upon the amounts from time to time standing to the credit in such deposit account at the rate of 5 p.c.p.a., and such interest will be credited on the usual quarter days.

Sometimes the rate is made to vary with the rate of profits, but this, by making the depositor a partner, in effect places him in a position, as regards recovery of his loan, at a disadvantage as compared with the ordinary creditors of the company. See sect. 3 of the Partnership Act, 1890.

A good security for the loan may, however, be made by debenture or otherwise. *Ex parte Sheil*, 4 C. D. 789.

7. No sum shall be deposited with the company unless it is the property of the depositor and is free from any trust, and a depositor shall not borrow for the purpose of making any deposit, or in any way assign or create any mortgage or charge on the amounts standing to the credit of his deposit account. Any depositor acting in breach of this clause will disentitle himself to be paid any interest on the sum deposited.

8. The company may at any time, by notice in writing to the depositor, close his deposit account; and in such case the amounts standing to the credit of such deposit account shall become payable at the expiration of seven days from such notice being given, and payment thereof shall be made at the office of the deposit treasurer. As from the closing of a deposit account as aforesaid, the amount to the credit thereof will cease to carry interest.

9. Upon the closing of a deposit account, whether by withdrawal of the full amount thereof or pursuant to the last preceding clause, the depositor's book must be given up to the company to be cancelled.

Form 384.

10. The deposit treasurer will keep a register of the depositors' addresses, and any notice to a depositor may be given by delivering the same to him personally, or by sending the same through the post, addressed to him at his registered address a/sd; and every notice so sent by post shall be deemed to be served on the day following that on which it is placed in the post office.

11. In these conditions the deposit treasurer means such officer of the coy as shall from time to time be appointed by the coy to discharge the duties of deposit treasurer.

ACQUISITION of SHARES by EMPLOYEES.**Form 385.**

Acquisition
of shares by
employees out
of savings.

(1) The directors may at any time require any employe of the coy to leave undrawn any part of the emoluments payable by the coy to such employe, and the moneys so left undrawn shall be placed to the credit of such employe in an account to be opened in the books of the coy, and until payment out or investment in preference shares such money shall carry interest at the rate of 6 p.c.p.a., and such interest shall be credited accordingly.

(2) Whenever the directors consider it expedient, they may determine to invest all or any of the moneys standing to the credit of such account in the purchase on behalf of such employe of preference shares in the coy, and thereupon the directors shall give notice to the ppal holders of preference shares, calling on them, in proportion as nearly as may be to the preference shares held by them, to transfer for the consn below mentioned the required number of preference shares to such employe, and to deliver such transfer to the coy to be registered.

(3) Upon the receipt of each such transfer duly executed, the coy shall out of the moneys a/sd pay to the transferor the consn calculated at par; that is to say, at the sum equal to the capital pd upon the shares sold.

(4) If any preference shareholder makes default in executing and delivering such transfer, the coy may authorize the secretary to execute the same in his name and on his behalf, and such execution shall have full effect, and the purchase-money, on execution thereof become payable to the member who made such default.

(5) When any employe has moneys amounting to 100*l.* or upward available for investment under this clause, he may at any time require the directors to invest the same as a/sd, and if the directors do not comply with such request within eight weeks after the same is made he may withdraw such moneys.

(6) In this clause, until otherwise determined by a general meeting, "the ppal shareholders" means exclusively those holders of

preference shares who for the time being hold respaly more than twenty preference shares, and no preference share once taken under this clause can again be taken. **Form 385.**

(7) Any difficulty as to the proportions in which the preference shares should be provided as aforesaid shall be determined by the directors, and their determination shall be conclusive.

(8) Any shares transferred to any employé under this clause shall *ipso facto* become ordinary shares, and the certificate of title issued to him shall be framed accordingly.

PROFIT-SHARING SCHEME.

(1) From and after the 1st of January, 19—, the surplus (if any) of the clear profits of the company's business beyond such definite sum as is for the time being reserved to the company for its own benefit (hereafter referred to as the "reserved limit") shall be divided into two equal parts, whereof one is to be distributed gratuitously as a bonus among the employés in the manner defined by these rules, and the other to be retained by the company. **Form 396.**
Method of sharing.

(2) The present reserved limit has been communicated confidentially to —, chartered accountant, and will not be altered for the first three years if the scheme so long subsists. Thereafter it may be raised or reduced by the company, but (unless altered during some month of January) not so as to affect the distribution of profits for the financial year current at the time of alteration. Notice of any alteration will be given to the employés in such manner as to let them know how far such alteration would have affected the last preceding distribution if it then been in force. **What is the reserved limit.**

(3) The accounts of the business will be audited each year by a chartered accountant, who shall certify the profits (if any) to which the employés are entitled. **Accountant's costs.**

(4) The employés entitled to share in the profits for any financial year are to be such only as were employed at the commencement of such year, and have furnished a request to be entered on the list of profit-sharers. The acceptance of the terms herein offered is not to be in any way a condition of employment or of promotion. Profit-sharers will be free to become or remain members of any trade or friendly society. **Qualifications for profit-sharing.**

(5) The scheme is to continue in force only until the company gives notice to the employés putting an end thereto, but such notice, unless given during some month of January, will not take effect until the end of the financial year current at the time it is given. **Duration of scheme.**

Form 386.**Method of
distribution.**

(6) The employés' share of profits accruing in each financial year is (subject as after mentd) to be distributed among them in proportion to their respective salaries or wages at the commencement of such year, taken for one week, exclusive of premiums, overtime, or other variable allowances. In making any year's distribution, it shall be permissible to the coy to carry forward undivided to the credit of the following year's employés' share of profits any sum which, if divided, would have given to them less than one week's wages calculated as aforesaid.

**Payment of
bonus.**

(7) Each employé's bonus shall, within two months of the end of the financial year, be paid into his account at some savings bank, and will then become his absolute property.

**Employés
leaving.**

(8) An employé whose service ends by notice given on either side, by illness, or by death, will have a right to bonus for the financial year in which his service ends in proportion to the portion of the year elapsed to the end of the month preceding the end of his service. Any employé leaving under circumstances other than before mentd shall lose such right. Any sum lost to an employé under this rule does not accrue to the coy, but goes wholly to increase the distribution to the other employés.

**Proviso in
event of
damage.**

(9) If an employé ceases to be in the service of the company by reason of any wilful act or default on his part causing loss or damage to the coy, or is at the time indebted to the company, his bonus shall be applied to making good such loss or damage, or to payment of such debt.

**Partnership
not conferred.**

(10) The employés are not to have either the rights or be under the liabilities of partners, and accordingly they are not to intermeddle in the management, or be entitled to investigate or discovery of the accounts of the business.

**Alteration
of rules.**

(11) Alterations or modifications of these rules which experience may suggest as desirable may from time to time be made by the coy, but such changes, unless made during some month of January, are not to take effect until the end of the financial year current at the time they are made.

Definitions.

(12) In these rules words importing

The masculine gender include also females.

"The company" means the above-named coy.

"Financial year" means the year from the 1st of January to the 1st of January

To L. M., of —.

Form 387.

Sir,

Agreement
with employer
for retransfer
of shares.

With reference to your offer to transfer or procure the allotment to me of — fully pd-up 17. shares in the capital of L. M., Limited below referred to as "the coy"), on the terms here set forth, I desire to say that I accept that offer, and undertake to perform and observe the sd terms. Those terms are as follows:—

1. I am not to sell, mortgage, charge, or otherwise dispose of the sd shares until after ten years from the 1st January, 19—. And if I do or attempt to do anything in contravention of this provision, or if within the sd period I cease to be employed by the coy, the sd shares are at once to revert to you, and I will on demand transfer the same to you or your nominees. Not to sell.

2. During the sd period of ten years the certificate or certificates relating to the sd shares shall be lodged with, and retained by, the coy on your behalf. Deposit of certificates.

3. If at any time after the sd period of ten years, and within twenty years from the date hof, I shall desire to transfer the sd shares or any of them, I will in the first instance give you notice in writing of such desire, and in such case you shall have the option of purchasing the sd shares at their market value; and if there be no market value, or any difference arises between us as to the market value, then at such sum as the auditor of the coy shall certify to be in his opinion the fair value thof. Notice before transfer.

4. If I shall die within twenty years from the date hof, or shall, after ten years and within twenty years from the date hof, cease to be employed by the coy, you or your nominee shall have the option of purchasing the sd shares at a sum equal to the nominal value thof; and such option shall be exercisable at any time within — months after such death or cesser of employment as the case may be. Death.

5. Where you exercise any such option as aforesaid, it shall rest with you to fix the time and place for completion; and at the time and place so fixed I will transfer the shares on payment of the purchase-money; and if at the time and place aforesaid I make default in transferring the same, or if I make default in transferring under clause 1 hof, you may authorize any officer of the coy on my behalf to sign a transfer of such shares to you or your nominees, and a transfer signed by him shall be effective. Completion.

6. Any notice to me or my legal personal representatives may be served by sending the same through the post addressed to me at my address below mentioned, and any notice so served shall be deemed to have reached me or my legal personal representatives at the expiration of — days after it is posted. Notice.

AS WITNESS MY HAND AND SEAL, this, &c.

Form 388.

Participation
certificate as
if payee were
the holder of
a specified
number of
shares.

A., B. & Co., LTD.

No. —.

Participation Certificate on the footing of £—— Ordinary Shares

This is to certify that —, of — (hmftr called "the certificate holder"), whilst he is in the employment of the above-named coy (hmftr called "the coy"), will be entld, in addition to his salary, to payments varying with the annual amount of the profits of the coy as follows:—

1. The auditors of the coy shall, as soon as conveniently may be after the close of each financial year of the coy, certify in writing what are the net profits of the coy's business of such year.

2. In so certifying, such a sum shall be deducted for depreciation of plant as shall be equal to 5 p.c. of the value of such plant at the time being of the coy, and such a sum shall be deducted for reserve fund not exceeding 10 p.c. of such profits as the directors consider necessary to place to reserve, and in addition there shall be deducted a sum sufficient to pay dividend upon the preference shares (if any) in the capital of the coy for the time being outstanding, and the profits less these deductions are below referred to as "the surplus profits."

3. The auditors of the coy shall also certify what rate of dividend the surplus profits afsd would be sufficient to pay on the capital pd up on the ordinary shares in the capital of the coy for the time being outstanding.

4. If a dividend on £—— of ordinary shares at the rate afsd would exceed the salary for the year payable to the certificate holder, then and in such case the coy will pay to the certificate holder a sum equal to the excess as and by way of further remuneration for his services.

5. This certificate is one of a series of like certificates issued, or which may from time to time be issued, by the coy to the managers or employes of the coy by way of special inducement to promote the interest of the coy.

6. Notice in writing will be given by the coy to the certificate holder when any payment becomes due under this certificate.

7. At the expiration of fourteen days after each payment afsd becomes due, the coy will pay to the certificate holder the amount payable to him under this certificate.

8. In order to obtain payment of such amount, the certificate holder must produce this certificate to the coy, and must sign and deliver to the coy a receipt for the payment, and must permit the coy to endorse hereon a note of such payment.

9. When the certificate holder ceases to be employed by the coy he must forthwith surrender this certificate to the coy to be cancelled.

10. This certificate and the benefit thof are strictly personal, and are not transferable by the certificate holder; and if the holder shall

at any time assign, mortgage, charge, or part with possession or control of this certificate, or the interest of the holder thereunder or any pt thof, or attempt so to do, the coy may, by notice in writing to the holder, declare this certificate and all the interest of the holder thereunder forfeited, and thereupon the same shall be forfeited accordingly, and this certificate shall be surrendered to the coy to be cancelled.

Form 388.

11. A notice to the certificate holder hereunder may be served by the coy on him personally, or by sending the same through the post addressed to him at his address above mentd or at his last known place of address, and shall in such latter case be deemed to be served at the expiration of twelve hours after the same is posted.

Given, &c.

TRUST DEED *constituting* SUPERANNUATION FUND.

THIS INDENTURE made the — day of —, 19—, Between — (hnfr called "the coy") of the one part, and —, of —, a director of the coy, —, of —, a director of the coy, —, of —, secretary of the same coy, and —, of —, as nominee of the committee of the sick fund (see cl. 26) (hnfr called "the present trees") of the other part.

Form 389.

Trust deed constituting superannuation fund.

WHEREAS the coy is desirous of establishing a superannuation fund for the benefit of its male employes in London and Birmingham

NOW THESE PRESENTS WITNESS AND DECARE as follows:

1. In these presents, unless excluded by the subject or context, "the trees" means and includes the present trees, or other the trees or tree for the time being hof. "The fund" means the superannuation fund to be constituted as hnfr provided.

Interpretation.

2. A fund to be called the superannuation fund shall be constituted and established.

The fund established.

3. Such fund shall consist, in the first instance, of the several investments specified in the schedule hto, and there shall be added to the fund all contributions and additions which are to be carried to it as hnfr provided, and the income of the fund and of the investments for the time being representing the same shall also be added to the fund.

To consist of scheduled investments and future contributions.

4. The fund shall be vested in the present trees, or their successors in the trust.

To be vested in trustees.

5. The moneys from time to time in the hands of the trees upon the trusts hof, and not presently required for making any payment pursuant hto, shall, if and so far as the coy shall be willing to accept

Where not presently required, to be advanced

Form 389.

to company
on loan or
invested, &c.

Voluntary
annual con-
tribution of
company
to fund.

Fund prima-
rily for em-
ployés and
next for
dependants
of deceased
employés.

Employés still
to provide for
old age accord-
ing to means.

What em-
ployés may
apply for
allowances.

Other em-
ployés in
special cases.

Incapacitated
employés.

Evidence of
eligibility.

Modification
by trustees of
allowances.

Allowances
strictly
personal and
non-assign-
able, &c.

the same, be advanced to the coo by way of loan, repayable on demand, and carrying interest at 5 p.c.p.a., and the coo may at any time pay off any moneys so advanced, and any moneys in the hands of the trees upon the trusts hof, which the coo shall at any time be unwilling to accept on loan, may be invested in any investments by law permitted to trees, and the investments thof may at any time be varied as may seem expedient to the trees, or may be placed on deposit with any bank or banks as the trees may think expedient.

6. The coo proposes to contribute each year to the fund the sum of £— —, or such other sum as the coo shall from time to time determine, but the coo is not to be bound to make any such contribution.

7. The fund is to be regarded as primarily established for the benefit of employés whose character and length of service may, in the judgment of the trees, entitle them to a claim on it, and, secondly, for the purpose of assisting survivors who may have been dependent on deceased employés, and whose circumstances may necessitate some help.

8. The establishment of the fund is not to be regarded as in any way relieving employés of their duty to make such provision for old age and those dependent upon them as their means will permit.

9. Any employé of the coo who has been in the service of the coo or its predecessors in business for at least twenty-five years, and has completed the sixtieth year of his age, may apply for a retiring allowance.

10. Except in cases where ill-health or special circumstances shall in the opinion of the directors, justify it, no allowance shall be granted to an employé who is not sixty years of age and has not completed twenty years of service with the coo or its predecessors in business.

11. Any employé who has been in the service of the coo or its predecessors in business for at least twenty years, and has become mentally or physically incapacitated, may be granted an annual or other allowance subject to the provisions hof.

12. Any employé under sixty years of age who shall be in receipt of a retiring allowance shall, when required by the trees, be bound to satisfy them, by medical certificate or otherwise, that there has been no material change in the circumstances in which the allowance was granted.

13. The trees may withdraw or modify or determine any allowance when, in their opinion, the circumstances or conduct of the recipient shall justify them in so doing.

14. An allowance as aforesaid is to be regarded as strictly personal, and cannot be assigned, charged, or alienated in any way, and any attempt to assign, charge, or alienate shall determine the allowance, but with-

out prejudice to the trees' discretion to continue the same if they think fit after an interval or otherwise.

Form 389.

15. In fixing the amount of each allowance, and in making any modification therein, the trees may exercise their discretion with reference to all the circumstances; but, without prejudice to such discretion, it is declared that the following is the retiring allowance which it is contemplated will be payable, that is to say—

Discretion of trustees in fixing amounts. Subject to such discretion, certain rules shall be observed.

(a) Until such time as the fund shall have reached the sum of 5,000*l.* the retiring allowance per week after twenty years' service shall be one-third of the person's average weekly earnings for the last three years of his employment, but so that such allowance shall not exceed 15*s.* per week.

(b) After the fund shall have reached the sum of 5,000*l.* and upwards, the retiring allowance per week after twenty years' service shall be one-half of the person's average weekly earnings for the last three years of his employment, but so that such allowance shall not exceed 20*s.* per week.

16. Any employé who shall be dismissed, or shall retire from the service of the coy in consequence of misconduct, shall be disqualified from receiving any allowance hereunder.

Retirement of employé through misconduct.

Where by the rules an allowance was to be made to an employé retiring with the consent of the directors, it was held that an employé who was required to resign, and resigned accordingly, did not come within the words. *Stephenson v. Joint Stock Bank*, 20 T. L. R. 8.

17. The trees may grant such temporary or other allowance to widows and other dependants of employés who may die in the service of the coy, or shortly after leaving the service of the coy, as in their absolute discretion they may think proper.

Temporary allowances to widows, &c.

18. The trees may meet together for the dispatch of business, adjourn, and otherwise regulate their meetings as they think fit, and may determine the quorum necessary for the transaction of business. Until otherwise determined three trees shall form a quorum. A tree may at any time convene a meeting of the trees to be held at the office of the coy. Questions arising at any meeting shall be decided by a majority of votes, and in case of an equality of votes the chairman shall have a second or casting vote. A tree in the United Kingdom shall not be entitled to notice of a meeting of the trees.

Meetings and proceedings of trustees.

19. A meeting of the trees for the time being at which a quorum is present shall be competent to exercise all or any of the authorities, powers, and discretions by these presents vested in the trees generally.

Quorum

20. The trees shall cause proper minutes to be kept and entered, in a book provided for the purpose, of all their resolutions and proceedings, and any such minutes of any meeting of the trees, if purporting to be signed by the chairman of such meeting, or by the chairman of

Minutes.

Form 389. the next succeeding meeting, shall be receivable as *prima facie* evidence of the matters stated in such minutes.

Register of employees in receipt of allowances.

21. A register shall be kept by the trees in which shall be entered the names and addresses of the persons for the time being, and from time to time, who are in receipt of allowances hereunder, and of the trees for the time being *hof*.

Notices

22. For the purposes *hof* any notice to any tree, or to any person in receipt of any allowance hereunder, may be given by sending the same through the post, in a letter addressed to him at his registered place of address, and any notice so sent shall be deemed to be served on the day following that on which it is posted.

Alteration of regulations herein.

23. The coy may from time to time, by instrument in writing, under its common seal, with the assent in writing of the trees, alter all or any of the regulations contained in these presents for the time being relating to the fund *liby* constituted, and make new regulations to the exclusion of, or in addition to, all or any of the regulations for the time being relating to such fund; and the regulations so made and for the time being in force shall be deemed to be regulations, in relation to the fund, of the same validity as if they had been originally contained in these presents, and shall be subject in like manner to be altered or modified by any subsequent instrument in writing as aforesaid. For the purposes *hof* all the provisions herein contained shall be deemed to be regulations in relation to the fund.

Full discretion of trustees.

24. The trees, in the exercise of the authorities and discretions *liby* vested in them, shall have an absolute and uncontrolled discretion, and may exercise the same from time to time, and at any time.

Indemnity to trustees.

25. The trees shall *resply* be indemnified against all liabilities incurred by them in the execution of the trusts *hof*, and shall have a lien on the fund for such indemnity.

Directors and others as trustees of fund.

26. The trees of the fund shall always include two of the directors of the coy, the secretary of the coy, and one other person to be appointed by the majority for the time being of the committee of the sick fund which has been established in relation to the coy. The *sd* — and — are two of the present directors, the *sd* — is the secretary, and the *sd* — has been nominated by the committee of the sick fund.

New trustees.

27. The statutory power of appointing new trees in the place of any tree appointed in respect of his being the managing director or director or secretary of the coy shall be vested in the coy, and the statutory power of appointing a new tree in the place of any tree nominated by the committee of the sick fund shall be vested in the majority of the committee of the sick fund.

Director or secretary of company vacating office

28. Any tree who, having been appointed as managing director or a director or secretary of the coy, vacates office as such, shall be deemed thereupon to desire to be discharged from the trusts *hof* for

the purposes of the exercise of the statutory power of appointing new trees. **Form 389.**

29. If the coy shall at any time give to the trees notice in writing stating that the coy does not intend to make any further contributions to the fund, or an order shall be made or an effective resolution shall be passed for the winding-up of the coy, or when the longest liver of the now existing grandchildren of His late Majesty King Edward VII. shall die, the fund shall be realised and shall be distributed amongst the male employes of the coy in such proportions as shall be determined to be just and equitable by an arbitrator to be appointed as here provided, and accordingly such person shall forthwith be appointed arbitrator as the coy and the trees hof shall unanimously appoint, and if such appointment is not made within three calendar months after such order or effective resolution is made or passed, then the majority of the trees hof may request the President for the time being of the Incorporated Law Society of to appoint such arbitrator, and such President shall have authority to appoint him accordingly.

to retire from trusts.

Determination of trusts and distribution by arbitration.

30. The determination of the arbitrator appointed under the foregoing clause shall be absolute and final, and all the costs, charges, and expenses of and incident to the realisation and distribution of the fund, including the remuneration of the arbitrator, shall be payable out of the fund.

Determination of arbitrator absolute.

IN WITNESS, &c.

THE SCHEDULE above referred to.

Particulars of Investments.

MISCELLANEOUS CLAUSES in ARTICLES OF ASSOCIATION as to EMPLOYE DIRECTORS.

Directors.

1. The qualification of a director (other than an employé director) shall be the holding of nominal capital amounting to 7,500*l.* at least. **Form 390.**
The qualification of an employé director shall be the holding of nominal capital of such amount not being less than £—, as the directors (other than employé directors) shall from time to time determine. **Qualification.**

2. In this clause "employé director" means a director, who being a departmental head, and having been in the constant employment of the coy in that capacity, or otherwise, for at least ten years, is **Definition of employé director.**

Form 390.

Election and
rotation of
employé
directors.

elected or appointed by the directors (other than employé directors) to be an employé director in manner hnfr provided. Not more than three directors at any one time shall be employé directors.

3. The directors (other than employé directors) may from time to time elect or appoint any persons to be employé directors, but so that the total number of the directors at any one time shall not exceed the maximum number provided by, or in accordance with, clause and so that the total number of employé directors at any one time shall not exceed three.

4. If and whenever any of the directors shall be employé directors, the one of such employé directors who has been longest in office shall retire immediately prior to the first ordinary meeting to be held in each year, and the directors (other than employé directors) may, immediately before such ordinary meeting, fill the vacated office by either re-electing or re-appointing the retired employé director, or electing or appointing any other person who is qualified to be elected as an employé director. As between employé directors who have been in office an equal length of time, the directors (other than employé directors) shall decide which of the employé directors shall retire. The directors (other than employé directors) may from time to time remove any employé director from office before the expiration of his period of office.

Majority of
directors,
other than
employé
directors,
required to
consent to
elections, &c.

5. No election or appointment, or re-election or re-appointment, of an employé director shall be valid unless the same shall be made with the consent of an absolute majority for the time being of the directors (other than employé directors), which consent shall be testified or evidenced by joint or separate consent or consents in writing signed by the consenting directors.

TRUST DEED *constituting* PENSION FUND.

Form 391.

Trust deed
constituting
reserve fund.
Founder has
gratuitously
transferred
fully paid up
shares to the
trustees.

THIS INDENTURE, made the — day of —, between A. B., of —, hnfr called the founder, of the one pt, and C., of —, and D., of —, of the other pt.

WHEREAS the founder, who is largely interested in the N. Coy, Limtd (hnfr called "the coy"), is desirous of establishing a pension fund in relation to that coy, and with a view thereto has transferred — fully-pd shares of £— each in the coy, numbered — to — inclusive, to the said C. and D. NOW IT IS AGREED AND DECLARED AS follows:—

Shares to be
held on trusts
hereof.

1. The trees, which expression in this deed means the sd C. and D., or other the trees or tree for the time being hof, shall hold the sd shares and the income thof in trust for the purposes hof.

2. The income of the trust fund shall be applied in paying the pensions from time to time payable hereunder, and if the income of any half-year or other period shall be insufficient to pay the sd pensions, such pensions shall abate rateably.

Form 391.

Income to be applied for pensions.

3. The following persons shall be eligible as pensioners, that is to say:—

Who eligible as pensioners

- (a) Persons who, having served the coy for more than ten years, have attained the age of sixty-five.
- (b) Widows and orphans of employes who have died in the service of the coy.

4. During the life of the founder it shall rest with the founder, and after his death it shall rest with the coy, to elect pensioners and to determine the amount of the pensions payable to them respectively, and the time or times of payment, and to withdraw, reduce, or increase any pension.

Founder first and then company to elect pensioners.

5. A register of pensioners shall be kept by the coy, and there shall be entered therein the names and addresses of the pensioners, and the amounts of their respective pensions, and any other particulars relating thereto.

Register of pensioners.

6. Any surplus income from time to time in the hands of the trees may be invested by them in any investments authorized by law for the investment of trust funds, and the moneys so invested and the income thereof shall constitute a reserve fund, and may be applied by the trees or tree at any time in augmentation of the income of any half-year which shall be insufficient to pay the subsisting pensions.

Investment of surplus income as reserve fund, and income of latter to augment pensions.

7. Pensioners shall be elected for one year only, but they may be re-elected.

Pensioners only yearly.

8. The founder may at any time during his life by deed modify the provisions of this deed, and after his death the coy may at any time by deed modify the provisions of this deed.

Modification of these presents.

9. The statutory power of appointing new trees hereof shall be vested in the founder during his life, and after his death in the coy.

New trustees.

10. Any notice to any pensioner may be given, &c.

Notices.

11. *Proviso for winding-up within legal limits.*

Winding-up.

IN WITNESS, &c.

TRUST DEED *constituting* GUARANTEE FUND.

THIS INDENTURE made the — day of —, between The V. Bank of X., Limtd (hereafter called "the bank"), of the one pt. and of —, and — of — (hereafter called "the trees"), of the other pt.

Form 392.

Trust deed constituting guarantee

Form 392.

fund (re a
banking
company).

WHEREAS the bank has determined to establish a guarantee fund for the purposes hereafter appearing: AND WHEREAS the said — and — have agreed to act as trustees for the purposes of these presents

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:—

Guarantee
fund.

1. A fund, to be called "the guarantee fund," shall be established, and such fund shall be formed by contributions to be made by officers and clerks in the employment of the bank, who shall become subscribers to the said fund in manner following:

Subscriptions
of officers and
clerks.

2. Every officer or clerk who desires to become a subscriber to the said fund shall apply to the bank to fix the amount of his security, and, when that has been fixed, shall sign and deliver to the bank a letter as follows:—

"To the V. Bank of X., Limited.

"Gentlemen,—My security having been fixed by you at £— I beg to apply for liberty to become a subscriber to the guarantee fund in respect of a guarantee of £—, and I request your consent thereto, and in consequence thereof agree to be bound by the provisions of the trust deed constituting the said fund.

"Yours, &c.,"

Discretion of
bank as to
admittance
of applicants.

3. It shall be for the bank to determine whether an applicant as aforesaid shall or shall not be admitted to subscribe to the fund, and notice of such determination shall be given to such applicant.

Register.

4. A register of subscribers to the said fund shall be kept by the bank, and in such register there shall be entered the name of each subscriber to the fund, and the amount of the guarantee in respect of which he subscribes, and the time from which he is a subscriber for that amount, and the time when he ceases to be a subscriber.

Rates of con-
tributions.

5. Every applicant who is admitted to subscribe as aforesaid shall be bound to contribute to the fund a premium of 2s. 6d. p.c.p.a. on the amount fixed as his security, and such contribution must be made by equal quarterly payments on the usual quarter days.

Sometimes provision is made for contributions by the company, e.g., a sum equal to the yearly contributions of the subscribers until the fund amounts to a specified sum, and that when this fund amounts to that sum subscribers who have subscribed for ten years shall not pay further subscriptions, unless and until the fund is reduced to less than the specified amount. Sometimes it is provided, that when the fund exceeds a specified sum, the surplus shall be carried to the superannuation fund.

6. If any subscriber makes default for more than seven days in paying any contribution due from him as aforesaid, the bank may, by notice in writing, exclude such subscriber from the benefit of the fund, and thenceforth he shall forfeit all interest in the fund; but the bank, in its discretion, may annul any such forfeiture on such terms and conditions as it may think expedient.

Form 392.

Exclusion and forfeiture on default in contributions.

7. The fund shall be regarded as a security to the bank against all defalcations and misfeasances by the subscribers thereto for the time being, but, as regards each subscriber, such security shall be limited to the amount in respect of which he has been a subscriber.

Fund to be a security against defalcations.

8. Whenever the bank certifies under its seal that any subscriber to the fund has been guilty of any defalcation or misfeasance, and the amount necessary to compensate the bank therefor, then and in any and every such case the bank may withdraw from the fund and appropriate a sum equal to the amount so certified, but not exceeding the amount of the security in respect of which such employé has been contributing.

On defalcation bank may indemnify itself from fund.

9. In the event of any subscriber to the fund voluntarily retiring from the service of the bank, or dying, such subscriber, or his legal personal representatives, as the case may be, shall, provided such subscriber has not been guilty at any time of any defalcation or misfeasance in relation to the bank, be entitled to payment out of the fund of a sum equal to one-half the amount of the premiums paid by him to the fund.

Allowance to a subscriber on retirement where no default.

10. A subscriber to the fund who is dismissed by the bank from its service for any cause whatsoever shall forfeit all interest in the fund.

Forfeiture on dismissal.

11. All contributions to the fund shall be paid to the bank, and the bank shall keep a proper account thereof; but it shall not be bound to keep such contributions separate from the general assets of the bank, or be regarded as a trustee of such fund.

Bank to hold fund and keep separate account.

12. The bank may at any time by deed dissolve the fund, and in that case the fund shall be applied, first, in making good to the bank all sums certified by the bank under clause 8 hereof, and the surplus shall be applied, so far as the same may extend, in paying off to each subscriber who has not been guilty of any defalcation or misfeasance in relation to the bank, one-half the amount of the premiums subscribed by him, and the residue shall belong to the bank.

Dissolution and distribution.

Sometimes it is provided that the fund shall be the absolute property of the bank, and that no subscriber thereto shall be entitled to require any account thereof, and that the bank may at any time put an end to the fund, and that any moneys at the credit of the fund shall in that case belong absolutely to the bank.

13. The bank may at any time by deed alter all or any of the regulations and provisions herein contained, and may make new regulations and provisions to the exclusion of or in addition to all or

Alteration of these presents.

Form 392. any regulations and provisions herein contained, and any regulations and provisions so made by deed shall be deemed to be regulations and provisions of the same validity as if they had been originally contained in these presents, and shall be subject in like manner to be altered or modified.

Consultative committee of officers.

14. The bank may at any time, and from time to time, appoint any of the officers of the bank to act as a consultative committee for the purposes of these presents, and may from time to time define the duties and powers of such committee, and may modify or dissolve such committee.

Additional security may be required by bank.

15. Nothing herein contained shall prevent the bank from requiring or taking from any subscriber to the fund any additional or special security for his fidelity.

Subscribers not absolved from default notwithstanding their subscriptions.

16. The personal liability of every subscriber to the fund to make good his defalcations and misfeasances shall remain and subsist in every respect as if the sd guarantee fund had not been established, and each subscriber shall enter into a bond for faithful service framed in accordance with the form set forth in the schedule hto.

17. The statutory power of appointing new trees hof shall be vested in the coy.

IN WITNESS, &c.

THE SCHEDULE above referred to.

BOND of EMPLOYÉ for FAITHFUL SERVICE.

Form 393.

Bond for faithful service.

I, --- of ---, in the county of ---, in conson of the V. Bank of X., Limited (huftr called "the bank"), taking me into its employment upon an agreemt terminable upon one month's notice by either party, do hby bind myself, my heirs, exors and admors, unto the bank, that I will, during all the time that I continue in the employment of the bank in any capacity, faithfully, diligently, and carefully attend to the business of the bank, and to the best of my skill and ability perform all duties which may be required of me, and observe and execute all such instructions or regulations as have been or may be given to me, from time to time, by any one in the employment of the bank who may be set over me; that I will keep secret all transactions which may come to my knowledge while in the service of the bank, and will honestly and truly account to the directors, managers, inspectors, or other officers of the bank having authority in that behalf, for all sums of money, bills, promissory notes, or other securities, property, or effects of every kind belonging to the bank, or

Form 393.

any of its officers or customers, with which I may be entrusted, or which may at any time and in any way come to my hands or under my control; and that I will, when required, pay and deliver the same to any person or persons to be appointed on behalf of the bank to receive the same; that I will on demand pay and make good to the bank the amount of all loss, damage, and expense which may be sustained or incurred by the bank by or through the non-fulfilment of any of the obligations hitherto contained, or by or through any act, neglect, or default done, permitted, or suffered by me at any time while I continue in the employment of the bank, with interest at the rate of 5 p.c.p.a. from the date of demand till payment; and further, that neither I nor my representatives shall be entitled to any relief in respect of the obligations herein contained, or any of them, from any guarantee fund connected with the bank to which I may have contributed while in the employment of the bank, nor shall I or my representatives be entitled to refuse to pay or make good the amount of any loss, damage, or expense as aforesaid, or the interest thereon, upon the ground that the same has been or might be paid or made good out of any such guarantee fund; and, lastly, that a certificate in writing, signed by the principal cashier of the bank, stating the amount at any time payable by me hereunder, shall be conclusive evidence as against me and my legal personal representatives that such amount is due from me hereunder.

IN WITNESS whereof I have hereunto set my hand and seal this — day of —.

Witness, —.

Schemes under the Workmen's Compensation Act, 1906.

As already pointed out, companies are often "employers" within the meaning of this statute, and, where they are large employers of labour and are not satisfied with the terms offered to them by companies assuring against accidents, they should consider and take advice with reference to what schemes may be lawfully and can be expediently entered into with a view to the common benefit of both employers and employed, and in substitution for the hard-and-fast provisions of the Act. Such an alternative is permissible. See *Taylor v. Hamstead Colliery Co.*, (1904) 1 K. B. 838, 845, where Collins, M. R., says: "The provisions of the scheme are substituted for the provisions of the Act." The workman is given an option by sect. 1 (2) (b) to proceed under the Act or apart from the Act, and the exercise of his option is conclusive. *Edwards v. Godfrey*, (1899) 2 Q. B. 333. It may be that the mutual insurance of employers is the best course to adopt. (See Form 135, *supra*.)

A scheme has been adopted by at least one Government Department (the Admiralty).

NOTICES.

CHAPTER XII.

INTRODUCTORY NOTES.

NOTICES have frequently to be given by a company to its members and to others under the Act, or under the company's articles, or otherwise.

A notice must be properly authenticated, and as to this sect. 117 of the Act of 1908, replacing sect. 64 of the Act of 1862, provides that "a document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorized officer of the company, and need not be under its common seal." These words do not import, it is conceived, that the signature must be a personal one; it may be by some agent. *The Queen v. The Justices of Kent*, L. R. 8 Q. B. 305; *Morton v. Copeland*, 16 C. B. 535; *Re Whitley*, 32 C. D. 337; *Bennett v. Brumfitt*, L. R. 3 C. P. 28. The term "document" in sect. 117 includes summons, notice, order and other legal process and registers. See sect. 285 of the Act.

Notices.

Authentication.

As to the mode of service on members, *prima facie* a notice by the company to a member must be personal, but the articles of association generally contain special provisions allowing of service by post, and these provisions are effective. See *supra*, p. 778.

A notice, whatever its object, must be fairly and intelligibly framed. It must not, that is, be misleading or equivocal. It must convey clearly to the mind of an ordinarily intelligent person the required information. See *supra*, p. 694. If it is equivocal, it is not enough that the sender of the notice intended that it should be read in one way, for the receiver is entitled to put any reasonable construction on it; and if according to that alternative construction the notice is insufficient, the sender is estopped from saying that the other is the true one; and so if the notice is misleading it is bad, for it fails of its end. A benevolent construction cannot be applied to such a document.

Construction of notices.

"It seems to me," said Bowen, L. J., in *Alexander v. Simpson* (1889), 43 C. D. 139, "to be impossible for us to adopt the view

that a benevolent construction ought to be put on commercial notices. What we have to consider is not what is the result of any particular construction, but what was the meaning which ordinary business men would attribute to the notice at the time they receive it. But a notice may fairly assume that the shareholders have knowledge of some documents; for, as Lord Selborne, L. C., said in *Campbell's case*, 9 Ch. 122, "all the shareholders of a company must have imputed to them knowledge of the Acts of Parliament [that is, the Companies Acts, 1862 to 1900, or, now, the Companies (Consolidation) Act, 1908], and also of their own memorandum and articles of association." See also per Lord Cairns, L. J., *Sewell's case*, 3 Ch. 140; and the observations of Lord Selborne, L. C., in *Oakhani Oil Co. v. Crum*, 8 App. Cas. p. 71. See further as to notices of general meetings, pp. 692 *et seq.*

Some matters must be brought pointedly to the attention of the shareholders; for example, where the directors are interested in a contract or matter which is to be submitted to a meeting for confirmation or approval, it appears to be desirable, and in some case absolutely necessary, to disclose the fact in the notice convening the meeting or in some accompanying articles. Thus, in *Kaye v. Croydon Tramways Co.*, (1898) 1 Ch. 358, where an agreement providing for the sale of the company's undertaking was to be submitted, and as part consideration a substantial sum was to be paid to the directors of the selling company as compensation for loss of office, and the notice convening the meeting simply described the agreement as an agreement for the sale of the undertaking, it was held that this was insufficient. "I do not think," said Lindley, L. J., in that case, "that this notice discloses the purpose for which the meeting is convened. It is not a notice disclosing that purpose fairly, and in a sense not to mislead those to whom it is addressed. It follows that . . . the resolution which was passed under this notice is not one which is binding upon absent or dissenting shareholders."

Again, in *Tiessen v. Henderson*, (1899) 1 Ch. 861, the notice called the meeting with view to reconstruction, and to approve of an agreement, &c., but it did not disclose the fact that several of the directors were interested. It was held that the notice was insufficient, and that it ought to have disclosed the material facts. "The man I am protecting," said Kekewich, J., "is not the dissentient but the absent shareholder—the man who is absent because, having received and with more or less care looked at this circular, he comes to the conclusion that on the whole he will not oppose the scheme but leave it to the majority. I cannot tell whether he would have left it to the majority of the meeting to decide if he had known the real facts. He did not know the real facts, and I think, therefore, the resolution is not binding upon him."

With the above cases may be contrasted *Grant v. United Kingdom*

Switchback Railways Co., 40 C. D. 135. In that case the Court of Appeal, affirming Mr. Justice Chitty, held that a resolution confirming an agreement in which the directors were interested was effective, although the notice did not expressly disclose the fact that the directors were so interested. "It was argued," said Cotton, L. J.,

that the meeting was not good because the notice convening it gave no intimation that the contract was one which could not be carried into effect without the sanction of a general meeting. I think that the difficulty was sufficiently suggested by the mere fact of a meeting being called, for, had it not been for the fact that the directors were interested, no meeting would have been necessary."

See also *Southall v. British Mutual Life Assurance Society* (1871), 6 Ch. 614, in which it does not appear that the fact that the directors were interested was disclosed in the notice.

As to what business can be transacted at a meeting where the articles require the notice to specify the general nature of the business, and the notice has specially mentioned it, see *supra*, p. 692.

Unless the articles otherwise provide, a notice convening a general meeting, to be effective, must convene the same unconditionally; and accordingly to say that "if" a specified event happens a meeting will be held on a specified day and at a specified time and place is not sufficient. *Alexander v. Simpson*, 43 C. D. 139. But where the articles provide, as at p. 696, *supra*, that whenever it is intended to pass a special resolution, the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting *conditionally* on the resolution being passed by the requisite majority at the first meeting, such a provision is valid. See *North of England Steamship Co.*, (1905) 2 Ch. 15, C. A. The Court of Appeal, in that case, distinguished *Alexander v. Simpson*, 43 C. D. 139, in which case the articles did not contain any such special provision.

Conditional notice.

The Acts or articles very commonly provide that so many days' notice shall in certain cases be given, *e.g.*, of a call or meeting. Very commonly the words are supplemented by the addition of the words "at the least," or "not less than," or of the word "clear"; and where thus supplemented, it is well settled that the number of days must be computed exclusive of the day on which the notice is served or to be regarded served, and also of the day of the meeting, resolution, or other matter. Thus, sect. 69 of the Act (1908) provides for the passing of a special resolution, and that the resolution, after being passed at one meeting, is to be confirmed at a second meeting held "at an interval of not less than fourteen days" from the date of the meeting at which such resolution was first passed. This means that there must be an interval of fourteen clear days between the two meetings. *Railway Sleepers Co.*, 29 C. D. 204; *Rex v. Salop*, 8 A. & E. 173.

Clear days.

And even when the provision as to notice is not thus supplemented,

it is doubtful whether the number of days must not be computed in like manner, for in the case last mentioned, Littledale, J., said "I do not see any distinction between 'fourteen days' and 'at least fourteen days.'"

Sect. 69 of the Act (1908) requires that the resolution shall be confirmed at a subsequent general meeting . . . held after an interval of not . . . more than one month from the date of the meeting at which . . . a resolution was first passed. "'Month' here means 'calendar month.'" Sect. 3 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63).

Abroad. As to notice to shareholders who are abroad, see *supra*, p. 779.

Time by post. As to the time when the notice served by post is to be considered to be served, see *supra*, p. 780.

Executors of deceased members. As to when a notice is to be served on "the members," see *Allen v. Gold Reefs of West Africa*, (1899) 2 Ch. 556.

Unauthorized notice by secretary. A notice given by the secretary without authority is, *prima facie*, irregular (see *supra*, p. 740), but it may be ratified by the board (*ibid.*).

Waiver of irregular notice. Sometimes the rule in *Royal British Bank v. Turquand* (*supra*, p. 79) applies, and the company may accordingly be precluded from objecting that the notice was irregular.

Outsiders. As to notices to outsiders, these have to be authenticated in accordance with sect. 117 of the Act (1908), set forth at the commencement of this chapter. As to the mode of service, they should, *prima facie*, be served on the party personally. If the party to be served is a company under the Act, the notice may, as provided by sect. 116 of the Act, be served by leaving it at or sending it by post to the registered office of the company.

Sect. 116 above referred to must be read in conjunction with sect. 26 of the Interpretation Act, 1889, which runs thus: -

"Where an Act passed after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve,' or the expression 'give,' or 'send,' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post" (sect. 26).

Where the party to be served is not a company, a notice may generally be served through the post; but, if so served, it will rest with the company to prove that it did in fact reach the party to be served. Proof, however, that it was duly addressed and posted, and has not been returned to the Dead Letter Office, may afford *prima facie* evidence of service.

Oral notices from company. As to oral notices, there are many cases in which oral notices may be given by a company. *Trueman's case*, (1894) 3 Ch. 272. A com-

pany can give an oral notice by its agent duly authorized. Notice to a managing director in that character on a matter affecting the business of the company under his management is notice to the company. *Jaegen, &c. Co. v. Vallen*, 77 L. T. 180.

A company, like an ordinary person, is subject to the rules of constructive notice; that is, notice which, though not actual notice, is imputed to a person by a Court of law or equity. Thus, notice to the company's agent in any particular matter is notice to the company. *Holland v. Hart*, L. R. 6 Ch. 681; *Blackburn v. Vigors*, 12 App. Cas. 531, 543, unless the agent is guilty of fraud on his principal (*Cave v. Cave*, 15 Ch. D. 639), in which case, of course, the presumption is that he will not disclose his own fraud. So notice may be imputed where the company has knowledge of a fact which should have led to further inquiry. *James v. Smith*, 1 Ha. 43; *Wall v. Lord Egmont*, 1 De M. & G. 460; 9 Ha. 449; *A. W. Hall & Co.*, 37 Ch. D. 712; and see sect. 3 of the Conveyancing Act, 1882. Knowledge of a fact by a single director is not necessarily notice to the company (*Hampshire Land Co.*, (1896) 2 Ch. 743; *Marseilles Co.*, L. R. 7 Ch. 163; *Young v. David Payne & Co.*, (1904) 2 Ch. 609); nor is a company to be taken to have notice of all its secretary knows, e.g., of a matter communicated to him as secretary of another company, for he is under no obligation to pass the knowledge on. *Fenwick, Stobart & Co.*, (1902) 1 Ch. 507.

Constructive notice

Allotment Letters.

An application for shares is usually made by letter signed by the applicant or his agent (see p. 48), accompanied by a deposit of so much per share in respect of the shares applied for, and the company's acceptance of this offer is usually signified by allotment and notice thereof to the allottee. As a general rule, an allotment without notice to the allottee is not sufficient to bind him. The applicant has offered to take the shares; and, if the company is minded to bind him by contract, it must, in accordance with the ordinary rule, not merely accept the offer, but notify such acceptance to him or to his agent duly authorized to receive notice of allotment. See *supra*, p. 51. Until such notice of allotment the applicant is entitled to withdraw his application. See *supra*, p. 257.

Allotment letters

As to the importance and operation of letters of allotment, see *supra*, p. 51.

A notice of allotment may, as a general rule, be served by post, and it will take effect as from the time it is posted, even though it should not reach the allottee. See *supra*, p. 52.

Hence the importance of preparing and sending out proper letters of allotment, and of making and preserving careful record of the names and addresses of the persons to whom such notices are sent, and of the contents of the notices, and of the persons who prepared and posted them respectively; for, if any dispute should subsequently arise, the company is thus in a position to prove posting of the requisite notices of allotment, i.e., by affidavit of the person who posted same, such person being allowed to refresh his memory by referring to the contemporaneous entries.

By the joint operation of the Stamp Act, 1891, and sect. 9 of the Finance Act, 1899 (62 & 63 Vict. c. 9), a letter of allotment is liable to a stamp duty

of 6d. unless the nominal amount of what is allotted is less than 5*l.*, in which case the duty is only 1*d.* See *supra*, p. 51. The stamp must be impressed; nevertheless, an unstamped letter of allotment may be sufficient to show that notice was given of the allotment so as to make a contract. *Whitley Partners* 28 W. R. 241; *Steel's case*, 42 L. T. 11; W. N. (1879) 217.

As to the conditions precedent for directors going to allotment, see pp. 9, 51

Form 364.

THE COY. LIMITED

Allotment
letter.

No.

Allotment Letter.

To

[6d. stamp

SIR. In answer to your application for shares in this coy I have to inform you that the directors have allotted you 100 shares of 1*l.* each

The total amount payable thereon, upon application and allotment, is 100*l.*

You have pd on application 30*l.*

Leaving still to be pd by you 70*l.*

which sum is now due, and must be pd to the coy's bankers, Messrs
No. —, — Street, E.C., on or before the — of —,
19 —, who will give you for same the appended receipt.

An alternative form may be worded: — "Leaving the sum of £ — due to you, for which I enclose a cheque payable to your order."

Due notice will be given when the present allotment letter may be exchanged for a share certificate.

I am, &c.

Bankers' Receipt for payment on allotment [not to be detached].

Received this — day of —, from the above-named allottee for credit of the — Coy, the sum of £ —.

For Messrs.

A. B., Cashier.

Date —.

Memorandum

[To be detached and retained by the bankers.]

To —, Bankers.

Please receive to the credit of the — Coy. Limited, the sum of £ —, due from —, on allotment letter No. —.

£ —.

Date

THE — COY. LIMITED

Form 395

No. — to — Letter of
date —

SIR, — I have to inform you that the directors regret that they are unable to allot you any shares in this coy. in compliance with your applicon, dated, &c

I enclose you a cheque for £ —, being the amount pd by you on applicon.

Your obedient servant

—, Secretary

THE — COY. LIMITED.

Form 396

5*l*. Preference Shares, 1905.

Allotment by
way of offer
at a premium

Enttl to a preferential dividend at the rate of 5 p.c.p.a., —

[Date.]

SIR, — I beg to inform you that the directors have allotted to you of the above-mentd New — 5*l*. Preference Shares to which you are enttl in right of the Ordinary Shares held by you in this coy as shown by the Register of Members on the — instant, being one new share for every 100*l*. of stock in accordance with, and subject to the terms of the resolution passed at the Extraordinary General Meeting of the coy held on the — of —

A circular to existing members offering them further shares is not a prospectus within sect. 81 (7) of the Companies Act, 1908. See *supra*, p. 178.

The first payment or deposit of 2*l*. per share will be due on the — next, and unless the same be pd on or before that date the allotment will be forfeited.

It is not proposed to take payment in anticipation of calls.

You are at liberty to renounce this allotment in favour of any other person, provided you fill up and sign the Form of Renunciation (No. 2), and that the person in whose favour you renounce signs the Form of Acceptance (No. 1).

In case you wish to renounce a portion only of the shares offered divided allotment letters will be granted on or before the — of — next; the present allotment letter to be returned to me with the applicon.

The dividends on the shares will be pd at the same time as the dividends on the Ordinary Stock of the coy. each half-year.

—, Secretary.

Insert any provision for fractional certificates. See note to Form 398.

* * If you do not accept or renounce the allotment you will oblige by returning the —

Form 386.

The — Coy, Limtd.

*Form of Acceptance (No. 1).*5*l.* Preference Shares. 1909.

Entld to a preference dividend at the rate of 5 p.c. on the capital
from time to time paid up thereon.

Index No. —.

Deposit, 2*l.* per share on — shares, payable the — day of
£ —.

Name —.

Allotment of — shares under the resolution of the Extraordinary
General Meeting of coy. held on the — day of —.

I (or we) hby accept the above-mentd shares, and request the
directors to cause them to be registered as under.

Acceptor of shares to sign Name, Address, and Description in full.

Date —.

Bankers:—Messrs. — &c.

****** It is essential that the member should preserve this receipt, and
return it to the coy when applied for.

The — Coy, Limtd.

Index No. —.

5*l.* Preference Shares. 1909.

Entld to dividend at the rate of 5 p.c. on the amount called up from
time to time.

Deposit, 2*l.* per share on — shares, payable the — of —
£ —.

Bankers' Receipt.

Received from — the sum of — pounds for the credit of the
— Coy, Limtd.

For — (1*d.* stamp.)

Date —.

~~Now~~ This sheet must be presented to the bankers intact.

The — Coy. Limtd.

Form 396.

Form of Renunciation (No. 2).

5l. Preference Shares. 1909.

I (or we) hereby renounce — right to — shares allotted to —
in favour of the person accepting the same.

Name and address of the member renouncing the shares. (6d. stamp.)

NOTE: Renunciations must be signed by the members to whom
the shares are allotted, and, in cases of joint accounts,
all the persons named in such accounts must sign the
renunciation.

A sixpenny stamp must be affixed where indicated
before the renunciation is signed.

Under the Stamp Act, 1891, as modified by sect. 9 of the Finance Act, 1899
(62 & 63 Vict. c. 9), the duty of a letter of renunciation is 6d., unless the
nominal amount of what is allotted is less than 5l., in which case the duty
is 1d.

The stamp may be impressed or adhesive.

THE — COY, LIMTD.

Form 397.

Issue of, &c.

Fractional
certificate.*Fractional Certificate (No. —).*

For one —th of a £ — share, part of the above issue. On the
delivery to the coy, before the — day of —, of this certificate,
together with nine other like certificates, and an appicon in writing
signed by the person making such delivery, and framed in accord-
ance with the form endorsed hereon, with the requisite sum inclosed,
the coy is to allot to such person one of the sd shares of £ —.

—, Secretary.

TO THE — COY, LIMTD.

Form 398.

Issue of, &c.

Request
to allot.

GENTLEMEN,—In accordance with your circular of the — of —,
I request you to allot me at a premium of £ — one share in your
capital of £ —, pt of the above issue, in respect of this and the
other fractional certificates annexed hto and numbered as below.
the issue price of such shares to be pd as follows:

and I enclose £ —, the amount payable on the — of —.

Yours, &c.

Sometimes, where shares are to be offered to the shareholders at less than
the market price and it is desired to make a *pari passu* division, it becomes

Form 398. necessary to provide for fractional certificates. In such case the certificate may be framed as above, and the allotment letter can contain a statement in these terms:—

"I also enclose certificates representing — fractions of — each of a share. These you may either sell or you can buy other fractional certificates to make up the whole shares, and this can be effected through your stockbroker or through the coy's secretary. A holder of — such certificates on delivery thof to the coy before the day of — can obtain an allotment of a share in accordance with the terms thof."

Form 398a. This circular is to be sent entire to the company's bankers with a remittance for the amount payable together with the requisite form or forms duly filled up.

Allotment
by way of
offer at par.

THE A COY. LIMTD.

No. ———.

Address
Date

SIR OR MADAM,—In accordance with resolutions lately passed at general meetings of the coy, 100,000 shares of 10*l.* each have been created, to be converted when paid up into stock which will as regards each 100*l.* be divided into 50*l.* of 5 per cent. preference stock and 50*l.* of ordinary stock.

Of these shares — were to be offered at par during the present year to the holders of the first preference shares and ordinary stock at the rate of — for every 100*l.* of stock held, and I am instructed to inform you that the directors have allotted to you — of such shares of 10*l.* each, and that in respect of this allotment the amounts following are payable as follows:—

On the acceptance of this offer, £ — — per share.

On the 30th day of January, 1912, £ — — per share.

On the 1st day of March, 1912, £ — — per share.

A cheque for £ —, being the amount due upon the acceptance of this offer, should be sent to the coy's bankers, Messrs. —, of —, on or before the — day of February, 1912, otherwise the allotment will be cancelled.

— shares will, on the 1st July, 1912, be converted into first preference stock and ordinary stock ranking resply for dividend as from the — day of January, 1912, *pari passu* with the existing first preference stock and ordinary stock of the coy resply.

Dividend at the rate of 5 per cent. per annum upon the instalments, from the dates fixed for payment thof to the — of —, will be declared at the annual meeting of the coy to be held about the

month of —, 19—. Interest at the rate of 5 p.c.p.a. will be charged on instalments whilst in arrear. **Form 398a.**

You are at liberty (1) to accept the sd shares yourself, or (2) to renounce them wholly or partly in favour of any other person. In case (1) you will please fill up and sign the enclosed form of acceptance A., and in case (2) you will fill up and sign the form of renunciation B., and the person in whose favour the shares are renounced should fill the form of acceptance A.

Yours truly,

Secretary.

Shareholder's name.

FORM A.

Form of Acceptance.

To the Directors of the above-named Coy.

GENTLEMEN,—I (we) accept the above-mentioned shares and agree to pay the amounts due in respect thereof, and further request you to enter the shares to be registered as under.

Name in full —

Address —

Description —

Signature —

Date —

Proper stamp to be attached.

FORM B.

Form of Renunciation.

To the Directors of the — Coy, Limited.

I hereby renounce all right to the shares allotted as within mentioned in favour of —.

Name in full of person in
whose favour the allotted
shares are renounced.

Address —

Description —

NOTE.— The person accepting the above shares renounced, must sign the form of acceptance A. annexed hto, and where it is desired to renounce only a portion, the secretary will, on application, issue divided allotment letters.

Form 398a.**MEMORANDUM.**

Name of the Company.

Issue of — shares of £ — each.

Received from — the sum of £ — being the amount payable at the rate of — in respect of — shares allotted.

Name of coy —

BANKERS' RECEIPT.

Issue of, &c.

Received from — of — the sum of £ — on account of the Coy, Limtd, in payment of amount due on allotment of shares to —.

Allotment No. —

This receipt to be carefully preserved by the shareholder to be exchanged hereafter for share certificates.

Form 399

THE — — — COY, LIMTD.

Circular
offering
shares
(tenders).5 per Cent. Preference Shares of 10*l.* each.

The directors are prepared to receive offers for 10,000 of the above shares which remain unissued, and will allot the shares to the proprietors who offer the highest premium, which must not be less than 2*l.* per share. The first instalment of 2*l.* per share, with the premium, to be pd to the coy's bankers not later than 3rd January next; interest to commence from 1st January next.

It is intended that a further call of 2*l.* per share shall be payable on the 1st February next. Prepayment of this call and of the remaining 6*l.* per share will be accepted, at the option of the allottee, with the instalment interest upon such prepayment being allowed at the rate of 3 p.c. until each call becomes due.

The shares will be registered free of cost.

A form on which the offer should be made is annexed, and the offer must be in the hands of the undersigned not later than the morning of —, the — *proximo*.

—, Secretary.

Form 400.**Form of Offer.**Application
annexed to
above.

To the Directors of the — — — Coy, Limtd.

I beg to apply for — 5 p.c. preference shares of 10*l.* each, for which I am willing to pay a premium of — per share, and will

FORMS.

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pay 2l per share and the premium to one of the coy's bankers not later than the — next. Interest to commence from —, —, —. **Form 400.**

(Name) —.

(Address) —.

(Date) —.

Register No.

[N.B. Allotments will be made to shareholders only.]

* * Please indorse the envelope, "Offer for shares."

THE — COY, LIMTD.

Form 401.

Address, Date, &c.

Another.

According to the resolution passed at the extraordinary meeting held at, &c., on, &c., the directors are prepared to receive from shareholders registered on the books of the coy on this date, tenders for — ordinary shares of £— each in this coy.

Tenders of not less than £— premium per share, accompanied by a deposit of £— per share, will be received on the annexed form, which must be addressed to the coy and marked "Tender for New Shares," and delivered at this office on or before — o'clock on — th September next.

In the case of your tender being accepted, wholly or in part, the stipulated premium, together with the further sum of £— per share, is to be paid to the — Bank, Limtd, — Street, London, E.C., on or before — th October next, failing which the allotment will be liable to be cancelled, and the deposit of £— per share forfeited.

These shares will rank for dividend as from the 1st July, 19—.

It is proposed that the balance of £— per share shall be pd as follows:

£ — on the 15th January, 19—

£ — on the 30th June, 19—

By order,

—, Secretary.

THE — COY, LIMTD.

Form 402.

Tender for 10,000 New Shares.

Same form.

To the Directors of the — Coy, Limtd.

GENTLEMEN, —In reply to your circular of — of —, 1909, and on the terms thof, I hby tender for — new shares, or any less

Form 402. number that may be allotted to me, at a premium of — pounds, — shillings and — pence per share, and subject to the future calls to be made thereon, and I enclose cheque herewith for £ —, being a deposit thereon at the rate of 2*l.* per share.

I undertake to pay, on or before the 15th October next, the above premium on such shares as may be allotted to me, together with the further sum of £ — per share, to the — Bank, Limited, — Street, London, E.C., and I request you to register me as the holder of such shares.

Name —.

Address —.

Description —.

Premium offered, £ — per share

Date —, 19 —.

Form 403.

Application
for debentures.

THE — COY., LIMITED.

Issue of — debentures of £ — each, carrying interest at the rate of — p.c.p.a.

To the above-named company.

GENTLEMEN,—Having paid to your bankers the sum of £ — being a deposit of £ — per debenture on application for — of the above-mentioned debentures, I request you to allot me that number of debentures on the terms of your prospectus dated the — of —. And I hereby agree to take the same or any smaller number that may be allotted to me, and to pay the balance of £ — per debenture as provided by the said prospectus.

Name in full.

Address, —.

Description,

Date, —

Signature, —.

If you desire to pay in full on allotment, the words "the date specified in the said prospectus" should be struck out, and the word "on allotment" and a discount substituted.

Form 404.Application
for debenture
stock.

THE — COY. LIMTD.

Issue of £ — 4 p.c. debenture stock.

To the above-named coy.

GENTLEMEN, - Having pd to your bankers, Messrs. —, the sum of £ —, being a deposit of £ — p.c. on £ — of the above-mentioned debenture stock, I request you to allow me that amount of such debenture stock upon the terms of your prospectus dated the — day of —. And I hereby agree to accept the same or any smaller amount that may be allotted to me and to pay the balance of — p.c. by the instalments provided for in the sd prospectus.

Name in full,

Address, —,

Description,

Date, —

Signature,

THE — COY. LIMTD.

Issue of, &c.

*Allotment Letter.***Form 405.**Letter of
allotment of
debentures.

SIR, - In response to your applicon, the directors of the above-named coy have allotted to you — debentures of £ — each.

The amount payable on applicon is £

The amount payable on allotment is £

Making together £

Deducting from this the amount already paid by you,

namely £

There remains a balance due from you of £

You will be so good as to pay this sum to the coy's bankers, Messrs. —, No. —, — Street, on or before the — day of —.

The remaining instalments will be payable as follows:—

£ — on the — day of —.

£ — on the — day of —.

£ — on the — day of —.

This letter must be produced at the bank on payment of each instalment, and the proper receipt taken.

Form 405. If you neglect to pay any instalment, you will render previous payments liable to forfeiture.

The debentures when ready, of which due notice will be given, will be delivered in exchange for this allotment letter, duly signed by you, and the bankers' receipts for the amounts pd thereon.

Your obedient servant,

—, Secretary

To —.

This letter should be carefully preserved.

RECEIVED the within-mentd debentures.

Date —.

Signature

RECEIVED the — day of —, the sum of £—, being the balance as above, payable on allotment.

For the — Bank, Limited

RECEIVED this — day of —, the sum of £—, being the first instalment as above mentd.

For, &c.

RECEIVED the — day of — the second instalment above mentd.

For, &c.

RECEIVED the — day of — the final instalment above mentd

For, &c.

The — Coy, Limited.	The — Coy, Limited.	The — Coy, Limited.	The — Coy, Limited.
Allotment No. —	Allotment No. —	Allotment No. —	Allotment No. —
£— payable on allotment.	First instalment, £—.	Second instal- ment, £—.	Final instalment, £—.

Capitalisation of Profits.

Cases very commonly occur in which it is desired to capitalise undivided profits. If the issued shares are only in part paid up, the capitalisation can be effected by declaring a bonus out of the undivided profits and making a call payable at the same date. But more commonly what is desired is to issue paid-up bonus shares to the members and at the same time to carry from reserve to capital account a corresponding amount. Such a transaction cannot be carried out exactly on the lines above indicated, for paid-up shares cannot be issued unless they are paid up by some one other than the company. Now the reserve fund belongs to the company, and to issue shares on the footing that the company is to pay them up out of the reserve fund is irregular, for the payment is by the company. In order to compass what is desired, it is necessary to declare a bonus or dividend payable out of reserve (free of income tax) so that each

member may have an individual right, and then this indebtedness of the company for the bonus or dividend can be satisfied by the issue of paid-up shares.

Form 405.

Where capitalisation is contemplated, it is necessary to attend to the following directions:—

- a) See that the reserve fund clause authorizes the payment thereof of a bonus or dividend to the members, and, if needs be, alter the clause. See *supra*, p. 754, clause (17), and *infra*, Form 474.
- b) See that there is sufficient to the credit of the reserve fund to cover the dividend or bonus without diminishing the fund too much.
- c) See that the company has shares sufficient to satisfy the bonus or dividend, and, if needs be, increase the capital.
- d) See that the articles authorize the satisfaction of a dividend or bonus by the issue of paid-up shares, for *prima facie* dividends must be paid in cash (*Hoole v. Great Western Ry. Co.*, L. R. 3 Ch. 262; *Wood v. Odessa Tramways Co.*, 42 Ch. D. 645; see *supra*, pp. 767, 768), and, if needs be, alter them.
- e) If there is no such authority, and it would be inconvenient to alter the articles, see that the shares to be offered in satisfaction are likely to be accepted by the allottees. Sometimes there is practical certainty as to this—e.g., where the shares to be allotted will be worth much more than par—for a man is not likely to elect to take 100% in cash if by taking shares he would get 150% worth.
- f) Bear in mind sect. 88 of the Companies Act, 1908: for, if the transaction is to be carried out without giving the members the unconditional right to take the dividend or bonus in cash, the transaction may not amount to a cash payment, and it will therefore be necessary to file a contract "constituting the title" of the allottees to the allotment. See Form 52.

The following Forms indicate one mode of carrying out a capitalisation:—

THE --- COY. LIMTD.

MINUTES OF RESOLUTIONS OF BOARD.

The resolution passed at the extraordinary general meeting of the coy on the --- of ---, to the effect that it was desirable to capitalise the sum of 100,000*l.*, being part of the undivided profits of the coy standing to the credit of the coy's reserve fund, and accordingly that the same be distributed as a bonus amongst the holders of the ordinary shares in proportion to the ordinary shares held by them resp'y, and that the directors should be and they were thereby authorized to distribute amongst them the 100,000 unissued ordinary shares, was taken into conson, and **it was resolved:**

That pursuant to the sd resolution the sum of 100,000*l.*, being part of the undivided profits of the coy standing to the credit of the coy's reserve fund, be distributed as bonus amongst the holders registered on the --- day of --- of the ordinary shares in the coy's capital, in proportion to the ordinary shares held by them resp'y, and that the 100,000 unissued ordinary shares be in accordance with the sd resolution dis-

Form 406.

Minutes as to
bonus shares

Form 406.

tributed amongst them in like proportions, and that pursuant to clause 123a (see *supra*, pp. 767, 768) of the arts of asson, A. B., of —, he and he is hby authorized on behalf of the holders of the ordinary shares in the coy's capital on the — day of —, to enter into an agreeemt with the coy providing for the allotment to them as nearly as may be in due proportion of the sd 100,000 shares credited as fully pd up and in satisfaction of the sd bonus, and that the draft of the sd agreeemt submitted to this meeting be and the same is hby approved, and that the seal of the coy be affixed to such agreeemt as and when the same shall have been signed by the sd A. B.

The sd agreeemt was thereupon signed by the sd A. B., and the common seal was affixed thereto, it being dated the — day of —.

It was resolved

That — ordinary shares in the capital of the coy be allotted in accordance with the provisions of the sd agreeemt, and that the letters of allotment thof submitted to the meeting be signed by the secretary and sent out, and that the fractional certificates submitted to the meeting and referred to in such letters be signed and sent in accordance with such letters.

It was also resolved

That the sd bonus be declared and hby made payable free from any deductions for income tax.

As to form of agreement, use Form 63, *supra*, with some modification, and see Form 474, *infra*.

Form 407.

Allotment
letter of bonus
shares pur-
suant to
above.

THE — COY, LIMTD.

Issue of 100,000 new ordinary shares of £1. each,
credited as fully pd up.

Authorized by resolution passed at general meeting of the coy
held on the — day of —.

ALLOTMENT LETTER.

Register —
Value —
Number —.

[Address and date.]

SIR or MADAM, —I am instructed to inform you that the directors have, in accordance with the resolution passed at the extraordinary general meeting of the coy of the — day of —, and the agreeemt

dated the — day of — and made between the coy of the one part and — on behalf of the ordinary shareholders of the other part, allotted to you — of the above-mentd shares credited as fully pd up in satisfaction of the bonus of £ — payable to you under the sd resolution.

Form 407.

I am also instructed to enclose you a fractional certificate, representing one-half of one share. This certificate, as you will see, if duly presented with another certificate of a similar kind, confers the right to call for an allotment of one additional 1/2 ordinary share fully pd up, and you can either sell your certificate or acquire another and thus obtain the full benefit.

You will be so good as to sign and return to me the enclosed form of receipt and request, in order that the certificates relating to the shares thus allotted to you may be made out.

The — Coy, Limtd.

To the above-named coy.

GENTLEMEN,—I acknowledge the receipt of your letter of allotment of the — instant in respect of — ordinary shares fully pd up, and I request that the certificate for the same may be made out and sent to me at the address below set forth.

Dated
Name in full
Ordinary signature —
Address —
Description

THE — COY. LIMTD.

Form 408.

FRACTIONAL CERTIFICATE.

Fractional
certificate
as above.

Representing a bonus of ten shillings made payable out of the coy's reserve fund.

Issue of 100,000 new ordinary shares of 1/2 each credited as fully pd up in satisfaction of bonus.

On presentation of this certificate with another like certificate the coy will, at the request of the person presenting the same, allot to such person one fully pd-up ordinary share in the capital of the coy of 1/2

The request aforesd must be made to the coy before the — day of —.

Such request must be in writing, signed by the person making the same.

Form 408. Such request is to be deemed to authorize the coy to empower any official of the coy, on behalf of the person making the request, to concur with the coy in entering into an agreement providing for the allotment of such share credited as fully pd up in satisfaction of the corresponding amount of the bonus

Dated the — of

As witness, &c

Form 409.

Instalment
reminder

THE — Coy, LIMITED.

Issue of 10,000 shares of 5/- each.

Third instalment of 1/- per share, making 3/- per share pd up.

No. — . Amount £ — . No. of shares.

SIR (OR MADAM),—I beg to remind you that the third instalment of 1/- per share falls due on the 1st of June next, and is, in accordance with the prospectus of the coy, to be pd to the — Bank, No. —, — Street, London, for the account of the coy.

The sum payable by you in respect of the — shares held by you is £—, and the sum must be pd by you to the bankers of this coy on or before the — day of

By order of the Board.

Secretary

To

* * * This portion to be retained by the banker.

 If the amount is remitted to the bankers by post, an address should be given for the return of the receipt.

NOTE. This letter must be presented entire to the bankers, who will sign the annexed receipt. Transfers of the shares herein referred to will not be accepted until the instalment has been pd

Under the arts of assn of the coy, interest at the rate of 6 p. a. is payable on any instalment in arrear.

The — Coy, Limited.

Registered Office. No.

Issue of — shares of £ — — each.

No. — . Amount, £ — . No. of shares.

Bankers' Receipt.

Third instalment of 1/- per share, making 3/- per share

RECEIVED from — the sum of £ —, being the amount of the

instalment of 1/ per share on — shares of — payable **Form 400.**
the — of —, 1905

For the — of —
Cashier

Dated the — day of —

£ —

NOTE. This receipt will be returned to the proprietor

Memorandum.

To be detached and retained by banker

The — Coy, Limtd

— paid the instalment of 1/ per share on — shares

Date —

No —

THE — Coy, Limtd

Form —

Final instalment of 5/ on ordinary shares.

No — Registered Office

R. I am directed to remind you that the final instalment of 5/ per share on the — ordinary shares held by you in this company is due and is payable — Saturday, the 15th instant. The amount of our final instalment is £ —, which should be forwarded to the — Bank, Limtd, — Street, London, E.C., together with the — attached hto, on or before that date.

The registered offices of the coy have now been removed to — address, where all communications to the secretary should be sent.

Yours faithfully,

—, Secretary

Add receipt and bankers' memorandum.

Or, if preferred, substitute the words "with this notice" for the words "with the half-sheet attached hereto," and add fuller receipt.

Final Instalment

RECEIVED the — day of — from — the sum of £ — on account of A. B. Coy, Limtd, being the final instalment of 5s per share on — ordinary shares due the — day of —

For the — Bank, Limtd.

—, Cashier

Form 411.

Notice that
certificate
is ready.

THE — COY, LIMTD.

Capital 100,000*l.*, divided into 10,000 shares of 10*l.* each.

First Issue, 5,000 shares.

To — of —.

Date

SIR OR MADAM,— I beg to inform you that the certificate of title to your shares in the above-named coy will be ready for delivery to you, or your duly authorized agent, at —, between the hours of — and — on the — day of —. If you desire me to send the certificate by post, you will be so good as to fill up the enclosed form of request and forward same to me.

Yours faithfully,
—, Secretary

Some companies insert the words "in exchange for your allotment letter and bankers' receipts" before the words "If you." But a company has no right to make such a condition unless the prospectus expressly so provides; and it seems scarcely fair to call on the allottee to part with the documents which belong to him and may be of value to him. Even where property is conveyed to a purchaser, he is not called on to surrender for ever the agreement and the receipt for the deposit; why, then, should an allottee be put at a greater disadvantage?

Form 412.

Notice of call.

THE — COY, LIMTD.

SIR, — I beg to give you notice that at a meeting of the directors of this coy, held here on the — of —, a call of £ — per share was made, and it was determined that such call should be pd on the day of — to — at —.

The sum payable by you in respect of the — shares, of which you are the holder, is £ —, and I have to request that you will pay the same to the coy's bankers, as above, on or before the — day of —.

As to essentials of a call, see pp. 654, 655, *supra*.

Form 413.

Another.

THE — COY, LIMTD.

I beg to give you notice that the directors have made a call of 1*l.* per share upon all the members holding shares upon which only 4*l.* per share has been pd, and that the same will be payable to the bankers of the coy, Messieurs —, at their banking house, No. — Street, London, E.C., on the — day of —.

The amount payable by you upon the — shares, with 4*l.* only pd. held by you in respect of such call, is £ —.

Upon presentation at the offices of the Coy of the bankers' receipt, **Form 413.** together with the certificate of shares, a note of the payment will be indorsed on the certificate.

Your obedient servant.

—, Secretary.

No —.

Bankers' Receipt.

RECEIVED this — day of —, for the — Coy. Limtd, the sum of £ —, being amount of call due — of —, 1905.

For the — Bank, Limtd.

£

This letter and form of receipt to accompany remittance

THE — Coy, LIMTD.

Form 415.

Notice of call.

15L Shares. 19 —

Fourth instalment of 3L per share, making 12L per share called up

Payable on the 1st February, 1905.

Secretary's Office,

Jan. 19 —

Register No. — —.

20 shares @ 3L... 60L.

Name — —.

Prepayment @ 3L... £ —

The directors having made a call of 3L per share on the 15L shares, such call to be pd on the 1st Feb. 19—, you are hereby requested to pay the sd call, on or before the day appointed, to one of the undermentd bankers, and in default thof interest at the rate of 5 p.c.p.a. will be charged from the above date until the sd call is actually pd

Bankers { Messrs.
 { Messrs.
 { The — —.

No transfer of shares can be registered until the sd call is pd. Divided call-letters will be issued on applicon, provided the number of shares be given.

By order.

—, Secretary.

NOTE.—Proprietors desirous of prepaying the final call of 3L per share can do so; interest at the rate of 3 p.c.p.a. will be allowed on the amount so prepaid.

Form 416.Receipt of
call.

THE — COY, LIMTD.

15/ Shares. 19—.

Fourth instalment of 3/ per share, making 12/ per share called up

Payable on the — day of —, 19—.

Register No. —.

20 shares @ 3/...60/.

Prepayment @ 3/...£

RECEIVED FROM — the sum of £--- on account of the — Coy.

For —

£—.

Date —

NOTE.— This receipt must be forwarded to the coy's office, together with the receipts for previous payments, before any transfer of the shares can be

—, Secretary

. Interest at the rate of 3 p.c.p.a. is allowed on calls paid in advance.

Form 417.Another.
Instalment.

SIR.— I beg, &c., and it was declared that such call should be pd by two instalments of 2s. 6d. each, payable resply on the — of — and — of — to the coy's bankers, the — Coy, Limtd, at No. —, Lombard Street, London, E.C.

You are the registered holder of £00 ordinary shares, and I have to request that you will pay the following amounts to the coy's bankers as above on the dates mentd below:—

1st November, 19	£75
1st January, 19	£75

When each instalment is due, this letter should be sent entire, together with cheque for the amount, payable to the bankers of the coy, who will return it receipted.

When the two instalments have been pd, this letter should be sent to the office of the coy, together with share certificate relating to your shares, in order that a note of payment of the call may be indorsed on the latter.

Should it be desired to transfer any of the above shares, the two instalments must be pd, which may be done at any time before the due dates.

By order of the Board,

—, Secretary.

THE --- COY, LIMTD.

Form 418.

No. ---.

Bankers' receipts.

Ordinary Shares.

Bankers' Receipt for payment of first instalment of first call.

RECEIVED this --- day of ---, 19 --, of ---, the sum of £ ---, being the first instalment of a call of 5s. per share, payable 1st November, 19 --, on --- ordinary shares in the above coy.

For the --- Bank, Limtd.

The --- Coy, Limtd.

No. ---.

Ordinary Shares.

Bankers' Receipt for payment of second instalment of first call.

RECEIVED this --- day of ---, 19 --, of ---, the sum of £ ---, being the second instalment of a call of 5s. per share, payable 1st January, 19 --, on --- ordinary shares in the above coy.

For the --- Bank, Limtd.

The --- Coy, Limtd.

No. ---.

Ordinary Shares.

FIRST CALL.

First instalment of 2s. 6d. per share due 1st November, 19 --.

£ ---.

To be retained by the Bankers.

The --- Coy, Limtd.

No. ---.

Ordinary Shares.

FIRST CALL.

Second instalment of 2s. 6d. per share due 1st January, 19 --.

£ ---.

To be retained by the Bankers.

Sometimes the allotment letter contains at foot blank receipts for payment of the amounts payable on allotment, and in respect of the next instalment, or of several instalments, with a memorandum in each case to be detached by the bankers, thus:—

Form 419.	RECEIVED the — of —, £—, being the sum payable on above allotment.	RECEIVED the — of —, £—, being the sum payable on the — day of —.
Another.	The — Coy. Limtd.	The — Coy. Limtd.

Memorandum.

[To be detached by Bankers.]
 Allotment letter No. —.
 Mr. — has paid £— allotment moneys.
 Date —.

Memorandum

[To be detached by Bankers]
 Allotment letter No. —.
 Mr. — has paid £— allotment moneys.
 Date —.

Form 420.

Notice, under sect. 86 of Act of 1908, avoiding allotment.

TO THE COY. LIMTD.
 And the directors thof.

TAKE NOTICE, that I, the undersigned, do hby, pursuant to sect. 86 of the Companies (Consolidation) Act, 1908, avoid the allotment of — shares of £— each in your capital made to me in the month of —, 19—, and require you to remove my name from your register of members in respect of such shares, and to repay to me the sums amounting to £— pd by me in respect of such shares, with interest at the rate of 4 p.c.p.a. thereon as from the time when I pd the same resply to you; and take notice, that unless within seven days from the date hof you notify to me your assent to such avoidance, and remove my name as afovd, I shall take such proceedings against you as I may be advised.

Dated the — day of

Signature of allottee
 Name in full
 Address
 Description —

Sect. 86 of the Companies Act, 1908, provides that an allotment made by company to an applicant in contravention of the foregoing provisions of the Act (see sect. 85, *supra*, p. 9) shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up. The above is a formal avoidance; but it is not essential to express the avoidance in formal terms; it is enough if the notice clearly puts an end to the contract. After allotment is once made, though irregularly, it is only voidable at the option of the shareholder. The company cannot insist on paying back the application moneys, for the shareholder may prefer to keep the shares (*Barton v. Bean*, (1908) 2 Ch. 240); nor is it necessary that the rescinding shareholder should take actual legal proceedings to avoid the contract, within the month. Notice of avoidance followed by prompt legal proceedings, though after the month, is sufficient. *Re National Motor Co.* (1909) 2 Ch. 228.

To THE — COY, LIMTD.

And the directors thof.

TAKE NOTICE, that I hereby rescind and avoid the contract under which shares in your capital were, in the month of —, allotted to me, such contract having been induced by misrepresentations in your prospectus, and I require you to remove my name from your register of members [a/c., as in the preceding form].

Where a contract to take shares has been induced by misrepresentation on the part of the company, it is voidable at the option of the allottee; but it is valid until the allottee elects to repudiate it. See *supra*, pp. 193, 197. Unless the company at once gives in, the shareholder repudiating should take legal proceedings by the issue of a writ, notice of motion, or summons, otherwise he may lose his right to rescind. Any delay in such a case on the shareholder's part may be fatal. See *supra*, p. 197.

Misrepresentations—Circular Correcting.

Sometimes before allotment the directors discover that some material statement in the prospectus is not correct. In such a case the discovery ought at once to be communicated to applicants. *Scottish Petroleum*, 23 C. Div. 413. And it may be necessary, in order to protect the directors, to offer the allottee his money back, or to make the allotment in some way conditional on his signifying that he desires to renew his application.

So far as the company is concerned, it might suffice to give notice in the letter of allotment of the discovery, for if the allottee pays the allotment money after such a notice, he in effect elects to affirm the contract, and could not subsequently repudiate it, but directors do not stand in so favourable a position, for an allottee may elect to keep the shares without waiving his right to damages against the directors personally, and in order to protect them it may be necessary to inform the applicant of the discovery, tell him that the directors withdraw the original prospectus and offer him his money back, and ask him if he wishes to have the shares, to fill up a fresh application on the footing of a corrected prospectus, copy enclosed. See *supra*, p. 244.

THE — COY, LIMTD.

SIR [OR MADAM].—With reference to your application for an allotment of — shares in the above coy, I am instructed by the directors to inform you that since the publication of the prospectus it has been discovered that one of the statements in that prospectus is incorrect and cannot be justified. The statement in question is that [state what]. This statement was based on the report of Mr. —, in which the following passage occurred [set it out].

But from a further report of Mr. —, received since the publication of the prospectus, it appears that [etc.]. Accordingly, in the result, the statement in the prospectus above referred to was and is incorrect.

P.

Form 421.

Notice avoiding allotment where contract induced by misrepresentation.

Form 422.

Circular when misrepresentation discovered.

Form 422.

The directors therefore, who desire to act in perfect fairness, withdraw the original prospectus, and must abstain from making any allotment thereon.

They do not, however, consider that in the circumstances the prospects of the coy are in any way prejudiced by the fact that *etc.*; and accordingly they have prepared a corrected prospectus, a copy of which is enclosed, and you will be at liberty to renew your applicon on the footing of that prospectus. In the circumstances I have to request that you will be so good as to sign in the place indicated, and send to me, as soon as you conveniently can, one or other of the forms subjoined, in order that the directors may give effect to your wishes as therein expressed.

Yours faithfully,

—, Secretary

Form 423. To the Directors of the — Coy, Limtd.

To be used
with the
above.

GENTLEMEN,—I beg to withdraw my applicon, and request you to repay me the deposit on applicon which has been paid by me.

Date —.

Signature —.

To the Directors of the — Coy, Limtd.

GENTLEMEN,—With reference to the circular letter of the — day of —, and to the corrected prospectus enclosed therein, I wish to renew my applicon, dated the — day of —, for an allotment of — shares on the terms that such applicon is to be treated as referring to the corrected prospectus of the — day of —, instead of to the original prospectus of the — of —, which is withdrawn by the directors.

Date —.

Signature —.

Form 424.

Another in
lien of
reminder.

THE — COY, LIMTD.

Registered Office, —.

Issue of — preference shares of 5*l.* each at 5*l.* 5*s.* per share, payable 10*s.* per share on application, 10*s.* per share on allotment, 2*l.* 5*s.* per share on — (of that, 5*s.* per share is premium), 2*l.* per share on —.

SIR OR MADAM,—I am to remind you that in respect of the allotment to you of — of the above preference shares the sum of £— will be payable by you on the — of —, 1905, in accordance with the prospectus of the — of —.

Be so good as to pay the amount to the coy's bankers, the — Bank, Limtd, — Street, E.C., for the account of the coy.

The directors take this opportunity of mentioning that there was a slight inaccuracy in the prospectus in that it did not disclose that by the terms of the contract mental in the prospectus the undertaking was to be taken over subject to the current liabilities of the vendor, amounting to about 32,000*l.*, and referred to in the balance-sheet accompanying the prospectus. The non-disclosure of this fact was purely accidental, and having regard to the price (1,220,000*l.*) the directors do not consider the matter of any material moment. If, however, you desire it, the directors will be pleased to relieve you from your contract and place you *in statu quo*. Both the preference shares and the debenture stock offered for subscription were over subscribed

Form 424.

By order of the Board,

—, Secretary.

To —.

[Date.]

If the amount is remitted to the bankers by post, an address should be given for the return of the receipt.

This letter must be presented entire to the bankers, who will sign the annexed receipt.

The — Coy, Limtd.

Registered Office, —

No. of allotment —.

No. of shares —.

Bankers' Receipt for instalment due — of —.

RECEIVED from — the sum of £—, being the amount of the instalment of 2*l.* 5*s.* per share (including 5*s.* per share premium) on an allotment of the above preference shares, payable the day of —.

For The — Bank, Limtd.

Dated the — day of —, 1912.

NOTE. The above letter and receipt to be returned to the proprietor.

Memorandum.

[To be detached by bankers.]

Please receive to the credit of The — Coy, Limtd, the sum of £—, due from — on the — of —, as per letter of reminder.

No — Date —.

SIR or MADAM,—At a meeting of a considerable number of the ppal shareholders in this coy, held on the — of —, the position of the coy was considered, and it was resolved:—

1. That having regard to [*state what*], it is necessary to take

Form 425.

Notice with a view to investigation.

Form 425.

prompt action to protect the interests of the shareholders, and Messrs. — should be, and they were thereby appointed, a provisional committee for the purpose of, &c.

2. That the shareholders be requested to sign a requisition for a general meeting.

At the same meeting an agreement dated the — day of —, providing for the requisite further steps, was approved: it was resolved that the shareholders be requested to ratify the same. I now enclose prints,

1. Of the proposed requisition in the form recommended by the committee; and

2. A print of the agreement above referred to, and shall be obliged by your signing your name at the foot of both in the place indicated, and sending the same to me by return of post

Form 426.

THE — COY, LIMTD.

No. —.

Receipt on
deposit of
transfer.

RECEIVED from —, of —, the undermtd transfer and certificate with a view to registration:—

Transferor.	Transferee.	No. of Shares.	Distinguishing Numbers both inclusive.	
			From.	To.

and registration fee — shillings.

—, Secretary.

The receipt must be given up in exchange for new certificate should the transfer be registered.

[Receipts as above require no stamp unless the fee is over 2l. They should be printed and bound up in books with corresponding counterfoils.]

Form 427.

THE — COY, LIMTD.

Notice of
presentation
of transfer.

Notice of Presentation of Transfer.

(Address.)

(Date.)

To — of —.

I have to inform you that the undermtd transfer purporting to be signed by you has been presented for registration, and that the same will be registered unless I hear from you to the contrary at once.

Your obedient servant,

See *supra*, p. 675, as to such a notice.

THE — COY, LIMTD.

Form 428.

*Balance Ticket.*Balance
ticket.

Counterfoil.	No.	[Date.]	No.	[Date.]
No.	[Date.]		Issued in respect of	shares
No. of certificate			in the above-named coy, standing	
			in the name of	, and num-
No. of shares in			bered to	inclusive, the
Certificate			certificate for which has been de-	
No. of shares in			posited in the coy's office.	
Certified transfers			—, Secretary.	
Shares in				
Balance ticket				
Nos. to inclusive			NOTE.—This ticket must be	
In name of			surrendered before any fresh	
Deposited by			certificate for the above shares	
			will be issued.	

THE — COY, LIMTD.

Form 429.

Re — deceased.

Notice where
shareholder
dead.

SIR, -I am desired to inquire whether the exors [or admors] of the above deed desire, in accordance with the coy's acts of assen, to be registered as members in respect of the shares of the deed, or whether they merely desire to transfer the same. If registration is desired the coy will require the production of a request in writing, as below, signed by the exors [or admors] in the presence of a credible witness.

I am, &c.,

—, Secretary.

To —.

By order of the Board.

To — Coy, Limtd.

GENTLEMEN, -The undersigned being the legal personal representative s] of — of — deed, desire to be registered in the books of the coy as the holder[s] of the — shares standing in the name of the sd deceased, and request that such registration may be made accordingly.

Signatures, duly witnessed.

*Form A.***Form 429.**

Other notices
where share-
holder dead.

General form of letter to be sent to exors at the time of registration of probate or letters of admon.

To the exors of the will [or the admors of the estate and effects of — deed.

GENTLEMEN.—I beg to acknowledge on behalf of B. V. & Co., Limtd, the receipt of the probate of the above will [or letters of administration granted to you of the estate and effects of the sd dead, which has [or have] been forwarded to the coy by

I am instructed by the directors to state that before registering you as members of the coy in respect of the sd shares, you must be so good as to fill up, sign, and return to me the enclosed form.

I am, dear Sirs,

Yours faithfully.

As to notice of general meeting to executors or administrators of a deceased member, see *Allen v. Gold Roofs of West Africa*, (1900) 1 Ch. 556.

*Form B.***Form 430.**

Letter from
executors.

Form to accompany general letter to exors.

To B. V. & Co., Limtd

We, the undersigned — of — and — of —, being the exors of the will [or admors of the estate and effects] of — deed, of which probate was [or under letters of administration] duly granted to us on the — day of —, hby request you to register us as members of the coy in respect of the shares in your coy numbered to — inclusive, now standing in the name of the sd deed in the register of members of your coy, and we request you to place our names as joint holders of such shares on the said register

We also request that you will pay, until further orders, all dividends or interest now due, or which may from time to time become due, upon the sd shares, and on any other shares which may hereafter be placed in our joint names in the books of the coy, to —, whose receipt shall be a full and sufficient discharge for the same.

Dated the — day of —, 19 —

(Signed

*Form C.**Notice of Election by Executor***Form 431.**

Letter from
executors.

To accompany general letter (Form A) to exors.

To B. V. & Co., Limtd.

We, the undersigned — of — and — of —, being the exors of the will of — deceased, of which probate was [or admors of the estate and effects of — deceased under letters of admon]

duly granted to us on the — day of —, hvy elect, in pursuance of the regulations of the coy, to have the persons named in the schedule hto, if approved by the directors of the coy, to be registered as the holders of the shares in the coy bearing the respective numbers set opposite to the names of the sd persons, the shares being those now standing in the name of the sd —, deceased, in the register of members of the coy, and we herewith forward you the proper form of transfer, duly executed by ourselves as transferors, and the sd respective persons as transferees of the sd shares, together with the relative share certificates, and the sum of £ —, being 2s. 6d. for each transfer, as the proper transfer fee. Upon registration by the coy of the sd transfers, or such of them as the directors shall approve, we request the coy to send to the respective transferees, to the addresses mentd in the schedule, the certificates of the shares so transferred to them.

Form 431.

Dated.

(Signed.)

The SCHEDULE above referred to

No. of Shares transferred.	Name of Transferee.	Address of Transferee.	Denoting Numbers of Shares.

THE — COY, LIMITED.

Form 432.

Notice before
forfeiture for
non-payment
of call.

No —, ——— Street, &c.

[Date.]

Sir,

In my letter of the — - day of —, I gave you notice that at a meeting, &c

I am now instructed to inform you that the directors require you on or before the — day of — to pay the sd sum of £ —, together with interest then at the rate of — p.e.p.a. from the sd — day of —, up to this day, and that in the event of non-payment of the sd call and interest, on or before the sd — day of —, at the place aforesaid, the shares in respect of which such call was made will be liable to be forfeited.

I am, &c.,

To ———, &c.

—, Secretary.

As to the conditions of a valid forfeiture in such a case, see p. 658 *et seq.*

Form 433.**THE — COY, LIMTD.**

Notice of
ordinary
general
meeting.

Notice is hereby given that the fourth ordinary general meeting of The — Coy, Limtd, will be held at the — Hotel, — Street, London, E.C., on Monday, the — day of —, 1912, at — o'clock in the afternoon [for the purposes following, namely, to receive and consider the annual statement of accounts and balance sheet, and the reports of the directors and auditors thereon, to elect directors and other officers in the place of those retiring by rotation, to sanction the declaration of a dividend, and] to transact the [other] ordinary business of the coy.

The transfer books and register of members of the coy will be closed from — day the — th to — day the — th, both days inclusive.

Dated, &c.

By order,

No. —, — Street, &c.

A. B., Secretary

If the articles only require the objects of an extraordinary meeting to be specified, in notices calling general meetings the words in brackets can be omitted.

As to notice to executors or administrators of a deceased member, see *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 556.

Form 434.**THE — COY, LIMTD.**

Notice of
extraordinary
general
meeting.

Notice is hereby given, that an extraordinary general meeting of The — Coy, Limtd, will be held at, &c., on, &c., at — o'clock in the afternoon, when the subjoined resolution will be proposed.

Resolution.

That, &c. [set it out].

No. —, — Street, &c.

[Office of Coy.]

By order,

A. B., Secretary.

Form 435.**THE — COY, LIMTD.**

Another form.

Notice is hereby given that an extraordinary meeting of the above-named coy will be held at, &c., on, &c., at — o'clock in the afternoon, for the purpose of considering, and, if thought fit, passing a resolution [or, when a resolution will be proposed] authorizing the directors [e.g., "to raise the sum of £ — by the issue of mortgage debentures or otherwise"].

Dated, &c.

By order,

No., &c.

A. B., Secretary.

As to the necessity for stating that the resolution will be proposed as an extraordinary resolution, see *infra*, p. 1093.

Form 436

Notice of
extraordinary
general
meeting for
passing
special
resolution.

THE — COY., LIMTD.

Notice is hereby given that an extraordinary general meeting of the Coy., Limtd., will be held at [e.g., "The Terminus Hotel, Cannon Street, in the City of London," or "the registered office of the coy, No." &c.], on the — day of —, 19—, at — o'clock in the afternoon, when the subjoined resolution will be proposed as an extraordinary resolution.

Here set out the resolution.

Should the resolution be passed by the required majority, it will be submitted for confirmation as a special resolution to a second extraordinary meeting which will be subsequently convened.

Dated —.

By order of the Board

No. — Street, —.

A. B., Secretary.

As to passing special and extraordinary resolutions, see *infra*, p. 1092 *et seq.*

Sometimes to save trouble and expense it is desired to convene the two meetings by one and the same notice, as below. The second meeting cannot, however, be called contingently. *Alexander v. Simpson*, 43 C. D. 139, *supra*, p. 696. But where the articles contain a clause as at p. 693, *supra*, in effect authorizing the calling of the second meeting on a contingency to confirm a special resolution, there is no objection to the notice being so framed. This was decided by the Court of Appeal in *North of England Steamship Co.*, (1905) 2 Ch. 15. In such case the notice may run thus:

Should the above resolution be passed by the requisite majority, it will be submitted for confirmation as a special resolution to a further extraordinary general meeting, and such meeting will be held on — day, the — day of —, at the same time and place, for the purpose of considering and, if thought fit, confirming such resolution as a special resolution accordingly.

Sometimes where there is no such clause in the articles and it is considered specially desirable to call the two meetings by one notice, this can be done by the following form of notice: "And notice is hereby also given that a further extraordinary general meeting of the company will be held at —, on — day the — day of —, at — o'clock in the afternoon for the purpose of receiving a report of the proceedings at the above-mentioned meeting, and of confirming, if thought fit, as a special resolution the above-mentioned resolution." A notice so framed calls the second meeting unconditionally, and therefore avoids the objection raised in *Alexander v. Simpson*, 43 C. D. 139. *Jenner Institute*, 12 T. L. R. 294; and see *Espuela Land and Cattle Co.*, W. N. (1900) 139: 48 W. R. 684.

As to the proceedings at a meeting for passing or confirming special or extraordinary resolutions, and as to the conclusiveness of the declaration of the chairman, see *infra*, pp. 1095 *et seq.*

As to necessity for disclosure where directors are personally interested, see p. 694.

Form 437.

THE — COY. LIMTD.

Notice of
meeting to
confirm
special
resolution.

Notice is hby given that an extraordinary general meeting of the — Coy, Limtd. will be held at, &c., on — day, the 10th February, 19 —, at — o'clock in the — noon, when the subjoined resolution, which was passed at the extraordinary general meeting of the coy held in the —th of January, 19—, will be submitted for confirmation as a special resolution.

That, &c.

[Set out resolution as passed.]

Dated, &c.

By order,

No. —, — Street, &c.

A. B., Secretary

It seems clear that no modification of the resolution can be permitted at the confirmatory meeting. It must either be passed or rejected. *Wall v. London and Northern Assets Corporation*, (1898) 2 Ch. 469. There must be an interval of fourteen clear days between the two meetings. See sect. 69, *infra*, p. 1092, and *Railway Sleepers Co.*, 29 C. D. 204.

Form 438.

THE — COY. LIMTD.

Notice of
ordinary and
extraordinary
general
meetings
to be held
on same day.

Notice is hby given that an extraordinary general meeting of the — Coy, Limtd. will be held at, &c., on, &c., at — o'clock in the afternoon, when the subjoined resolution, which was passed at the extraordinary meeting of the coy, held on, &c., will be submitted for confirmation as a special resolution.

And notice is hby also given that at the same place, and on the same day, at — o'clock in the afternoon, or so soon afterwards as the extraordinary general meeting shall be concluded, the fourth ordinary general meeting of the coy will be held for the purpose of [see *supra*, p. 1080] transacting the ordinary business of the coy.

Dated, &c.

By order,

No. —, — Street, &c.

A. B., Secretary

Sometimes it is found convenient to convene an extraordinary meeting for the same day as the ordinary meeting, but it must be borne in mind that a separate proxy is requisite for each of two meetings though held the same day: *supra* p. 707.

Where two successive special resolutions have to be passed, it is not unusual to pass them in three meetings, or to hold the two intermediate meetings on the same day, as follows. See Form 439, *infra*. It seems better to adopt the course last mentioned, for it might be contended that a special resolution does not become effective until the close of the meeting.

Notice of Meeting [as in Form 436].

Resolution.

That the arts of assen of the coy be altered by the insertion therein immediately after Article 10 of the following Article, namely:—

10a. The coy may from time to time reduce the capital.

Should, &c.

Dated, &c.

See next form.

Form 439.

Notice of extraordinary meeting to pass two special resolutions at three meetings.

THE — COY. LIMTD.

Form 440.

Notice is hby given that an extraordinary general meeting of the Coy, Limtd, will be held, &c., when the resolution which was passed at the extraordinary meeting of the coy held on the — inst., namely, That [as above, Form 439], will be submitted for confirmation as a special resolution. Should such resolution be duly confirmed, the following resolution will be proposed at the same meeting, and, if passed by the requisite majority, will be submitted for confirmation as a special resolution to a subsequent extraordinary general meeting which will be subsequently convened.

Notice of the confirmatory meeting.

Resolution.

That the capital of the coy be reduced from £ — divided into shares of £ — each, to £ — divided into — shares of £ — each

Dated, &c.

By order,

No. —, &c.

A. B., Secretary

It was decided by Chitty, J., that this course of procedure is regular: *John Crossley & Sons, W. N.* (1892) p. 55.

A notice of two meetings to be held in immediate succession to consider *in* two alternative resolutions, one at each meeting, is not rendered an invalid notice of the second meeting by an express provision that it will only be held in the event of the first resolution not being passed at the first meeting. *Tiessen v. Henderson, Kekewich, J.* (1899) 1 Ch 861; and see *North of England Steamship Co., supra*, p. 1049.

To the directors of the — Coy, Limtd.

Form 441.

We, the undersigned members of the above named coy, holding in the aggregate — shares and upwards in the capital thof, do hby, in pursuance of the provisions in this behalf contained in sect. 56 of the Companies (Consolidation) Act, 1908, require you to convene an extraordinary general meeting of the coy, for the purpose of considering and, if thought fit, passing the subjoined resolution

Requisition of members for a general meeting.

Form 441.**Resolution.**That, &c. [*set it out*].

Dated, &c.

See *supra*, p. 690, cl. 59**Form 442.**Notice by
members
calling
meeting.

Notice is hereby given that an extraordinary meeting, &c., will, in accordance with the requisition below mentd, be held, &c. [*as in Form 436, adding :*]

This notice is given by the undersigned members of the coy [or by the direction of the members of the coy specified in the schedule hto and] holding in the aggregate upwards of one-tenth of the issued share capital in exercise of the power conferred by sect. 66 of the Cos (Consolidation) Act, 1908, the directors having failed for 21 days from the date of a requisition in writing, signed by such members, being deposited to convene a meeting for the purposes above mentd

Dated, &c.

[*Names of conveners*]

If the words in brackets are used, a schedule of names will be added, and the notice will be signed by some person on behalf of the conveners. In either case printed signatures would probably suffice.

Under sect. 66 of the Companies Act, 1908, holders of one-tenth of the issued share capital of a company may requisition a meeting.

Form 443**THE — COY. LIMTD**Notice of
meeting of
debenture
holders.

Notice is hereby given that a meeting of the holders of debentures of Series A. of the above-named coy for 250,000*l.*, secured by a trust deed, dated the — day of —, 1902, and made between the sd coy of the one pt, and — and — of the other pt, will be held at the offices of the coy, No. — Lane, London, on —, the — day of —, 19—, at 4 p.m., for the purpose of considering and, if thought fit, approving of certain modifications of the sd trust deed which have been proposed by the coy and recommended by the trustees and of authorizing the trustees to concur with the coy in executing a supplemental trust deed which will be submitted to the meeting for effectuating such modifications

This notice is given pursuant to the provisions contained in the second schedule to the sd trust deed.

By order of the directors

Dated, &c.

—, Secretary.

No. — Lane, London, E.C.

See Part III., 10th ed., p. 373, as to debenture holders' meetings.

THE — COY, LIMTD.

Form 444.

Notice is hereby given that a meeting of the holders of debentures of the above-named coy for 200,000L., secured by trust deed dated the day of —, 1902, and made between the coy of the one pt, and — and — of the other pt, will be held at, &c., London, E.C., on — day, the — day of —, 19—, at 11 o'clock in the forenoon, for the purpose of considering, and if thought fit sanctioning by extraordinary resolution, a provisional agreement, dated the — day of —, 19—, and made between — on behalf of the holders of the sd debentures of the one pt, and the coy of the other pt, which will be submitted to the meeting, and which, if sanctioned, is to take effect and operate by way of modification of the rights of the holders of the sd debentures and of the provisions of the sd trust deed.

The sd agreement empowers the coy to raise further funds by the issue of a new series of debentures ranking in point of security in priority to the existing debentures, and the securities for the same, and for the release of the half-year's interest on the existing debentures due the — of —, —, and for the payment of the interest on the existing debentures for 5½ years from 1st July, —, exclusively out of half-yearly profits of the coy as therein defined, and for other ancillary matters.

This notice is given pursuant to the provisions contained in the third schedule to the sd trust deed.

Dated the — day of —, 19—.

By order of the Trustees,

— and —,

Solicitors to the Trustees

THE — COY, LIMTD.

Form 445.

No. —, 24, — Street, S.W. [Date.]

To —,

Notice of
dividend and
warrant

The directors, by virtue of the powers given to them by clause of the arts of assen, having determined to pay an interim dividend of — p.c. [free of income tax] upon the ordinary shares or the paid-up capital]. I beg to hand you herewith a warrant [or draft] for £ —, the amount of such dividend in respect of — 10L. shares upon which the sum of £ — has been paid]

This half-sheet is to be retained by the shareholder, who is to sign the warrant at the foot hereof, and pass that only through a banker for payment.

Form 445Dividend
warrant.

The — — Coy, Limtd

Interim Dividend, 19

To the — — Bank, Limtd. 3rd August, 19—.

Pay to — — or order the sum of £

For the above-named coy.

Signature of Shareholder. —.

—, Directors.

—, Secretary.

Form 446Another
notice

Herewith I beg to hand you a warrant for the dividend at the rate of — p.c., upon — shares in respect of which the sum of £ — has been pd, making, with the interim dividend of — p.c. pd on me last, the dividend of — p.c.p.a. for the year ending —, 19—.

Form 447Another,
and certifi-
cate of deduc-
tion of income
tax

THE — — CO., LIMTD

Twenty-third Dividend

No.

Dividend for the half-year ending — June, 19—, at the rate of eight pounds [8*l.*] p.c.p.a., payable on and after —th August, 19— at the — Bank, — Street, E.C.

£ s. d

Six months on [10] fully pd up 10*l.* shares, each at
—s per share.

Less income tax at the rate of —d. in the £.

£

The above shares stand in the name of —.

This portion to be retained by the shareholder

The warrant to be torn off, and presented at the bankers after being signed at the foot.

I hereby certify that I have deducted for income tax the amount set forth in the above statement, and that the amount so deducted will be pd by me to the proper officer for the receipt of taxes.

—, Secretary

N.B.—Persons claiming repayment of income tax are informed that the Commissioners of Inland Revenue will receive this statement as a voucher in claiming taxes.

This is to certify that the coy having been assessed under the Income Tax Acts in respect of the whole of its profits and gains, the dividend set forth herein is a portion of such profits and gains in respect of which income tax has been or will be pd over to the proper officer for the receipt of taxes.

Form 448.

Another

NOTE. Persons claiming repayment of income tax are informed that the Commissioners of Inland Revenue will accept this portion of the warrant as a certificate showing the assessment to income tax upon the profits of the coy.

THE Coy, LIMTD.

No. — Street, London, E.C. [Date.]

No

Form 449.

Dividend
notice and
warrant.

SIR, I beg to hand you herewith an order on Messieurs — for £ —, being dividend of — p.c. (free of income tax) for the half-year ended the 31st of December, 19 —, on — ordinary shares in the capital of the coy standing in your name.

I hereby certify that this coy having been assessed under income tax laws in respect of the whole of its profits and gains, the dividend set forth herein is a portion of such profit and gain in respect of which income tax has been or will be pd over to the proper officer for the receipt of taxes.

Your obedient servant,

To

—, Secretary

N.B. Proprietors entld to exemption from income tax are informed that the Commissioners of Inland Revenue will receive this statement as a voucher in claiming a return of the same

The — Coy, Limtd

Warrant for dividend for half-year ended

To Bank, Limtd, No. —, — Street, London, E.C.

Pay — or order the sum of £ —

For the above-named coy,

, Directors

£ —

, Secretary.

Payee's signature —.

This draft must be signed by the payee, and presented within three months from date.

Form 450.

To THE — COY. LIMTD.

Direction by
shareholder to
pay dividends
into a bank.

I direct that until further notice all dividends from time to time becoming payable on any shares or any stock of the above-named coy for the time being outstanding in my name be paid to Messrs —, of —, for my account, and their receipt shall be a good discharge.

Date.

Signature

Address

Under the Stamp Act, 1891, a notice framed as above, or in the form following, is exempt from stamp duty.

Form 451.

To THE — COY. LIMTD.

Direction to
send warrants
by post.

I direct that warrants for dividends at any time hereafter becoming payable on any shares in the above-named coy for the time being standing in my name be sent by post to —, of —, at my risk

Date

Signature

Address.

Form 452.

To THE — COY. LIMTD.

Debenture
stock interest.

We authorize and request you to transmit by post all dividends which may accrue on the £— debenture stock issued by you and standing in our names to the — Bank, Limtd, No. — Street, on our behalf.

Dated the — day of —.

To the — Bank, Limtd.

Share
dividends.

We authorize and request you to place all dividends which you may receive on the shares in the — Coy, Limtd, standing in our names to the credit of the account of — [or of our account] with you.

Yours faithfully,

Form 453.

THE — BANK, LIMTD.

Authority to
bank to pay
dividends to
a third party.

This order must be signed by all the parties in whose names the shares are registered, and their addresses must be added.

To the Secretary of the L. & W. Bank, Limtd.

The bank is hereby authorized and required to pay to —, of —, until this authority is revoked in writing, all dividends or bonuses

now or hereafter payable on all shares in the bank for the time being standing in the name of the undersigned ---. **Form 453.**

Dated the --- day of ---

Usual signature
Name in full
Address

I, A., of ---, do hereby appoint B., of ---, to be my attorney in my name and on my behalf to receive all dividends from time to time payable on my shares in the --- Coy, Limited [and I declare that this power of attorney shall be irrevocable for one year from the date hereof]. As witness my hand and seal this --- day of --- **Form 454**
Power of attorney to receive dividend

[Signature and seal of A.]

Signed, sealed and delivered by the said A
in the presence of ---, of ---.

A power of attorney, as above, requires a 5s. stamp; but where the authority is for the receipt of one payment only, the stamp is 1s. Schedule to Stamp Act, 1891

NAME OF COY: ---, LIMITED.

Form 454a.

To the Registrar of --- Cos.

I, ---, of ---, hereby give notice that: ---

Notice as to the appointment of a receiver or manager

Only one of these paragraphs is to be used. Strike out the other.

1. I have obtained an order of the *insert name of the Court making the order*, dated, &c., for the appointment of Mr. ---, of ---, as receiver *[or manager]* of the property of this company.

2. On the --- day of --- I appointed Mr. ---, of ---, as receiver *[or manager]* of the property of this company under the powers contained in an instrument dated *[describe fully the instrument under which the appointment is made]*.

Date ---

Signature

Under sect. 94 of the Companies (Consolidation) Act, 1908 any person obtaining the appointment of a receiver or manager of the property of a company or appointing such a receiver or manager under any powers contained in any instrument, must within seven days from the date of the order or appointment give notice of the fact to the Registrar of Companies, and the Registrar is to enter the fact in the register of mortgages and charges on payment of the prescribed fee.

Form 455.

Consent to
new company
using name
of old.

To the Registrar of Cos.

I, the undersigned, being the liqr of the A. Coy. Limtd, give you notice that the sd coy is in course of being dissolved, and I hby, under the provisions of the Cos Act, 1908, s. 8 (1), and on behalf of the coy, testify its consent to the registration of a new coy, by the name of the A. Coy. Limtd.

C. D., Secretary.

A. B., Liquidator

Dated, &c.

See Companies (Consolidation) Act, 1908, s. 8 (1).

The above is the ordinary form. The registrar requires it to be signed by the liquidator, or by two of the directors, or by the whole of the members, when the subscribers to the memorandum of association are the only members, or by any other person duly authorized at a general meeting, the date of which must be given; and to be countersigned by the secretary (if any).

See further, *in/ra*, introductory notes to Chapters XXI. and XXII.

For other notices, see Index.

Form 456.

Advertise-
ment as to lost
certificate.

THE COY. LIMTD

Applicon has been made to the directors of this coy to issue to A. B., of —, a duplicate certificate of — shares in the coy, or other certificate or certificates in lieu thof, upon the statement that the original certificate, No. —, and dated —, has been lost or destroyed; and notice is hby given that if within 30 days from the date hof no claim or representation in respect of such original certificate is made to the directors they will then proceed to deal with such applicon for a duplicate or other new certificate or certificates.

Offices, —,

, Secretary

Date,

RESOLUTIONS.

CHAPTER XIII.

INTRODUCTORY NOTES.

MATTERS which are to be submitted to general meetings or to directors' meetings are generally expressed in resolutions.

As to Resolutions of General Meetings.

There are various kinds of resolutions from time to time passed by general meetings, viz.:

(1) Special resolutions.

See Companies (Consolidation) Act, 1908, s. 69 (2), *infra*, p. 1092.

(2) Extraordinary resolutions.

See Companies (Consolidation) Act, 1908, s. 69 (1).

(3) Ordinary resolutions: that is, resolutions only requiring a simple majority.

(4) Resolutions which, under the articles, require some specified majority.

The articles of a company constantly provide that certain acts shall be done by *the company in general meeting*; e.g., that officers shall be appointed at the ordinary general meeting, or that the directors may borrow money, or declare a dividend, or convert shares into stock with the sanction of the company in general meeting. In such cases the act will be done or the consent given by an ordinary resolution of the members of the company present in person, or by proxy (where proxies are allowed), at a general meeting of the company. Whether the meeting to pass the resolution should be an ordinary or an extraordinary one must depend on the nature of the business and the articles [*supra*, p. 697]. In either case the meeting must have been duly called [*supra*, p. 692], and a proper quorum must be present [*supra*, p. 697].

Resolution of general meetings.

Unless the articles otherwise provide, the question should in the first place be decided by a show of hands (*supra*, p. 699), and the chairman should declare the result accordingly, and his declaration

Show of hands.
Declaration of chairman.

will be sufficient, that is, *prima facie* evidence or conclusive, according as the articles or Acts provide. "Sufficient" means sufficient until the contrary is proved. *Horbury Bridge Co.*, 11 C. D. 109. But "conclusive" is more efficacious. It means final, so that proof to the contrary is not admissible. See, however, *R. Clark & Co.* (1911) S. C. 243, Ct. of Sess., and *infra*, p. 1099.

Poll.

A poll may be demanded in accordance with the articles (*see supra*, pp. 699, 700), and if properly demanded should be granted by the chairman and taken in due course, and the result should be duly declared.

Special and extraordinary resolutions.

But besides ordinary resolutions it is very common to provide by the articles that certain acts shall only be done by special resolution of the company or by extraordinary resolution. Moreover, the Act of 1908 requires or enables a company to do various things by special or extraordinary resolution, as will be seen in the notes to the following resolutions.

Mode of passing special resolution

It will, therefore, be convenient here to state what is meant by the expressions "special resolution" and "extraordinary resolution" respectively. This appears in sect. 69 of the Act of 1908 as follows:

Definitions of extraordinary and special resolution

Sect. 69.—(1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2) A resolution shall be a special resolution when it has been—

- (a) passed in manner required for the passing of an extraordinary resolution; and
- (b) confirmed by a majority of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a subsequent general meeting, of which notice has been duly given, and held after an interval of not less than fourteen days, nor more than one month, from the date of the first meeting.

(3) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed, a declaration of the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed, a poll may be demanded, if demanded by three persons for the time being entitled according to the articles to vote, unless the articles of the company require a demand by such number of such persons, not in any case exceeding five, as may be specified in the articles.

(5) When a poll is demanded in accordance with this section, in computing the majority on the poll reference shall be had to the number of votes to which each member is entitled by the articles of the company.

(6) For the purposes of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles.

The definitions contained in the above section of an "extraordinary resolution" and of a "special resolution" do not very far depart from the corresponding definitions in the Act of 1862 (sects. 51 and 129).

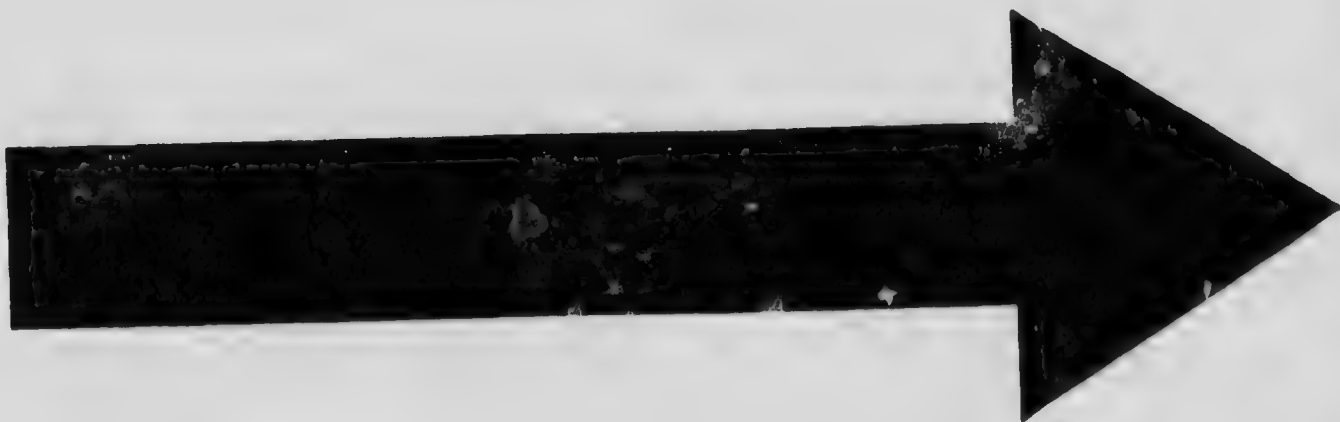
There is, however, one important difference, for in defining extraordinary resolution, sect. 69 makes it part of the definition that the resolution is one passed at a meeting convened by a notice "specifying the intention to propose the resolution as an extraordinary resolution." And as a special resolution must, under sub-sect. (2), be passed in manner required for the passing of an extraordinary resolution, it follows that the first meeting to pass a special resolution must be convened in like manner, that is to say, by a notice "specifying the intention to propose the resolution as an extraordinary resolution," for that is what the section says.

Hence, in drafting the notice of a meeting at which it is proposed to pass a resolution capable of being subsequently confirmed as a special resolution, it is necessary to frame the notice with special care so that the resolution when passed and confirmed may become a "special resolution" within the definition contained in sect. 69 (set out *supra*, p. 1092) of the Companies (Consolidation) Act, 1908. Sub-sect. (2) of that section says that "A resolution shall be a special resolution when it has been

Requisites of notice with a view to passing special resolution

- (a) passed in manner required for the passing of an extraordinary resolution; and
- (b) confirmed [in manner specified in the section]."

We have then to consider what is "the manner required for the passing of an extraordinary resolution." The earlier part of sect. 69 answers this question. "A resolution," says that part of the section, "shall be deemed to be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person, or by proxy where proxies are allowed, at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given." Here, then, we have the term "extraordinary resolution" defined in a single sentence, and it is impossible, on any rule of construction, to ignore any portion of that sentence. All the words are part of the definition. Not only must the resolution (a) be passed by the specified majority, but it must be passed at a general meeting of the company; and (b) that meeting must be convened by a notice specifying the intention to propose the resolution "as an extraordinary resolution." Turning back, then, to paragraph (a) of sub-sect. (2), we find that part of the statutory machinery for passing a special resolution is that the resolution shall be passed at the first meeting in manner required for passing an extraordinary resolution—that is to say, "by a majority of not less than three-fourths of such members entitled to vote as are present in person, or by proxy where proxies are allowed, at a general meeting of which notice specifying the intention to propose the resolu-



tion as an extraordinary resolution has been duly given," for these are the very words of the section.

No doubt it is easy to say that the words in paragraph (a) of sub-sect. (2) merely refer to the three-fourths majority, but if this is their meaning, why did not the Legislature in its definition say so? Nothing would have been easier than to do this—to substitute for the paragraph the words, "(a) passed by the majority requisite for the passing of an extraordinary resolution."

But the fact remains that the Legislature did not think fit to use these words (for the very good reason that they would have omitted a material part of the definition), and this being so, the interpreter cannot disregard the words actually used, or substitute other words on the mere conjecture that those words would more accurately express the Legislature's meaning, or that they would be the equivalent of the words actually used. Some people suggest that as sect. 69, in substance, re-enacts the law previously in force under sect. 51 of the Act of 1862, there is a presumption that the Legislature did not intend to alter that law, and that under the old law it was not necessary in calling the first of the two meetings requisite to pass a special resolution to say that such meeting was called to pass the resolution "as an extraordinary resolution." But this way of reasoning belongs to an entirely exploded mode of construction. In *Ex parte Griffith*, 23 C. D. 69, it was contended that sect. 92 of the Bankruptcy Act, 1869, ought, if possible, to be treated as having the same meaning as the former legislation on the same subject, but the Court of Appeal refused to adopt this contention, and considered that it was the duty of the Court to construe the new section as it stood. "The law," said Jessel, M. R., "has now been put into a different shape and form, and our duty is to construe the words of the Act." And Lindley, L. J., said: "What we have to consider is the true construction of sect. 92. I emphatically protest against being led away from the words of the section by any argument that the standard which the Legislature has laid down is equivalent to the standard of the old law. It may be so, but the language is different, and our duty is to construe that language." And Bowen, L. J., said, in reference to the former decisions, "the first thing which the Court did was to discuss the question whether the Act had altered the old law, and introduced an entirely new law, and they came to the conclusion that it had not altered the old law. Then began what I may call a complete metaphysical exploration of the motives of people. The Courts first adopted a supposed verbal equivalent for the words of the statute, and then pursued the old inquiries as to what were the deductions which followed from the adoption of those verbal equivalents. . . . I think it is the wiser policy to go back, as I do, in a humble spirit to the words of the statute."

This mode of construction accords, too, with the principles laid down by Lord Herschell, in *Bank of England v. Vagliano*, (1891) A. C. 144, namely that, "In construing a new Act of Parliament it is the proper course, in the first instance, to examine the language of the statute to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered to see if the words of the enactment would bear an interpretation in conformity with this view." These words were used with reference to codifying the statute, but the same principles apply to a consolidating and amending Act, like the Companies (Consolidation) Act, 1908. "The principle," said Chitty, L. J., in the Court of Appeal in *Thames Conservators v. Smeed, Dean & Co.*, (1897) 2 Q. B. 334, "of interpretation of a codifying Act is laid down by Lord Herschell in *Bank of England v. Vagliano*, *supra*; a statute codifying the law is to be interpreted as it stands, and recourse is not to be had to the former law except upon some

special ground, such, for instance, as an ambiguous provision. The same principle applies to such an Act as that which is now before us, but in a less stringent degree. In this Act the clauses of the repealed Acts are found repeated, but often in altered form and with amendments, whereby the sense may be in a great measure changed. Speaking generally, I think that the enactments must be dealt with as they now stand. . . ."

And as to the necessity of attending to the words of the section, see *Salomon v. Salomon & Co.*, (1897) A. C. 22.

In that case Lord Halsbury, L. C., said: "I can only find the true intent and meaning of the Act from the Act itself. And in the same case Lord Watson said: "What the Legislature intended to be done or not to be done can only be legally ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication." "I know," said Lord Herschell in the same case, "of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions."

Following these authorities the only safe course is to take the words of sect. 69 as they stand. What the Legislature had to determine was how a special resolution should be defined, and this it has done in the section. It says that the notice of the first meeting must state the intention to propose the resolution "as an extraordinary resolution."

To disregard the words will result in the supposed special resolution not operating as a special resolution, because it will not come within the statutory definition in sect. 69. So that the increase of capital, consolidation of shares, subdivision of shares, alteration of articles, and the like, intended to be effected by the special resolution will be void.

Lastly, it is said that in *Penarth Pontoon Co.*, W. N. (1911) 240, a learned judge confirmed a reduction of capital, although the resolution had not been passed in strict accordance with sect. 69 of the Act. Too much reliance should not be placed on such a decision: there was no argument. It can afford but little security to those who in a contested case seek to justify the disregard of the plain words of the Act, and to prove that to be a special resolution which does not come within the statutory definition. Besides, sect. 52 of the Act precludes subsequent objection.

The following points should be noted in regard to an extraordinary resolution:—

Points as to
extraordinary
resolution.

- (a) The meeting must be duly convened and held in accordance with the section and the articles of the company.
- (b) Accordingly the requisite number of days' notice must be given, and the notice must specify the intention to propose the resolution as an extraordinary resolution.
- (c) There must be a proper quorum present at the meeting. *Cambrian Co.*, 25 W. R. 409; *Romford Canal Co.*, 24 C. D. 85.
- (d) The resolution must be passed by a majority of not less than three-fourths of such members of the company entitled to vote as are present in person or by proxy (where proxies are by the articles allowed) at the meeting.
- (e) A declaration of the chairman that the resolution is carried is to be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the resolution. See *supra*, p. 700, and *infra*, p. 1098.

- (f) Upon a show of hands, hands only can be counted, not proxies. *Ernest v. Loma Co.*, (1897) 1 Ch. 1.
- (g) If a poll is demanded, then it can only be effectively demanded by three persons for the time being entitled according to the articles to vote, or by the number, whatever it may be, fixed by the company's articles for demanding a poll—under Table A. the number is three (T. A. Art. 56)—and entitled to vote according to the company's articles [or (if the articles of the company so provide) by one, two or four persons].
- (h) On a poll the majority must be calculated with reference to the number of votes to which each *member* voting is entitled by the articles of the company.

In regard to a special resolution the following further points should be noted:—

- (a) The resolution must be passed at two meetings duly convened, and held at an interval of not less than fourteen clear days, and not more than one calendar month. *Railway Sleepers Co.* (1885), 29 C. D. 204; and see Interpretation Act, 1889, s. 3.
- (b) Each meeting must be duly convened and held in accordance with the section and the articles of the company. The notice of the first meeting must state that the resolution "will be proposed as an extraordinary resolution." See *supra*.
- (c) There must be a proper quorum present at each meeting. See *Cambrian Co.*, 23 W. R. 409; *Romford Canal Co.*, 24 C. D. 85.
- (d) The resolution must be passed at the first meeting by a three-fourths majority, whether upon a show of hands or a poll. *Ayre v. Shelsey's Adamant Cement Co.*, 21 T. L. R. 465. And the show of hands must precede the poll. *Horbury Bridge Co.*, 11 C. D. 109. Articles cannot alter the statutory majority required for passing a special resolution, *e.g.*, for reduction of capital. *Ayre v. Shelsey's Adamant Cement Co.*, *supra*.
- (e) The resolution must be confirmed by at least a simple majority of the votes at the second meeting.
- (f) At each meeting, unless a poll is duly demanded, a declaration of the chairman that the resolution is carried is to be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the resolution. See sect. 69 (4), p. 1092, *supra*.
- (g) On a show of hands, hands only can be counted, not proxies. *Ernest v. Loma Co.*, (1897) 1 Ch. 1.
- (h) At a poll the number of votes each member voting is entitled to is to be taken into account, and votes by proxy.

if the articles permit, are to be allowed. As to convening the two meetings by one notice, see *supra*, p. 696.

Where it is intended to pass a special resolution the notice of the first meeting ought to inform the members that the resolution will be proposed as an extraordinary resolution. Usually the notice further states that if the resolution is passed by the requisite majority it will be submitted for confirmation as a special resolution to a subsequent meeting. But the intention so to submit it need not be expressly stated. Thus a resolution purporting to alter the memorandum or the articles, or a resolution that can only take effect as an alteration of the memorandum or articles, implies an intention to deal with the matter by special resolution. In preparing a notice, it is to be borne in mind that members are deemed to have notice of the Act, and of the company's memorandum and articles. See *Campbell's case*, 9 Ch. 1, and *supra*, p. 1048. Sect. 69 (1), (2) of the Act says, in regard to a special resolution, as well as an extraordinary resolution, "of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given"; and where practicable, it is desirable to set out the exact terms of the resolution; but it seems that the words are not to be strictly construed, and that where full and fair notice of the character of the proposed resolution is given, that will suffice, even though the exact terms are not set out. See *Imperial Bank v. Bank of Hindustan*, 6 Eq. 91. Even where the notice sets out the exact terms of the proposed resolution, it seems that an amendment may be proposed and adopted at the first meeting provided that it comes within the scope of the notice and does not commit the meeting to anything more onerous than the resolution itself. Thus, where notice of a resolution to fix the directors' remuneration at a specified sum was given, it was held that the resolution was effective notwithstanding that it was passed with an amendment reducing the remuneration to a smaller figure. *Torbock v. Lord Westbury*, (1902) 2 Ch. 871. So where the notice specified several resolutions, some *ultra vires* and others *intra vires*, and all were passed, the *intra vires* resolutions were held good. *Thompson v. Henderson's Transvaal Estates Co.*, (1908) 1 Ch. 765. In a recent case, *Betta, Ltd. v. Macnaghten*, (1910) 1 Ch. 430, a notice to "reappoint three auditors" was held to cover an appointment of two additional directors, but as to this, see further, p. 692.

Notice of intention to pass.

Amendment of terms.

An imperfect notice cannot be aided by disclosure at the meeting, for the rights of absentees must be regarded; the notice may have induced them to absent themselves. *Clinch v. Financial Corporation*, 5 Eq. 481; *supra*, p. 694; *Teede and Bishop, Ltd.*, W. N. (1901) 52; 84 L. T. 561; and see the remarks of Kekewich, J., in *Tiessen v. Henderson*, (1899) 1 Ch. 861.

Imperfect notice.

But there can be no amendment, at the second meeting, of the resolution as passed at the first meeting: it must either be confirmed

or rejected *simpliciter*. *Wall v. London and Northern Assets Corporation*, (1898) 2 Ch. 469.

Difficulty in convening general meeting from want of prescribed quorum or of directors.

Sometimes there is a difficulty in convening or holding a general meeting; it may be that the articles require a larger quorum for a general meeting than can be got together. In such case it is conceived that the members present would constitute a quorum. Lord Davey so advised, when at the Bar. Again, where there are no directors there may be a difficulty as to convening a meeting, whether under the articles or under sect. 66 of the Companies Act, 1908. In such cases it may be necessary to call in aid sect. 67 of the Companies Act, 1908, which provides as follows:

"In default of and subject to any regulations in the articles—

- (i.) A meeting of a company may be called by seven days' notice in writing served on every member in manner in which notices are required to be served by Table A. in the First Schedule to this Act
- (ii.) Five members may call a meeting;
- (iii.) Any person elected by the members present at a meeting may be chairman thereof;
- (iv.) Every member shall have one vote." Sect. 67.

Jessel, M. R., in *Brick and Stone Co.*, W. N. (1878) 140; 22 S. J. 625, was of opinion that sect. 52 of the Companies Act, 1862, which the above section reproduces, was applicable where it was impracticable to call a meeting in accordance with the articles, *e.g.*, where there were no directors; and this view has been frequently acted on.

No proxies on show of hands.

It has been decided by the Court of Appeal in *Ernest v. Loma Gold Mines*, (1897) 1 Ch. 1 (overruling *Bidwell Brothers*, (1893) 1 Ch. 603), that proxies cannot be counted on a show of hands.

Declaration of chairman.

The show of hands having been taken, the chairman must state the result, for that is part of his duty as chairman, and if the resolution has been carried by the requisite majority, he should say: "I declare that the resolution has been carried," and such declaration should be duly recorded in the minutes in accordance with sect. 71 of the Companies Act, 1908; see *supra*, p. 745.

To such a declaration special efficacy is given by sect. 69 (3) of the Act, for that section, as appears above, provides that "a declaration of the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the same."

Will be conclusive.

The chairman's declaration is therefore conclusive subject to a poll. It is conclusive, that is, unless a poll is demanded, and this demand must be by three persons for the time being entitled according to the articles to vote, unless, &c. (see sect. 69 (4)). Articles commonly require more than the statutory minimum (three) of persons to demand a poll—*e.g.*, five—and where they do their require-

ments must be conformed to; so also where only one or two or four persons may by the articles be empowered to demand a poll. The number required by the articles must not in any case exceed five (sect. 69 (4)).

There have been various decisions as to the meaning of the word "conclusive" in the corresponding section of the Act of 1862. Hall, V.-C., held that the word in effect precluded evidence that there was no quorum at the meeting (*Brynmawr Co.*, W. N. (1877) 45), although in point of law a meeting at which there is no quorum is not a meeting. But this decision, it is submitted, went too far, for the section only makes the declaration conclusive where it is made 'at any meeting,' which must mean a meeting duly convened and constituted.

Meaning of
"conclusive."

Where, however, the meeting has been duly convened and held, and the chairman has in fact, upon a show of hands, declared that the resolution has been carried, and no poll has been demanded, as aforesaid, the declaration is conclusive that the requisite majority has voted in favour of the resolution. It was so held by the Court of Appeal in *Re Gold Co.*, 11 C. D. 718. In that case the chairman declared the resolution passed. His declaration was impeached as incorrect, on the ground that out of seventeen members present, only eleven voted in favour, whilst two voted against and four abstained from voting on the resolution; but the Court held that the declaration was conclusive that the resolution had been passed by the requisite majority, on the ground that the section—the corresponding section of the Act of 1862—so provided. Strange to say, however, in *Young v. South African, &c. Syndicate*, (1896) 2 Ch. 268, a learned judge disregarded this decision, and in effect held that the declaration was not conclusive where it was proved to the Court that the declaration of the chairman was in fact incorrect. This decision treated the word "conclusive" as equivalent to the words "*primâ facie*," although the Legislature was clearly alive to the distinction between the two expressions, for it provided in several sections of the Act of 1862, e.g., 31 and 37 (Companies Act, 1908, ss. 23, 33), that something shall be "*primâ facie*" evidence, whereas in sect. 51 (Companies Act, 1908, s. 69) it provided that something shall be "conclusive" evidence. The decision referred to was unfavourably commented on in the last edition but two of this work, and before very long Cozens-Hardy, J., in *Hadleigh Castle Gold Mines*, (1900) 2 Ch. 419, declined to follow it, and held, in accordance with the words of the section and the decision of the Court of Appeal in *Gold Co.*, *supra*, that the section meant what it said, and that the chairman's declaration was conclusive, not *primâ facie*, evidence. And soon afterwards the Court of Appeal in *Arnot v. United African Lands*, (1901) 1 Ch. 518, took the same view, and overruled *Young v. South African, &c. Syndicate*, *supra*, thus making it clear beyond all question that the words "conclusive evidence" in sect. 69 are

to have full effect. It has, however, been held that a chairman's declaration is not conclusive where in making it he states the figures for and against, and those figures show that he erroneously declares. *Caratal New Mines Ltd.*, (1902) 2 Ch. 498. Or where on the face of the proceedings it is plain that the resolution has not been carried by the requisite majority. *Clark & Co.*, (1911) S. C. 243 Ct. of Sess.

Notice of meetings.

As to notices convening meetings to pass resolutions, whether special, extraordinary, or otherwise, see *supra*, Forms 433 *et seq.*

Notice to Registrar.

As to notices to be given to the Registrar of Companies upon passing of a special resolution, see *supra*, Form 236.

As to Ordinary Resolutions.

Ordinary resolutions.

An ordinary resolution merely requires upon a show of hands a simple majority of the voters present, and, if a poll be demanded, a simple majority of the votes given thereat, whether in person or by proxy.

"It cannot be disputed," said Lord Hardwicke, C., in *Att-Gen. v. Day*, 2 Atk. 212, "that whenever a certain number of persons are incorporated a major part of them may do any corporate act, so if all be summoned and part appear, a major part of those that appear may do the corporate act, though nothing be mentioned in the charter of the major part." See *Grant v. United Switchback Rail.*, 40 C. D. 135.

But this principle—of the majority ruling—as applied to companies under the Act of 1908, is subject to the Act and to the memorandum and articles in each case applicable. Hence, it is necessary to see that the meeting is duly convened; that the resolution is one which can properly be put to the meeting; that the requisite quorum is present; that the regulations as to voting are duly observed; and that in any case the sense of the meeting is taken in the first instance by a show of hands; and afterwards, if a poll be demanded, by poll in the ordinary way, sect. 71 of the Act being borne in mind.

Resolutions which under the Articles require some Specified Majority.

Specified majority resolutions.

Occasionally the articles provide that something may be done by or with the sanction of a resolution passed by a majority of a special character, *e.g.*, a majority of those members present in person or by proxy, and entitled to three-fourths of the votes to which all the members present in person or by proxy are collectively entitled.

In such case the resolution cannot have effect unless it conforms to the articles and is passed by the requisite majority, or unless it is passed as a special resolution.

But if the Legislature has said that something may be done by special resolution, *e.g.*, the company's capital reduced, it is not competent to the company to require by its articles a larger majority for the purpose. *Ayre v. Shelsey's Adamant Co.*, 21 T. L. R. 464.

As to Resolutions of Directors.

The decisions of directors at board meetings are usually expressed in the form of resolutions, but it is not essential to their validity that they should be embodied in formal resolutions, and even where a formal resolution is proposed and passed the minutes not uncommonly do not record the precise terms thereof, but state merely the effect, *e.g.*, a contract, &c., was submitted and approved; the chairman was authorized, &c.

Directors' resolutions

Resolutions generally.

In framing a resolution, whether for a general meeting or a board meeting, it is of great importance to express it in clear and precise terms. In the case of a resolution to increase the capital, the resolution should be to the effect that the capital be increased, &c., not merely that it is "desirable to increase the capital." Again, care should be taken not to deal merely contingently with matters which under the Act must be dealt with definitely, *e.g.*, not to resolve that, "if the directors think fit," the shares outstanding shall be subdivided; or that, "if the directors are unable to raise the requisite funds, the company be wound up voluntarily." It might be supposed that points like these are not likely to be overlooked by those who frame resolutions, but experience shows that they often are.

General observations

So, too, as regards resolutions of directors. They should, where it is so intended, express a clear determination, and should comprise the incidental provisions requisite for giving effect to the resolution; thus, if a call is to be made, care should be taken that the resolution states the amount of the call, the time for payment, the place for payment, and to whom the call is to be made payable; and if it is to be paid by instalments, then the amount of each instalment and the time, &c. for payment (see p. 654). Again, if a transfer of shares is to be passed, the resolution should provide not only for the approval and registration of the transfer, but for the issue of the certificate to the transferee. And so in the case of a mortgage the resolution should deal with the execution of the mortgage deed, and, if necessary, the delivery thereof conditionally on payment of the mortgage money, and should give directions as to how the mortgage money is to be paid, and any other subsidiary matter that the special circumstances of the case may require.

PRECEDENTS.

Alteration of Articles.

Form 458. THAT the articles of association be altered in manner following:—

Alteration
of articles.

- (a) Article 5 shall be cancelled.
- (b) In Article 7 the word "four" shall be substituted for the word "seven."
- (c) The following article shall be substituted for Article 20, namely, "The coy may," &c.
- (d) The following article shall be inserted after Article 24, namely, 24a, "The directors may," &c.
- (e) The directors may at any time, &c., and Article 30 shall be modified accordingly.

Sect. 13 of the Act of 1908 (replacing sect. 50 of the Act of 1862) provides that—

- (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles; and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution.
- (2) The power of altering articles under this section shall, in the case of an unlimited company formed and registered under the Joint Stock Companies Acts, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum.

The section, it is to be observed, only gives power to alter or add to "the articles" of the company, as distinguished from its memorandum of association. The conditions in the memorandum cannot be altered, except in the manner and to the extent permitted by the Act. *Ashbury v. Riche*, L. R. 7 H. L. 653; *Ashbury v. Watson*, 30 C. Div. 376.

As to the power to alter the articles, see *supra*, p. 636; and in particular *Andrews v. Gas Meter Co.*, (1897) 1 Ch. 361; *Allen v. Gold Reefs of West Africa Co.*, (1900) 1 Ch. 656; and *James Colmer, Limtd.*, (1897) 1 Ch. 524, in which last case it was held that the power to alter the articles extends even to voting rights.

A company cannot exempt any article from liability to alteration. *Mallenon v. National Insurance Co.*, (1894) 1 Ch. 200.

Where a resolution is intended to authorize or effect something not authorized by the articles as they stand, it may be desirable in some cases, in the first place, to alter the articles so as to give the necessary authority and then to exercise that authority. See *Imperial Hydropathic Co. v. Hampson*, 23 C. Div. 1, where Cotton, L. J., said: "In my opinion it is an entire fallacy to say that because there is power to alter the regulations, you can, by a resolution which

might alter the regulations, do that which is contrary to the regulations as they stand in a particular and individual case." But too much stress must not be laid on these words. They were not intended to, nor could they, in effect, overrule *Campbell's case*, 9 Ch. 1, or *Toasdale's case*, 9 Ch. 54, and both those cases show that a special resolution may operate as an alteration of the articles or memorandum without any express reference to either. See also *Taylor v. Pilsen Co.*, 27 C. D. 268.

A company cannot, however, pass a resolution to reduce its capital at the same meetings at which it alters its articles, so as to give itself the necessary authority. *Patent Invert Sugar Co.*, 31 C. Div. 166, following *West India and Pacific S.S. Co.*, 9 Ch. Ap. 11, 12, n.; *Oregon Mortgage Co.*, (1910) B. C. 964 Ct. of Sess. Nor can it sub-divide its shares at the same meetings at which it takes power to sub-divide the same. The power must be given before it can be exercised.

That the regulations contained in the printed document submitted to the meeting, and for the purpose of identification subscribed by the chairman thof, be and the same are hby approved, and that such regulations be and they are hby adopted as the articles of the coy. in substitution for, and to the exclusion of, all the existing articles thof.

Where a large number of alterations have to be made, it is generally more convenient to adopt a new set of articles altogether. Where this course is adopted a copy of the new regulations should lie for inspection at the office, and the notice convening the meetings should state the fact; and in some cases it may be deemed expedient to send out printed copies of the proposed new articles with the notices. According to the decision of Kekewich, J., in *Norrandy v. Ind. Coops & Co.*, (1901) 1 Ch. 84, the notice should call attention to any material alterations, but sect. 69 does not so provide. See *supra*, p. 1094. Where it is desired that the meeting shall be at liberty to amend the draft at the meeting, the notice must be specially framed, e.g., let it convene the meeting (1) to consider and, if thought fit, approve the draft new articles which will be submitted to the meeting; and in the event of the approval thereof, with or without modifications, (2) to consider and, if thought fit, to pass a resolution to the effect "that the new articles already approved by this meeting, and for the purpose," &c., as in Form 459.

The notice should state that a copy of the new articles is enclosed, or that a copy of the proposed new articles may be seen at the company's office.

When new articles are adopted, care must be taken not to insert any clause inconsistent with the memorandum of association.

That the regulations contained in Table A., in so far as they apply to this coy, be altered as follows:

1. In clause --- the words --- shall be substituted for the words ---
2. Clause --- shall no longer apply.
3. The following clause shall be substituted for clause ---
4. The words following shall be inserted in clause --- immediately after the word --- where that word first occurs.
5. The words --- shall be added at the end of clause ---

Form 460.
Modification
of Table A

Increase of Capital.

Form 460a. That the capital of the coy be increased to 50,000*l.*, by the creation of 2,000 new shares of 5*l.* each.

Increase of capital.

The power to increase the capital is generally made exercisable by the company in general meeting, i.e., by an ordinary resolution of a simple majority, or by special or extraordinary resolution, or by the company simply. In the last case the directors can generally exercise the power under their general powers of management. See Table A., clause 71. See p. 683, *supra*.

In *Koffyfontein Mines v. Moseley*, (1911) A. C. 409, it was held, on construction of the articles, that though the directors had power under the articles to increase the capital by the creation of new shares, they had no power to issue such shares without the sanction of a general meeting.

See further as to increase of capital and creation of preference shares, *supra*, p. 683 *et seq.*, and *supra*, p. 812.

Whenever capital is increased, whether by resolution of the company or by resolution of the directors, notice to the Registrar must be given within fifteen days from the date of the passing of the resolution, or in default the company and every director and manager will be liable to a penalty of 5*l.* per day. See sect. 44 of the Act, and *infra*, Appendix.

And the duty imposed by Table B. of the Act on the increase, and that imposed by the Stamp Act, 1891, s. 112, must also be paid. See *supra*, pp. 436 *et seq.*

As to stamping and delivering the statement of the amount of increase, see sect. 5 of the Revenue Act, 1903 (3 Edw. 7, c. 46).

Upon increasing the capital, it is not necessary to purport to alter the memorandum of association, e.g., by resolving that the conditions contained in the company's memorandum of association be altered by increasing, &c. *Campbell's case*, 9 Ch. 21.

Form 461. 1. That the capital of the coy be increased to £ — by the creation of 20,000 additional ordinary shares of 1*l.* each ranking for dividend and in all other respects *pari passu* with the existing ordinary shares in the coy.

Ordinary shares at a premium.

2. That the sd 20,000 additional shares be offered in the first instance at a premium of 2*l.* 10*s.* per share to the members of the coy holding five or more ordinary shares in proportion as nearly as may be to the number of ordinary shares held by them resp'y, and upon the footing that the full amount of each share taken up plus the premium (making together 3*l.* 10*s.* per share) shall be pd to the coy on acceptance of the offer, and that such offer be made by notice specifying the number of shares to which the member is ent'd, and limiting a time within which the offer if not accepted by payment will be deemed to be declined, and that the directors be empowered to dispose of the shares not taken in response to such offer as they consider expedient in the interests of the coy.

1. That the capital of the coy be increased by the creation of 30,000 shares of 5l. each.

Form 402.

2. That 66,125l. part of the reserve fund of the coy, be distributed among the shareholders, by way of bonus, free of income-tax, in proportion to the number of shares held by them resp'y, on the 17th December, 1909, and that such bonus be payable on the 28th December, 1909.

New shares at par and bonus to be paid.

3. That the directors be authorized to offer at par to each shareholder shares of the coy equal in nominal amount to the bonus payable to him under the last preceding clause of the resolution, and that the nominal amount of such shares be pd to the coy upon application, on or before the 28th December, 1909, such shares not to participate in any dividend declared in February, 1910 in respect of profit accrued up to 31st December, 1909, but to participate in any dividend declared thereafter *pro rata* with the existing capital.

4. That the directors be authorized to dispose of any shares offered to a shareholder under the last preceding clause, and declined or not accepted by him within such time as the directors may appoint to such persons and upon such terms as the directors may think fit.

In the above case the shares (ordinary) were at a large premium, so that there was a practical certainty that the new shares would be taken up.

That there be added to clause 23 of the arts of assocn of the coy express authority to the directors if and when the adventurers named in the sd draft agreemt become entld to an allotment thof to create and issue not exceeding 1,200 A. shares of 10l. each mentd in the said draft agreemt with the rights and privileges following attached thereto:—

Form 403.

Contingent power to directors and adventurers.

- (a) Each of the sd new shares shall rank for dividend as if the same were two of the ordinary shares of 10l. each fully pd.
- (b) Each of the sd new shares shall confer on the holders the right to two votes at a general meeting.
- (c) In the winding-up of the coy each of the sd shares shall rank in the distribution of assets as if the same were two ordinary shares of 10l. each fully pd.

Preference Shares.

Power to increase capital can, as already mentioned [*supra*, p. 683], be taken by special resolution where the articles do not contain the necessary authority.

And the shares in the new capital can be given any preference or priority over the shares in the original capital, unless the memorandum of association contains something which is inconsistent with such an alteration of rights.

Even if both memorandum and articles of a company are silent on the subject, there is no implied condition that preference shares shall not be issued if the shareholders so resolve. *Andrews v. Gas Meter Co.*, (1897) 1 Ch. 361.

But the power to create preference shares, being in derogation of existing

rights, must be plain and unequivocal. Thus power in the articles to increase the capital "by the issue of new shares of such nominal amount, and on such conditions as such resolution may determine," is not sufficient to authorize the issue of preference shares. *Melhado v. Hamilton*, 21 W. R. 619; 29 L. T. N. S. 364.

If the articles authorize an increase of capital by the issue of new shares "with such rights and privileges, or with such restrictions and on such terms and conditions as the company in general meeting directs," preference shares can be created. *Webb v. Earle*, 20 Eq. 556.

So where there was power to increase the capital in such manner, and to be issued with and subject to such rules, regulations, privileges and conditions as the company, &c. should think fit. Sir George Jessel, M. R., held that the words "privileges and conditions" were words of extensive meaning, and fully authorized the issue of new shares with a preference both as regards dividends and in a winding-up. *Harrison v. Mexican Rail. Co.*, 19 Eq. 358.

A company may by its articles only have power to give a preference as regards dividends. Yet it may be very desirable, especially where new shares are to be issued, to provide that the holders thereof shall be repaid their capital out of the assets in priority to the other members as well as receive a preferential dividend.

Whether the company can confer this additional privilege must depend on the powers given by the articles. Power for the company to increase its capital "upon such terms, and either with or without special privileges or preferences to the holders of the shares in such increased capital as it may from time to time deem expedient," enables it to give a preference as regards capital as well as dividends. *Bangor &c. Co.*, 20 Eq. 59.

If the articles are defective in this respect they can be altered. See *Andrews v. Gas Meter Co.*, (1897) 1 Ch. 361.

Form 464.

Preference
shares.
Cumulative.

The following are some examples of resolutions creating preference shares of different kinds:—

That the capital of the coy be increased to 25,000*l.* by the creation of 2,000 new shares of 5*l.* each, to be called preference shares, and to confer on the holders thereof the right to a fixed cumulative preferential dividend at the rate of 6 p.c.p.a. on the capital for the time being pd up on such shares, and such preference shares in a winding-up to rank, both as regards capital and dividend [up to the commencement of the winding-up, whether declared or not, in priority to the other shares (and not to confer any further right to participate in profits or surplus assets)].

For provisions in articles as to preference shares, see *supra*, p. 820 *et seq.*

Form 465.

Another form.
Non-cumulative.

1. That the capital be increased to 30,000*l.* by the creation of 10,000 new shares of 1*l.* each.

2. That the new shares be called preference shares, and that the holders thof be entld to a preferential dividend, at the rate of 5*l.* p.c.p.a. on the capital pd up thereon, payable as regards each year out of the profits of that year [without any right, in case of deficiency, to resort to subsequent profits].

3. That in the event of the coy being wound up, the holders of the **Form 466.**
 sd preference shares shall be entld to have the surplus assets of the
 coy applied in the first place in repaying to them the amount pd up
 on the preference shares held by them resply, and any arrears of divi-
 dend up to the commencement of the winding-up, whether declared
 or not, but shall not be entld to any further participation in such
 surplus assets.

See Form 466. *infra*.

That the capital of the coy be increased by the creation of 21,000 **Form 466.**
 new shares of 12. each, to be called preference shares, to which there **Another form.**
 shall be attached the special rights and privileges following: that is
 to say: -

- (i.) The holders of such preference shares shall be entld to
 receive out of the profits of the coy as a first charge a
 cumulative preferential dividend at the rate of 10 p.e.p.a.
 on the capital for the time being pd up on such shares
 resply.
- (ii.) Whenever the profits of the coy in respect of any year shall
 be more than sufficient to pay the preferential dividend
 afsd to the close of such year, and also a dividend for
 such year at the rate of 10 p.e.p.a. on the ordinary shares,
 the holders of the preference shares shall be entld to
 participate in the surplus *pari passu* with the holders
 of the other shares.
- (iii.) The capital pd up on the preference shares shall not be
 liable to cancellation or reduction in respect of loss or
 depreciation.
- (iv.) In the event of the winding-up of the coy the holders of the
 preference shares shall be entld to have the surplus assets
 applied first, in paying off the capital pd up on the pre-
 ference shares held by them resply; secondly, in paying
 off the arrears (if any) of the preferential dividend afsd
 to the commencement of the winding-up, and thereafter
 to participate rateably with the holders of other shares
 in the residue (if any) of such surplus assets as shall
 remain after paying off the capital pd up on such other
 shares.
- (v.) If the preference shares afsd shall be converted into stock,
 such stock shall be called preference stock, and the rights
 and privileges attached to the preference shares shall, as
 nearly as may be, attach to the preference stock.
- (vi.) Every holder of preference shares shall have one vote for
 every preference share held by him up to ten, and an
 additional vote for every five preference shares beyond

Form 466.

the first ten shares up to 100, and an additional vote for every ten preference shares beyond the first 100.

- (vii.) The preference shares aforesaid shall be issued to such persons and on such terms and conditions as the Board may think fit, and clause 42 of Table A. shall as regards such shares be deemed to be modified accordingly.

Form 467.

Variation.

The following may be used instead of clause 2 of Form 465, above:—

That the new shares shall be called preference shares, and that the holders thereof shall be entitled to be paid out of the profits of each year a preferential dividend for such year at the rate of 5*l.* p.c.

It is sometimes preferred, because it does not expressly call attention to the contingency of the profits being deficient. In either case the dividend will be non-cumulative. See *supra*, pp. 812, 813.

Form 468.

Preference shares, power to issue more.

That [creation of preference shares] and that the rights, privileges and conditions following be attached to such preference shares, that is to say:—

1. The said preference shares shall carry the right to a fixed cumulative preferential dividend at the rate of 6 p.c.p.a. on the capital paid up thereon respectively.
2. The said shares shall rank, both as regards dividend and return of capital, *pari passu* with any further preference shares created as hereinafter mentioned and in priority to all other shares in the company, but shall not confer any further right to participate in profits or assets.
3. The company is to be at liberty, from time to time, to create and issue further preference shares ranking in all respects *pari passu* with the said 350,000 preference shares, but so that the aggregate amount in nominal value of all preference shares aforesaid, for the time being issued (including such 350,000), shall never exceed the aggregate amount in nominal value of the ordinary shares for the time being issued.

When it is desired to issue further preference shares ranking *pari passu*, it is desirable to take the power in express terms so that the company may not subsequently be exposed to a charge of breach of faith (p. 818). It may be (see *supra*, pp. 637, 638) that by special resolution altering the articles the company can take the requisite power, but the matter is perhaps not fully settled.

Sometimes it is considered better to introduce the power by implication in the form of a condition qualifying the exercise of the power, e.g., "No new share entitled to rank *pari passu* with or to any preference over the said preference shares shall [before the — day of —] be issued by the company without the consent in writing of the holders of two-thirds of the preference shares for the time being outstanding."

4. The preference shares shall not confer any right of voting at any general meeting of the coy, nor shall they qualify any person to be a director of the coy. **Form 468.**

5. In the event of the coy being wound up, the surplus assets thereof shall be applied in the first place in repaying to the holders of the sd preference shares, and of any other shares entitled to rank *pari passu* with them, the full amount paid up thereon, and, subject as aforesaid, such surplus assets shall belong to and be divided among the other members of the coy.

6. The directors shall be and they are hereby authorized to issue the sd — shares to such persons, and to be paid for by such instalments or otherwise as they think fit, and without being bound to offer the same or any of them to existing members of the coy.

Or, "the said shares shall be offered in the first instance to the existing shareholders as nearly as may be in proportion to the capital held by them respectively. Such offer to be made in such manner as the directors may determine."

That the capital of the coy be increased to £ — by the creation of 75,000 new shares, to be called "A" cumulative preference shares, and that the provisions following in regard thereto shall have effect, that is to say:— **Form 469.**

Second
preference
shares.

1. The sd new shares shall carry a fixed cumulative preferential dividend at the rate of 5 p.c.p.a. on the capital for the time being paid up thereon, and such dividend shall be paid as nearly as may be half-yearly, on the 7th April and the 7th October in each year.
2. The sd new preference shares shall rank for dividend next after the 80,000 existing preference shares, and in priority to the ordinary shares for the time being of the coy, whether preferred ordinary or deferred ordinary.
3. The sd new preference shares shall in winding-up be entitled to rank as regards repayment of capital next after the 80,000 existing preference shares, and in priority to the ordinary shares, whether preferred ordinary or deferred ordinary, but the sd new preference shares shall not be entitled to any further participation in such surplus assets.
4. The sd new preference shares shall only confer on the holders the right to attend and vote at general meetings on any question directly affecting any of the rights or privileges attached to such shares, and one vote per share.
5. The coy shall be entitled to create further new "A" cumulative preference shares ranking in all respects *pari passu* with the sd 75,000 new shares, not exceeding, however [state limit]
6. The holder of any of the sd preference shares may by notice in writing left, together with the certificate for the shares

Form 469.

therein referred to, at the coy's office not later than the day of —, or such later date as the directors may agree, elect to convert the preference shares specified in such notice into ordinary shares, whereupon such shares shall from the date of the notice become ordinary shares, and shall rank in all respects *pari passu* with the other ordinary shares of the coy, and shall cease to have any preference or priority as above mentd. and a new certificate shall be issued to the holder thof free of charge.

Sometimes a power is given to convert preference into ordinary shares
Thus:—

Form 470.

Conversion
of preference
into ordinary
shares.

Any holder of such shares may give the coy six calendar months notice in writing of his desire to convert the preference shares held by him, or any part thof, into ordinary shares, and upon the expiration of such notice the same shall *ipso facto* be deemed to be converted accordingly, and shall thenceforth confer the same rights and privileges as the other ordinary shares in the coy's capital.

Such a conversion as above will not be effective if the rights of the preference shares are declared by the memorandum of association.

Form 471.

Another
as soon as
aggregate
dividends
amount to
nominal value
of preference
shares).

1. That the capital of the coy be increased to 125,000*l.* by the creation of 100,000 new shares of 10*s.* each.

2. That the new shares be called preference shares, and that the holders thof shall be entld *pari passu* to receive the whole of the net profits of the coy until an aggregate amount of 10*s.* shall be pd out of such profits in respect of each of the sd preference shares.

3. That when and as soon as an aggregate amount of 10*s.* shall have been pd out of the net profits of the coy in respect of each of the sd preference shares, the same shares shall cease to have any preference or priority, and to be called preference shares, and the sd profits shall thenceforth be divided among all the members of the coy *pari passu*, in proportion to the respive amounts pd up or deemed to be pd up upon the shares held by them resply.

4. That in case the coy shall be wound up before an aggregate amount of 10*s.* shall have been pd out of the net profits of the coy on each of the new shares to be issued as afsd, the surplus assets (if any) of the coy shall be applied, in the first place, in paying to the holder of each such share such a sum as shall, together with the aggregate amount of net profits (if any) received in respect of such share, make up the sum of 10*s.*, and the residue (if any) of the sd surplus assets shall be divided among all the members, in proportion to the nominal amount of capital held by them resply. But in case

the coy shall be wound up after an aggregate amount of 10s. shall have been pd out of the sd profits on each of the sd new shares, the holders thof shall not be entld to any preference or priority in the distribution of the surplus assets (if any) of the coy. **Form 471.**

That the capital of the coy be increased to £— by the creation of 100,000 preference shares of 1l. each, and that the rights, privileges, and conditions following be attached to such preference shares, that is to say:— **Form 472.**

Preference shares power to issue further.

- (a) The sd preference shares shall carry the right to a fixed preferential dividend at the rate of 6 p.c.p.a. on the capital pd up thon resp'y, payable as regards each year out of the profits of that year.
- (b) The sd shares shall rank as regards capital *pari passu* with the ordinary shares.
- (c) The holders of the sd preference shares shall not as such be entld to any vote except on a resolution for the voluntary liquidation of the coy, and upon such resolution every holder of a preference share shall have one vote for every share held by him.
- (d) The coy is to be at liberty from time to time to create and issue further preference shares ranking in all respects *pari passu* with the sd 100,000 preference shares, but so that the aggregate amount in nominal value of all preference shares afsd for the time being issued (including such 100,000) shall never exceed the sum of £—.

1. That the directors be authorized to convert the 500,000 ordinary shares which have been issued and are fully pd into preferred and deferred stock, upon the footing that each holding of such shares shall be converted into stock, whereof one-third shall be preferred stock and two-thirds shall be deferred stock, and that the following provisions shall have effect with regard to such stock:— **Form 472a.**

Authority to directors to convert into preferred and deferred stock.

- (a) The preferred stock shall, as between the preferred stock and deferred stock, carry a fixed non-cumulative dividend at the rate of 6 p.c.p.a. on the capital pd up thon, and, in the event of the winding-up of the coy, shall rank for repayment of capital, together with a bonus of 5 p.c. in priority to the deferred stock.
- (b) The deferred stock shall confer a right to the surplus profits, and in the event of a winding-up to the surplus assets of the coy, to which the holders of the ordinary shares would, but for the sd conversion, have been entld.

Form 472a. 2. That the directors be authorized to issue 200,000 of the unissued ordinary shares as preferred shares ranking *pari passu* with the preferred stock referred to in the first resolution, and to convert the shares so issued, when fully pd, into preference stock.

Form 473. 1. That the 500,000 ordinary shares in the coy shall in future be called and known as preferred ordinary shares, and that the arts of asson be altered accordingly.

2. That the capital of the coy be increased to £ by the creation of 500,000 new shares of 1L each, to be called ordinary shares, and that such ordinary shares shall confer on the holders thof the rights following, that is to say:—

Converting
ordinary
shares into
preferred
ordinary, and
creating new
ordinary.

- (a) The right to the whole of the profits of each year available for dividend which shall remain after paying or providing for the payment of the cumulative preferential dividend on the existing preference shares to the close of that year and after paying or providing for the payment of a dividend for such year on the preferred ordinary shares at the rate of 10 p.c.
- (b) The right to three votes in respect of every ordinary share held by them resply.
- (c) The right in a winding-up to the whole of the surplus assets of the coy available for distribution amongst the members thof which shall remain after paying off the capital pd up on the preference shares and the capital pd up on the preferred ordinary shares.

And that having regard to the creation of the sd new ordinary shares, the following alterations be made in the arts of asson of the coy, that is to say:—

[Here set out the requisite alterations.]

Form 474. That the arts of asson be altered by inserting immediately after clause — a new clause, as follows:—

Capitalisation
of profits
(bonus and
corresponding
new shares).

- (1) The coy in general meeting may in the year 19— pass a resolution to the effect that it is desirable to capitalise the sum of 100,000L., being part of the undivided profits of the coy standing to the credit of the coy's reserve fund, and accordingly that that sum be distributed as a bonus, free of income tax, amongst the holders of the ordinary shares in proportion to the ordinary shares held by them resply, and that the directors be authorized to distribute amongst them the 100,000 unissued ordinary shares in like proportions.

- (2) When such resolution has been passed, the directors may allot and issue the 100,000 unissued ordinary shares credited as fully pd up to the holders of the outstanding ordinary shares in satisfaction of the sd bonus and as nearly as may be in proportion to the ordinary shares held by them resp'y, with full power to make such provisions by the issue of fractional certificates or otherwise as they think expedient for the case of fractions, and prior to such allotment the directors may authorize any person on behalf of the holders of such ordinary shares to enter into any agreement with the coy providing for the allotment to them of such shares credited as fully pd up and in satisfaction as aforesaid, and any agreement made under such authority shall be effective.
- 3) It shall be no objection to resolutions passed under paragraph (1) of this article that they are passed at the meeting at which the resolution introducing this article was confirmed as a special resolution, provided that due notice of the intention to propose such first-mentd resolutions shall have been given prior to the confirmatory meeting aforesaid.

Form 474.

As to form of agreement, see Form 63, *supra*, p. 413, and Forms 406-408, *supra*.

1. That without prejudice to the powers vested in the directors by the regulations of the coy, the directors be and they are hereby authorized to create and issue 10,000 further debentures of 10*l.* each, carrying interest at 5 p.c.p.a. and to be secured by charge upon the whole undertaking of the coy, subject to any existing mortgages and charges.

Form 475.

Creation of debentures and special preference shares

2. That the capital of the coy be increased by the creation of 10,000 new shares of 10*s.* each, to be called special preference shares, and that there be attached to the sd shares the rights following, viz.:—

Debentures offered to members at discount, subject to their subscribing new shares.

- (1) The holders of the sd shares, or of such of them as shall for the time being be issued, shall be entitled rateably, in proportion to the numbers held by them resp'y, to nine-tenths of the profits of the coy which it shall from time to time be determined to divide, and to nine-tenths of the assets which in a winding-up shall be available for distribution among the members.

- (2) Each of the sd shares shall confer on the holder the right to twenty votes.

3. That the sd debentures be offered for subscription to the existing shareholders in the coy at the price of 9*l.* 10*s.* per 10*l.* debenture, to be pd by such instalments as the directors determine, and upon the terms that each subscriber for any of the sd debentures shall, in respect of every debenture subscribed for by him, be entitled to an allotment of one of the sd special preference shares upon payment of

Form 475. its par value, and that if the said debentures shall be over subscribed by the shareholders, the subscribers shall be entitled to rank for allotment as nearly as may be in proportion to the shares now held by them, and that any of the debentures and shares not taken up by the shareholders may be disposed of on such terms and in such manner as the directors think fit.

Conversion of Shares into Stock.

Form 476. That the 10,000 shares in the capital of the coy which have been issued and fully paid up be converted into stock.

Conversion of shares into stock.

By sect. 41 (1) (c) of the Act of 1908 (replacing sect. 12 of the Act of 1862), a company limited by shares, if so authorized by its articles, may alter the conditions of its memorandum so as (*inter alia*) to convert all or any of its paid-up shares into stock and reconvert that stock into paid-up shares of any denomination.

The articles generally empower a company to convert any of its paid-up shares into stock. Sometimes the sanction of the company in general meeting or by special or extraordinary resolution is required, but where this is not the case the directors can generally exercise the power under such a clause as 113 of Form 251.

As to notice of conversion to be given to Registrar of Companies, see sect. 42 of the Act of 1908, and *supra*, Chap. VIII.

Form 477. That the whole of the preference shares in the capital of the coy be converted into stock, to be called preference stock.

Another.

Consolidation of Shares.

Form 478. 1. That the shares in the capital of the coy be consolidated in such manner that every five of the existing shares shall constitute one 5/ share, upon which the sum of 5/ shall be credited as having been paid up.

Consolidation of shares.

2. That the existing certificates of shares be called in by the directors and cancelled, and that new certificates be issued, subject to the provisions contained in clauses — of the arts of assen.

Sect. 41 (1) (b) of the Act of 1908 (replacing sect. 12 of the Act of 1862) permits a company limited by shares, if so authorized by its articles, to alter the conditions of its memorandum so as (*inter alia*) to consolidate and divide all or any of its share capital into shares of larger amount than its existing shares. It is usual to insert the necessary authority in the articles (see *supra*, Form 251, clause 49), although it is but seldom exercised, the modern tendency being to reduce rather than increase the denomination of shares. Even though no power to consolidate is inserted, a single special resolution is sufficient.

Division of Shares.

That each of the existing 10*l.* shares be divided into two 5*l.* shares. **Form 479.**
upon each of which the sum of 4*l.* shall be credited as pd up. **Division.**

See sect. 41 of the Act of 1908, replacing sects. 21 and 22 of the Act of 1867.
Before this latter enactment it was illegal to subdivide shares. *Holmen's case*,
2 Ch. 714; *Fielding and Rimington's case*, *ibid.* See also *Sewell's case*,
3 Ch. 131.

For form of clause to be inserted in articles giving the requisite power, see
supra, p. 684.

The power is to be exercised by special resolution; hence, if the articles do not
contain the necessary authority, two successive special resolutions are necessary.
as in the case of a reduction of capital.

Notice of a special resolution subdividing the shares must be given to the
Registrar of Companies.

(1.) That each of the 50*l.* ordinary shares in the coy's capital be **Form 480.**
divided into two shares of 25*l.* each, and that the capital of the coy be **Subdivision**
reduced from 250,000*l.* to 200,000*l.*, by cancelling pd-up capital to **and reduction.**
the extent of 5*l.* per share in respect of each of the 10,000 shares of
25*l.* each resulting from such division, and reducing the nominal
amount of such shares respy *pro tanto*.

(2.) That the shares resulting from the division of each of the **Renumbering**
existing 50*l.* shares be renumbered, so that the shares representing **and further**
that now numbered 1 be respy numbered 1 and 5,001, and those **division into**
representing that now numbered 2 be respy numbered 2 and 5,002, **preferred and**
and so on, and that the shares so to be numbered 1 to 5,000 be called **deferred**
preferred shares, and those to be numbered 5,001 to 10,000 be called **shares**
deferred shares, and that as between such preferred shares and such
deferred shares such preferred shares shall confer a right to a fixed
cumulative preferential dividend at 5 p.c.p.a. on the capital pd up
thereon and no more than such dividend, and that the arts of asson of
the coy be modified accordingly.

If the memorandum and articles give power to divide the capital into different
classes, a resolution as above may be effective; but it is desirable to find express
power as above, p. 684. In several cases companies have obtained the requisite
power from Parliament.

That in accordance with the request in writing, signed by all the **Form 481.**
members of the coy and submitted to this meeting, and in exercise of **Division of**
the power conferred by clause 5 of the coy's memdum of asson, the **existing**
existing capital of the coy be divided into two classes of shares, **shares into**
namely, 15,000 preference shares of 10*l.* each, and 15,000 ordinary **classes (power**
in memo-
randum.

Form 481. shares of 10l. each, and that the provisions following in regard thereto have effect, that is to say:

Preference shares free from restrictions in articles as to transfer.

- (a) The 15,000 preference shares aforesaid shall be those shares which are numbered — to — inclusive, — to — inclusive, — to — inclusive, and — to — inclusive, and such preference shares shall be from henceforth numbered 1 to 15,000 inclusive.
- b) The said preference shares shall carry a fixed cumulative preferential dividend at the rate of 5 p.c.p.a. on the capital paid up thereon, and such dividend shall run as from the 1st day of October, 19—, and shall be paid as nearly as may be half-yearly, on the — day of — and — day of —, the first payment to be made on the — day of — next.
- (c) Such preference shares shall be fully transferable and transmissible free from the restrictions imposed by clause 32 of the company's articles of association, and such shares shall only confer a right to vote at general meetings of the company upon any proposition for the sale of the company's undertaking, or for altering the regulations of the company, so as directly to interfere with the rights and privileges of the holders, and shall only confer a right to notice of and to attend at general meetings of the company where some such proposition is to be submitted.
- (d) Such preference shares in a winding-up shall rank for repayment of capital in priority to all the other shares.
- (e) The residue of the existing shares shall be numbered 15,001 to 30,000 inclusive, and shall be called ordinary shares, and, subject as aforesaid, such ordinary shares shall confer a right to the surplus profits of the company which it shall from time to time be determined to distribute by way of dividend, and in a winding-up shall rank for repayment of capital after the payment off of the capital paid up on the preference shares aforesaid.
- (f) These provisions, so far as necessary, shall take effect by way of alteration of the articles of association of the company.

In the above case there was power in the memorandum of association to divide the shares into several classes, &c.

Form 482.

Another.

That each of the existing 2,400 100l. shares in the company be divided into five preference shares of 10l. each and five ordinary shares of 10l. each, and that there be attached to such preference shares a right to a fixed cumulative preferential dividend at the rate of — p.c.p.a. as from the — day of —, and a right in a winding-up to repayment of capital in priority to the other shares for the time being outstanding, but such preference shares are not to confer any further right to participate in profits or assets.

That in accordance with the provisions of the coy's memorandum and **Form 483.**
 arts of assen, the whole of the pd-up shares in the capital of the coy
 of 10*l.* each be converted into preferred and deferred stock, upon the Conversion
of shares into
preferred and
deferred stock
 footing that each holding of such shares shall be converted into stock,
 whereof 60 p.c. shall be preferred stock and 40 p.c. shall be deferred
 stock, and that such conversion be and the same is hby sanctioned.

The resolution is to give effect to a provision as in **Form 216.**

That each of the existing shares of the coy be divided into two **Form 484.**
 shares of 5*l.* each, one of which shall be called a preference share and Subdivision
into prefer-
ence and ordi-
nary shares
 the other an ordinary share; and that the holders of the sd preference
 shares shall be entld to be paid out of the profits of each year a
 preferential dividend at the rate of 5 p.c. for such year, and that the
 surplus profits of each year shall be applied in payment of dividends
 on the sd ordinary shares.

That each of the existing 50*l.* shares be divided into five fully **Form 485.**
 pd-up 10*l.* shares. Simple sub-
division.

That each of the existing 10*l.* shares be divided into ten 1*l.* shares, **Form 486.**
 and so that, as regards those shares which are not fully pd up, the Subdivision
with direction
as to portion
unpaid.
 proportion between the amount (if any) which is pd and the amount
 (if any) which is unpd on each share of reduced amount shall be the
 same as it was in the case of the existing 10*l.* share from which the
 share of reduced amount is derived.

Reduction of Capital.

See further, *infra*, p. 1255, Petitions.

It is now settled that any kind of reduction may be confirmed by the Court.
British and American Corporation v. Couper, (1894) A. C. 399; *Poole v.*
National Bank of China, (1907) A. C. 229. The effect of these authorities has
 received statutory sanction in the words "in any way" in sect. 46, clause (1)
 of the Companies (Consolidation) Act, 1908.

That out of the accumulated profits of the coy the sum of 5*l.* per **Form 487.**
 share be pd off by way of reduction of capital and free of income-tax Reduction by
payment off
out of profits.
 pursuant to sect. 40 of the Cos (Consolidation) Act, 1908.

Such a reduction does not require the confirmation of the Court. The shares
 were ordinary shares, and as to tax, see *supra*, p. 765.

That the capital of the coy be reduced from 100,000*l.* (divided **Form 488.**
 into 5,000 preference shares of 10*l.* each and 5,000 ordinary shares of Another.
 10*l.* each) to 90,000*l.* divided into 5,000 preference shares of 10*l.* each
 and 5,000 ordinary shares of 8*l.* each, and that such reduction be

Form 488. effected by reducing the nominal amount of the ordinary shares from 10*l.* to 8*l.* each, and extinguishing the liability in respect of uncalled capital on the ordinary shares to the extent of 2*l.* per share.

Confirmed by *Romer, J., James Colmer, Ltd., (1897) 1 Ch. 524.*

Form 489. That the capital of the coy be reduced from 50,000*l.*, divided into 5,000 shares of 10*l.* each, to 30,000*l.*, divided into 5,000 shares of 6*l.* each, and that such reduction be effected by returning to the holders of the 5,000 shares that have been issued pd-up capital to the extent of 4*l.* per share, and by reducing the nominal amount of each of the said shares from 10*l.* to 6*l.*

Return of capital.

Form 490. That in respect of each share in the coy's capital upon which the sum of 4*l.* 10*s.* has been pd up, capital be pd off to the extent of 1*l.* upon the footing that the amount returned, or any part thof, may be called up again.

Return liable to recall.

Northmoor Co., confirmed 9th Feb., 1883, Kay, J.

In the above case, Kay, J., decided that there was jurisdiction to sanction a return of capital on this footing, and that decision has frequently been followed during the last few years. See also *Coldhurst Co., Hall, V.-C., Jan., 1882; Explosives Co., Chitty, J., in 1885 and 1886; Fore Street Warehouse Co., Kay, J., W. N. (1888) 155; 59 L. T. 214.* Capital, it need hardly be said, cannot be returned or paid off except with the sanction of the Court. *Treva v. Whitworth, 12 App. Cas. 409.* See *supra*, p. 861.

Form 491. That the capital of the coy be reduced from 500,000*l.*, divided into 500,000 shares of 1*l.* each, to 125,000*l.*, divided into 500,000 shares of 5*s.* each, and that such reduction be effected by cancelling capital which has been lost or is unrepresented by available assets, to the extent of 15*s.* per share upon each of the 253,727 shares which have been issued, and are now outstanding, and by reducing the nominal amount of all the shares in the coy's capital from 1*l.* to 5*s.* per share.

Cancelling lost capital.

In cancelling capital which has been "lost or is unrepresented by available assets," it is the practice to use those words in the resolution, but they may be omitted, if desired, and the words "paid-up capital" can be substituted.

Form 492. That the capital of the coy be reduced from 180,000*l.* (divided into 7,000 shares of 20*l.* each, in this resolution called ordinary shares, and 8,000 preference shares of 5*l.* each) to 110,000*l.*, divided into 7,000 shares of 10*l.* each, and 8,000 preference shares of 5*l.* each, and that such reduction be effected by cancelling pd-up capital which has been lost or is unrepresented by available assets to the extent of 5*l.* per

Reducing ordinary shares exclusively.

share on each of the ordinary shares, and by extinguishing the liability in respect of uncalled capital to the extent of 5*l.* per share on each of the ordinary shares, and by reducing the nominal amount of the ordinary shares from 20*l.* to 10*l.* each. **Form 492**

Reduction confirmed by Chitty, J., 12th May, 1888; *R. Madulacema Coffee and Cinchona Co., Limited*.

Where by the memorandum or articles, or terms of issue, the preference shares are made preferential, not only as regards dividend, but as regards capital, a cancellation of lost capital should *prima facie*, as in the above resolution, be thrown on the ordinary shares exclusively. *American Pastoral Co.*, 62 L. T. 625. But in the absence of such special circumstances the reduction ought to be an all-round reduction *pari passu* on all classes of shares, as in *Bannatyne v. Direct Spanish Telegraph Co.*, 34 C. Div. 287; *Direct Spanish Cable Co.*, 34 C. Div. 307; *Barrow Hematite Co.*, 39 C. D. 382; *Credit Assurance Guarantee Corp.*, (1902) 2 Ch. 601.

It was, however, held by North, J., in *Quebrada Land Co.*, 40 C. D. 263, that even when the preference shares are given no preference as regards capital, it is competent to the company, by special resolution, to throw the loss exclusively on the ordinary shares; and that this view is correct has now been decided by the House of Lords. *British and American Corporation v. Couper*, (1894) A. C. 399. Any mode of reduction which is not inequitable may be confirmed by the Court. *ibid.*; see Companies (Consolidation) Act, 1908, s. 46 (1); *Neale v. Birmingham Tramways Co.*, (1910) 2 Ch. 464; and *Peole v. National Bank of China*, (1907) A. C. 229.

There is, of course, no objection to throwing a loss on certain shares if the holders assent thereto. It has often been done, e.g., *Virian & Co.*, W. N. (1886) 32; *Llynvi Co.*, 26 W. R. 55; and *Gatling Gun Co.*, 43 C. D. 628. Such a reduction hurts no one, and when confirmed and the minute registered it is unimpeachable.

Preference shares may be paid off and cancelled in pursuance of a contract in the memorandum and articles binding on both preference and ordinary shareholders by applying for the purpose a portion of the profits of the company. *Re Didco Pier Co.*, (1891) 2 Ch. 354.

That the capital of the coy be reduced to 1,691,737*l.*, divided into 169,767 ordinary shares of 10*l.* each, and 84,067 general founders' shares of 1*l.* each, and that the remainder of the capital, namely, the 27,833 ordinary shares, numbered, &c., and the 29,933 general founders' shares, numbered, &c., be pd off (the capital represented thereby being in excess of the wants of the coy), and that such last-mentd ordinary and general founders' shares resply. and all liability thereon, be wholly extinguished. **Form 493.**

Reduction of capital by paying off and extinguishing specified ordinary and founders' shares.

The above resolution was confirmed by the House of Lords. *British and American, &c. Corporation v. Couper*, (1894) A. C. 399. The company was possessed of assets in America and in England, and the object of the resolution was to pay off the American shareholders out of the American assets. It was held that this was in effect a purchase by the company of its own shares, but that the Court had, under the Companies Acts, 1867 and 1877, jurisdiction to sanction such a reduction of capital, or any other kind of reduction.

Form 494.

Cancelling
lost capital by
extinguishing
two classes of
shares and
part of capital
paid up on a
third class.

That the capital of the coy be reduced from 163,618*l.* to 50,700*l.* and that such reduction be effected by cancelling capital which has been lost, or is unrepresented by available assets to the extent of, and by the cancellation of the whole of the 5,943 ordinary shares of 3*l.* 10*s.* each, and the whole of the 20,521 second preference shares of 3*l.* 10*s.* each, and the sum of 1*l.* per share upon each of the 20,284 first preference shares of 3*l.* 10*s.* each, and by reducing the nominal amount of the sd first preference shares from 3*l.* 10*s.* to 2*l.* 10*s.* each

The above resolution was confirmed by Chitty, J., 13th Feb., 1895. See *Floating Dock of St. Thomas*, (1891) 1 Ch. 691. The first preference shares were, by the articles, given a preference both as regards capital and dividend, and, it being proved that the assets were worth less than the capital paid up on the preference shares, the order was made. The case was followed by Stirling, J., in *London and New York Investment Co.*, (1895) 2 Ch. 860, followed by Farwell, J., in *National Bank of China* (*Times*, Feb. 14th, 1905).

Form 495.

Cancelling
purchased
shares.

That the capital of this coy be reduced by the cancellation or extinguishment of 1,482 shares, purchased in pursuance of the special resolution passed at an extraordinary general meeting of the coy, held on the 4th day of February, 1882, and confirmed at a subsequent extraordinary general meeting, held on the 25th day of February, 1882.

Albert New Mills Co., Limited and Reduced, confirmed by Kay, J., July 30, 1887. An effort was made to get this reduction through on the footing that creditors were not interested; but the learned judge held that they were, and required the usual proceedings.

Form 496.

Another.

That the 265 fully pd-up shares already purchased by the directors out of the reserve fund be cancelled, and that the capital of the coy be reduced by the sum of 2,650*l.*, being the nominal amount of such shares.

Moule's Patent Co., confirmed 4th May, 1883.

Form 497.

Confirming
past returns,
&c.

That the capital of the coy be reduced from 400,000*l.*, divided into 4,000 shares of 100*l.* each, of which 1,500 are preference shares and 2,500 are ordinary shares, to 250,000*l.*, divided into 2,500 ordinary shares of 100*l.* each; and that such reduction be effected by cancelling so many of the sd preference shares as have not been taken or agreed to be taken by any person, and by paying off as capital in excess of the wants of the coy the capital pd up, and not yet repd, on so many of the sd preference shares as have been taken, and by confirming, and the coy does hereby confirm, the repayment of the capital on so many of the sd preference shares as have already been pd off, and

that the preference shares upon which the capital pd up has been, **Form 497.**
or shall be repd as afd, be cancelled.

Pope and Pearson, Limited, confirmed 24th December, 1881, by the High Court.

Where capital has been improperly returned, it is desirable to get the sanction of the Court as above, so as to get rid of the liability on the part of the directors for the breach of trust in misapplying the funds of the company.

There have been several subsequent cases in which this has been done, but the creditors are, of course, in all such cases interested, and the formal procedure must be followed.

That the capital of the coy be reduced to 850,000*l.*, divided into 99,800 ordinary shares of 8*l.* 10*s.* each, and 2,000 deferred shares of 1*l.* each, and that such reduction be effected by cancelling capital to the extent of 1*l.* 10*s.* in respect of each of the ordinary shares which have been issued and are now outstanding, and by reducing the nominal amount of all the ordinary shares in the coy's capital from 10*l.* to 8*l.* 10*s.*, but such reduction to be without prejudice to the coy's right to sue for and recover all arrears of calls now outstanding and due in respect of the sd shares or any of them. **Form 498.**

Reducing
ordinary
shares and
preserving
arrears of
calls.

This was the resolution in *Credit Assurance and Guarantee Corporation, Limited*. The reduction was sanctioned by the Court of Appeal, 30th July, 1902. See report, (1902) 2 Ch. 601.

That the capital of the coy be reduced to 1,345,000*l.*, divided into 1,500,000 preference shares of 13*s.* each, and 1,350,000 ordinary shares of 5*s.* each, and 650,000 deferred shares of 1*s.* each, and that such reduction be effected as follows:— **Form 499.**

Reduction
where several
classes in ac-
cordance with
agreements.

- (1) By cancelling pd-up capital which is unrepresented by available assets to the extent of 7*s.* in respect of each of the preference shares, and by reducing the nominal amount of such preference shares accordingly to 13*s.* each.
- (2) By cancelling pd-up capital which is unrepresented by available assets to the extent of 15*s.* in respect of each of the ordinary shares in the coy, and by reducing the nominal amount of such ordinary shares to 5*s.* per share.
- (3) By cancelling pd-up capital which is unrepresented by available assets to the extent of 19*s.* in respect of each of the deferred shares in the coy, and by reducing the nominal amount of such deferred shares and of the unissued deferred shares to 1*s.* per share.

Form 499. The above is a resolution settled by the author in *Welsbach Incandescent Gas Light Co., Limited*, (1904) 1 Ch. 87. The reduction was sanctioned by the Court of Appeal.

The memorandum of association defined the rights of each class, but power to modify was inserted. Meetings of each class were held approving of the proposed resolution for reduction, and of resolutions making corresponding alterations in the articles, and special resolutions were passed accordingly, declaring, amongst other things, that the provisions thereby made in regard to the rights of the members of each class as regards dividends and distribution of assets in a winding-up should take effect by way of modification of the rights originally attached thereto, and accordingly such members should not be entitled to any rights inconsistent therewith, and in particular all arrears of undeclared dividends up to the time when the said order and minute should be registered should be extinguished.

The provisions in sect. 46 (1) (b) of the Companies Act, 1908, empowering a company to cancel "any lost capital or any capital unrepresented by available assets" are alternative provisions, and the latter is not explanatory of the former. *Re Hoare & Co., Limited*, (1904) 2 Ch. 208.

Form 500.

Reducing
without
prejudice
to liability.

That the capital of the coy be reduced from 2,000,000*l.*, divided into 200,000 shares of 10*l.* each, to 1,846,875*l.*, divided into 25,000 shares of 10*l.* each (being the shares at present unissued) and 175,000 shares of 9*l.* 2*s.* 6*d.* each. And that such reduction be effected by cancelling paid-up capital which has been lost or is unrepresented by available assets to the extent of 17*s.* 6*d.* per share in respect of each of the 175,000 shares which have been issued, and by reducing the nominal amount of each of the said shares from 10*l.* to 9*l.* 2*s.* 6*d.*, and that the conditions contained in the coy's memdum of asson be modified accordingly.

Form 501.

Cancellation
of unissued
shares.

That the capital be reduced from &c. to &c., by cancelling 10,000 of the existing preference shares which have not been taken or agreed to be taken by any person.

Under sect. 41 (1) (e) of the Companies Act, 1908, a special resolution as above operates without the sanction of the Court. And where the articles give the requisite power (e.g., by resolution of a general meeting), a special resolution is not requisite.

Form 502.

Cancellation
of shares and
consolidating
others.

1. That the capital of the coy be reduced by cancelling the 100 founders' shares of 1*l.* each.

2. That the ordinary shares in the capital of the coy be consolidated in such manner that every five thof shall constitute one 5*l.* share.

The above resolution for reduction was confirmed by Chitty, J., in *Islington, &c. Co.*, 10th May, 1892. The founders' shares had been surrendered.

That the capital of the coy be reduced from 30,000*L.*, divided into 160 ordinary and 140 preference shares, all of 50*L.* each, to 23,000*L.*, divided into 460 ordinary shares of 50*L.* each, and that such reduction be effected by returning to the holders of the 140 preference shares that have been pd up capital to the extent of 50*L.* per share out of the net profits of the coy set apart under clause 116 of the arts of issn of the coy, and by cancelling the capital represented by the sd preference shares.

Form 503.

Reduction by payment off of one of two classes.

The above resolution was confirmed by Chitty, J. See *Didido Pier Co.*, (1891) 2 Ch. 351. The articles provided for setting aside a portion of the profits as a sinking fund to redeem the preference shares. Held, that the Court could sanction the reduction.

1. That the capital of the coy be reduced from 780,000*L.*, divided into 7,800 shares of 100*L.* each, with 87*L.* 16*s.* paid thereon and 12*L.* 4*s.* uncalled, to 546,000*L.*, divided into 7,800 shares of 70*L.* each, with 65*L.* 16*s.* paid up thereon and 4*L.* 4*s.* uncalled, and that such reduction be effected—

Form 504.

Reduction by payment off and issue of debentures.

(a) By extinguishing the liability in respect of the uncalled capital to the extent of 8*L.* per share on each of the shares of the coy;

(b) By returning to the shareholders pd-up capital to the extent of 22*L.* per share.

2. That the sd 7,800 shares of 70*L.* each, with 65*L.* 16*s.* pd thereon, be subdivided into 54,600 shares of 10*L.* each, with 9*L.* 8*s.* pd up on each share.

3. That the directors be and they are hby authorized to create an issue of debentures for a total sum not exceeding 139,000*L.* [*subject to certain specified provisions*].

4. That the directors be and they are hby authorized to issue the debentures to such of the shareholders as shall consent to accept the same at par, in part satisfaction of the cash to be repd to them on their shares as hereinbefore provided, but so that the amount per share to be so satisfied should not exceed 18*L.*, and that as regards any debentures which shall not be so accepted by the shareholders, the directors shall be authorized to dispose of them to such persons, whether shareholders or not, and upon such terms as they think fit.

Confirmed by Stirling, J., *Nixon's Navigation Co.*, (1897) 1 Ch. 872.

That the capital be reduced, &c. by cancelling the pd-up shares numbered —, as provided by the provisional agreement, &c.

Form 505.

Cancellation of issued shares.

In such a case the sanction of the Court must be obtained; but if the shares are fully paid up and nothing has been paid for the surrender, the consent of creditors may not be requisite. See sect. 48 of the Companies Act, 1908, and *Levi Co.*, 26 W. R. 55; 37 L. T. 373; *Vivian & Co.*, 34 W. R. 411; W. N. (1886) 32; *Islington Electric Co.*, W. N. (1892) 83. But having regard to

Form 505. *Trevor v. Whitworth*, 12 App. Cas. 409, it is very clear that such a transaction ought not to be carried out without the prior sanction of the Court, and the same observation applies to Form 506. In *Fisvan & Co.* there was a provisional agreement that the company should be at liberty to cancel some of the vendor's shares by special resolution sanctioned by the Court.

Form 506.Cancellation
of shares

That the capital of the coy be reduced to 58,520*l.*, divided into 2,926 shares of 20*l.* each, and that such reduction be effected by cancelling all the unissued shares, and also the 640 shares which from time to time have been surrendered to or for the benefit of the coy, and that the conditions contained in the coy's memorandum of association be modified accordingly.

Mediterranean Hotel Co. *Carson, J.*, 3rd August, 1885. In this case also the shares had been purchased out of the reserve fund. See also *York Glass Co., Limited*, 60 L. T. 744.

Form 507.Paying off
capital out
of profits

That out of the accumulated profits of the coy there be returned to each member a sum equal to 10 p.c. on the capital paid up on the shares held by him in reduction of such capital, and to the intent that the unpaid capital may be increased by a similar amount.

See sect. 40 of the Act of 1908, *infra*. Appx.

Form 508.Provision for
issue of
income certificates in
respect of
arrears of
preference
dividend.

That if the capital of the coy shall be reduced to 1,870,000*l.*, the holders of preference stock shall be given and accept in satisfaction and discharge of their right to receive out of past or future profits any dividends or preference stock in respect of the years ending 30th June 1901, 30th June, 1902, and 30th June, 1903, funded income certificates equal in nominal amount to 9 p.c. of the amount of the preference stock held by them resp'y, such certificates to bear interest at the rate of 4 p.c.p.a. (non-cumulative) as from the 30th June, 1903, payable out of surplus profits remaining in the year ending 30th June, 1901, and in every subsequent year, after providing for the dividend on the preference stock and arrears, if any, other than arrears hereby discharged, the coy to be at liberty at any time, without prejudice to the preference dividend, to redeem such certificates or any of them out of profits; and in case the whole of such certificates are not redeemed by 30th June, 1918, the coy shall set aside out of surplus profits remaining after payment of the cumulative preference dividend and the interest on the said certificates in the year ending 30th June, 1919, and every subsequent year, an amount not exceeding 5,000*l.* in each year so far as the profits extend, to be applied in redeeming the certificates for the time being outstanding.

The above was one of the features of the scheme for reduction of capital sanctioned by the Court in 1903. See *Allsopp & Sons, Limited*, 51 W. R. 644.

That the 20,000 preference shares in the coy of 1*l.* each and 2,000 deferred shares in the coy of 1*l.* each be reorganized and consolidated into one class of 22,000 shares of 1*l.* each, to be called ordinary shares, and to rank as regards dividend and capital *pari passu*, and each share to confer one vote, and that the coy's memorandum and articles be altered accordingly.

Form 508a.

Resolution for reorganization of capital.

The above resolution is to operate under sect. 45 of the Act—the reorganization of capital section. It has to be approved by a resolution passed by a majority in number of shareholders of each class holding three-fourths of the share capital of that class, and confirmed in the same manner as a special resolution, and requires the confirmation of the Court.

Sometimes where founders' shares have become very valuable it is urgently desired in the general interest of the company to convert them into ordinary shares. Thus, if there be 100 *l.* founders' shares, worth in the market 100*l.* each, it may be desired to issue to the holders 10,000*l.* in nominal value of ordinary shares, credited as fully paid up, as the consideration for the surrender or cancellation of the founders' shares, so that the possible conflict of interests arising from the division into two classes may be terminated.

Conversion of founders' shares.

But such a transaction is beset with difficulties, for it amounts to a purchase by the company of its own shares, and is therefore *ultra vires* unless sanctioned by the Court as a reduction of capital. *Trevor v. Whitworth*, 12 App. Cas. 409; *Famatina Co. v. Bury*, (1910) A. C. 439. Where, however, the ordinary shares are at a large premium the conversion may be effected in a regular manner by arranging with the holders of the founders' shares that they shall be at liberty to subscribe at par for a number of ordinary shares, sufficient regard being had to their premium value to give to the founders their equivalent for their founders' shares, the founders undertaking in consideration of this liberty to allow the founders' shares to be cancelled. Then let the shares be subscribed for and paid up at par, and let it be sanctioned by the Court. Such sanction can be obtained without consent of creditors, for the reduction of capital by cancelling the founders' shares does not involve any diminution of liability or payment off of any paid-up capital. See *infra*, p. 1261. The following forms indicate the mode in which such a conversion may in such circumstances be effected. Sometimes the transaction is carried into effect by a private Act of Parliament.

1. That the agree^{ment} of the ——— day of ———, and made between A. B. on behalf of the coy of the one part, and C. D. on behalf of himself and all other the holders of founders' shares in the capital of the coy of the other part (being an agree^{ment} providing for the cancellation of the 300 founders' shares of 1*l.* each, and the subscription at par by the holders of such founders' shares of new ordinary shares in the capital of the coy to be created as therein mentd, which agree^{ment} has been ratified by all the holders of the sd founders' shares other than the sd C. D.), be and the same is hereby approved of and sanctioned, and that the directors be and they are hereby authorized to affix the seal of the coy to such agree^{ment} and carry the same into effect if and when the same becomes absolute.

Form 509.

Resolution cancelling founders' shares.

The agreement referred to in the above resolution was as follows:—

Form 510.

Provisional
agreement for
cancelling
founders'
shares.

AN AGREEMENT made the — day of —, between A. B. on behalf of the — Coy, Limtd (huftr called the coy), of the one pt, and C. D., of, &c., on behalf of himself and all others the holders of founders' shares in the capital of the coy, of the other pt. WHEREAS the coy was incorporated in 19— and has a nominal capital of £— divided into — preference shares of 1*l.* each and — ordinary shares of 1*l.* each and — founders' shares of 1*l.* each; AND WHEREAS all the sd shares have been issued and are fully pd up; AND WHEREAS it is apprehended that the market value of each of the sd founders' shares is £— or thbts, and of each of the sd ordinary shares is £— or thbts; AND WHEREAS it is deemed expedient that the sd founders' shares shall be cancelled, and that the holders thof shall subscribe for and be allotted ordinary shares in the capital of the coy upon the terms huftr set forth, and that for such purposes the capital of the coy shall be increased by the creation of — new ordinary shares of 1*l.* each:

NOW IT IS HEREBY AGREED as follows:—

1. When this agreement becomes absolute the sd A. B. and each of the other holders of founders' shares afsd who shall ratify this agreement (huftr referred to as a "ratifying holder") shall in respect of every founders' share held by him be deemed to apply for an allotment of — of the sd new ordinary shares upon the footing and condition that he is to pay up the full nominal amount thof by two instalments, namely, 10*s.* per share on allotment and 10*s.* per share thirty days after allotment, and the coy shall allot the same accordingly without further applicon, and the allottees shall duly and punctually pay such instalments.

2. The coy is to be at liberty to pass a special resolution cancelling the founders' shares afsd, and to apply to the Ct for an order confirming such cancellation, and the coy shall convene the requisite meetings for the purpose, and the sd A. B. and each ratifying holder shall concur in the passing of such special resolution and also a resolution for increasing the capital by the creation of the sd — new ordinary shares of 1*l.* each.

3. This agreement is conditional:

- (1) On its being ratified by all the holders of founders' shares afsd other than the sd A. B.; and
- (2) On its being approved by the coy in general meeting; and
- (3) On a resolution of a general meeting of the coy being passed for the creation of — new ordinary shares of 1*l.* each;
- (4) On a special resolution being passed for the reduction of the capital by the cancellation of the sd — founders' shares; and
- (5) On the sanction of the Ct being obtained to such reduction

And if all these conditions are not fulfilled within six calendar months from the date hof, this agreement shall at the expiration of

such period become void; and if all these conditions are fulfilled within the sd period of six calendar months, then immediately on such fulfilment this agreemt shall become absolute **Form 510.**

As WITNESS, &c.

Reserve Capital.

That capital of the coy to the extent of 10*l*. in respect of each of the issued shares shall not be capable of being called up except in the event of and for the purpose of the coy being wound up. **Form 511.**

Reserve
liability.

Change of Name.

That the name of the coy be changed to The Coy, Limtd. **Form 512.**

As to change of name, see sect. 8 (3) of the Companies Act, 1908, replacing sect. 13 of the Act of 1862. The proper course is to ascertain from the Registrar that there is no objection to the proposed name, apply to the Board of Trade for liberty to make the change, and then to finally pass a special resolution as above. Liberty is readily granted. The change is not complete until the new certificate of incorporation for which the section provides is issued (sect. 8 (4)). *Shuckleford, Ford & Co. v. Douglassfield*, L. R. 3 C. P. 107.

Change of
name.

Borrowing and Debenture Stock.

That the directors' power to borrow conferred by clause 49 of the arts of asson be extended, so that the amount at any one time owing in respect of moneys so borrowed or raised shall not, without the sanction of a general meeting, exceed £- . **Form 513.**

Extension of
directors'
power.

That the directors be and they are hby authorized, in addition to any sums already borrowed for the purposes of the coy, to borrow to an amount not exceeding in the aggregate 10,000*l*., by the issue of 200 debentures of 50*l*. each, redeemable on the 1st January, 19 , such debentures to bear interest at the rate of 10 p.c.p.a. payable half-yearly, and to be in the form of the draft, a print whereof has been produced to this meeting and identified by the signature of the secretary of the coy. **Form 514.**

Creation of
debentures to
pay off old
debentures.

That the repayment of the money payable according to the tenor of the sd debentures be secured by a trust deed in the form of the draft submitted to this meeting and identified by the signature of the secretary of the coy, and expressed to be made between the coy of the one part and — of the other part, and that the directors be and they are hby authorized to execute, under the seal of the coy, a deed in the terms of the sd draft.

Form 515.

Another.

That the directors be and they are hby authorized to borrow the sum of 10,000*l.* for the purpose of paying off the debentures of the coy which fall due on the 1st January, 19—, and that such sum be raised by the issue of new debentures payable on 1st January, 19—, and bearing interest at the reduced rate of 4 p.c.p.a., such debentures to be secured by trust deed, and that the new debentures and trust deed also be framed in accordance with the forms submitted to this meeting, and identified by the signature of the coy's secretary; and that the directors be and they are hby authorized to issue any of the sd new debentures in exchange, at par, for any of the existing debentures the holders of which may desire to renew, and that, pending the placing of the new debentures, the directors be and they are hby authorized to borrow from the coy's bankers or otherwise, on such terms as they think fit, any moneys required to pay off any of the existing debentures which fall due.

Acquisition of a Business.**Form 516.**

Authority to directors to acquire by amalgamation another concern, and sanction of provisional agreement, and when latter absolute to increase capital.

That it is expedient to acquire and take over by way of amalgamation the undertaking of the — Coy, Limtd, and that the provisional agreement for the purpose submitted to this meeting be and the same is hby approved; and that the directors of this coy be and they are hby authorized to adopt and ratify and to affix the seal of this coy to the sd agreement and to carry the same into effect, with full power to assent to any modifications in the agreement which they think expedient in the interests of this coy, either before or after the adoption thereof; and that if the sd agreement becomes absolute the directors be and they are hby empowered to increase the capital of the coy to 1,500,000*l.*, by the creation of 33,800 new shares of 20*l.* each; and that the directors be and they are hby authorized to deal with any portion of the shares so created in accordance with the sd agreement in so far as the same shall be required for the purposes of such agreement, and to deal with any surplus as the directors may think expedient in the interests of the coy, and without being under any obligation to offer the same in accordance with clause 23 of the arts of asson of this coy.

Division in Specie in a Winding-up.**Form 517.**

Winding-up in view of provisional agreement having been sanctioned for sale of undertaking to another company.

1. That, having regard to the provisional agreement of the — day of —, entered into by A. on behalf of this coy for the sale of the undertaking of this coy to the N. Coy, Limtd, which agreement was ratified by the general meeting of the coy held on this — day of —, it is desirable to wind up this coy, and accordingly that this coy be wound up voluntarily, and that B. and C., directors of this coy, be and they are hby appointed the liqrs for the purpose of such winding-up.

See "Reconstruction," *infra*, and notes to Form 43, p. 372, *supra*.

2. That the sd liqrs be and they are hby authorized (when and so soon as the debts and liabilities of this coy shall have been pd and satisfied or duly provided for) to distribute in specie or kind amongst the contributories of this coy in accordance with their respective rights and interests therein, the 50,000 ordinary shares of 5*l.* each in the capital of the N. Coy, Limtd (credited as fully pd up), which form pt of the consideration for the sd sale, and so that each contributory shall be entld to elect to have his or her proportion thof allotted to himself or herself, or to his or her nominee or nominees, such election to be declared by notice in writing to the sd liqrs within twenty-one days after the passing of this resolution.

3. That the sd liqrs do sell the shares not so allotted, and do pay the net proceeds of sale to the contributories who would have been entld to the shares sold, rateably in proportion to the number of the shares sold which they would have been entld to call for.

Form 517.

Distribution in specie of sale consideration and sale by liquidator of unclaimed assets (shares of other company).

Debenture Holders' Resolutions.

That this meeting of the holders of the debentures of the — Coy, Limtd, secured by trust deed, dated, &c., and made, &c., hby sanctions the provisional agreemt submitted to this meeting, which agreemt is dated the — day of —, and made between the sd coy of the one pt, and A. B., purporting to contract on behalf of all the holders of the sd debentures, of the other pt, and assents to the modifications of the rights of the debenture holders and of the provisions of the sd trust deed to be effected by the sd agreemt [or hby assents to the proposed modifications of the sd trust deed, and authorizes the trees thof to concur with the coy in executing a supplemental trust deed in the terms of the draft submitted to this meeting for effecting such modifications].

Form 518.

Resolution of debenture holders sanctioning agreement for modification of rights.

This is a specimen of a resolution where a majority of a class of debenture holders have power to assent to a modification of the rights of the class. See Part III., 10th ed., p. 140.

Altering Constitution or Objects (sects. 9 and 264 of Act of 1908).

That the memdum and arts of asson submitted to this meeting be and the same are hby approved, and that, pursuant to the provisions of the Cos Act, 1908, ss. 9 and 264, the form of the coy's constitution be altered by substituting such memdum of asson with extended objects as therein set forth, and such arts of asson, for the coy's deed of settlement dated, &c., and for all regulations of the coy subsequently made and now in force; and that the directors be and they are hby authorized to apply to the Ct to confirm this resolution under the sd Act.

Form 519.

Resolution of members for acquiring new memorandum and articles under Companies Act, 1908, ss. 9 and 264.

See *infra*, p. 1310, and, for form of petition, *infra*, p. 1315.

Form 520. That the objects of the society be altered by the addition to clause 1 of the laws of the society of the words following, that is to say: —
 "The society may also, from time to time, and at any time, take over, on such terms and conditions as may be arranged, the whole or any pt of the business assets and undertaking and liabilities of any other coy, society or institution carrying on any assurance business which this society is authorized to carry on; and the terms and conditions aforesaid may include provision for payment by the society of all or part of the expenses of and incident to the winding-up and dissolution of the transferring coy, society, or institution, and may provide for the concession to the policy holders, annuitants, creditors, directors, employees, and members of the transferring coy, society, or institution of any special rights, privileges, and advantages, and may include any other provisions which the directors of this society may think expedient, and the agreement containing such terms and conditions shall, when sanctioned (if requisite) by the High Court of Justice, be effective for all purposes."

Resolution for
extension of
objects under
Companies
Act, 1908,
s. 9.

Form 521. That clause 3 of the society's deed of settlement be altered by inserting therein, immediately after the words "and to advance money by way of loan on any security whatsoever such as they can and lawfully may," the words, "and to borrow or raise money for the purposes of the society by the issue of debentures or debenture stock, and to frame, constitute and secure the said debentures or debenture stock as may seem expedient, with full power to make the same either perpetual or terminable and either redeemable or otherwise, and to charge or secure the same on the undertaking of the society, in such manner as may seem expedient," and that the objects of the society be extended accordingly.

Form 521a. That the provisions of the company's memorandum of association with respect to its objects be altered so as to read as follows: (1) &c.;
 Another. (2) &c. [or by inserting therein, immediately after paragraph (a), the following new paragraph]

Local Board.

Form 522. 1. That a local board (in this resolution called "the local board") be made for the management and carrying on of the business of the coy in Ireland, and the same is hereby constituted, and that —, —, and — be, and they are hereby appointed to be, the first members of such local board, and that the regulations following in regard to such local board shall have effect, that is to say:

Resolutions
appointing a
local board
in Ireland.

(1) Until otherwise determined by the directors of the coy, the

number of members of the local board shall not be less than two or more than five. **Form 522**

- (2) The local board shall at all times conform to the regulations and directions, whether general or special, which may be imposed on or given to it by the directors.
- (3) The local board shall have such powers, authorities and discretions as the directors may think expedient to invest it with, by power of attorney or otherwise.
- (4) The local board shall hold its meetings at — or at its office in Ireland for the time being of the day.
- (5) Mr. — shall be the first secretary of the local board and shall be entitled if the local board shall so long subsist to hold office up to the — day of —, and afterwards for so long a period, &c.
- (6) The local board may meet together for the dispatch of business, &c.
- (7) It shall not be necessary to give notice of a meeting of a local board to a member thereof who is not for the time being in Ireland, and where the local board determines that meetings shall, until further notice, be held on specified days in the week or month, notice of such determination shall be a sufficient notice of such meeting.
- (8) A member of the local board may at any time or the secretary of the local board on the request, &c., questions arising, &c.
- (9) The local board may elect a chairman, &c.
- (10) A resolution in writing, &c.
- (11) A meeting, &c.
- (12) The minutes, &c.
- (13) A member of the local board may at any time by notice in writing to the local board resign his membership thereof, and the local board shall be at liberty to fill up any vacancies in its body.

And that the power of attorney for investing the local board in Ireland with certain powers, authorities and discretions submitted to this meeting be and the same is hereby approved, and that the common seal be affixed thereto, and that the same when sealed be delivered to the sd —, — and

Various Resolutions.

That the seal of the coy be affixed to the agreement submitted to this meeting, and expressed to be made between — of the one pt, and the coy of the other pt, which agreement has been framed in accordance with the draft referred to in clause — of the coy's acts of assen, and has already been executed by the sd —, and that the solor be directed to file the sd agreement with the Registrar of Companies. **Form 523.**

To seal
agreement.

Form 524. That — shares in the capital of the coy of £— be allotted as follows (then state names of allottees and number of shares to be allotted to each, e.g., To — of —, — shares, and so on, or set them out in tabular form).
 To allot.

And that the secretary do give notice of allotment to the above-named persons resply.

Form 525. That — shares in the capital of the coy of £— each be allotted to the several persons in that behalf named in the applicons and allotment sheets submitted to this meeting and for the purpose of identification subscribed by the chairman thof, and so that each allottee shall receive an allotment of the number of shares set opposite his name in the — column of the sheet in which his name appears, and that notice of such allotment be given to the respective allottees, and that in each case where in the — column of the sd sheets the words "no allotment" are inserted the deposit pd by the corresponding applicant be returned, and that where the applicon money pd by an allottee exceeds the amount payable on applicon and allotment in respect of the shares allotted to him, the excess be returned to such applicant.
 Another.

Form 526. It appearing that the agreemt of the — day of — between — of the one pt, and the coy of the other pt, has been duly executed, resolved that the fully pd-up shares to be issued pursuant to clause — of the sd agreemt be allotted to the sd —, and that notice of such allotment be given to him.
 To allot paid-up shares.

Form 527. That Messrs. — of — be and they are hby appointed to be solors of the coy.
 To appoint solicitors.

Form 527a. That an account be opened with the — Bank, Limtd, in the name of the coy, and that the — of the sd bank be authorized to pay cheques signed by any two directors of the coy and countersigned by the secretary, and that the signatures of the directors and secretary be furnished to the bank.
 To open banking account.

Form 528. That the prospectus of the coy offering — shares for subscription as now finally settled at this meeting and signed by the chairman thof be and the same is hby approved, and that such prospectus be published and circulated in accordance with the scheme which has been prepared by Messrs. —.
 To approve prospectus.

That the proposed common seal submitted to this meeting be and the same is hby adopted as the common seal of the coy, and that the three keys of the box in which such seal is contained be placed as to one in the custody of the secretary, as to another in the custody of the chairman, and as to the third in the custody of the vice-chairman

Form 529.

To adopt
common seal.

That a call of £— per share be and the same is hby made on the members, and that such call be made payable on the — day of — to the — Bank, Limtd, at No. — Lombard Street, in the City of London.

Form 530.

To make call

That notice be given in accordance with clause — of the arts of asson of the coy to those members who have made default for more than — days in payment of the call payable on the — day of —

Form 531.

To give notice
before for-
feiture.

That the undermentd shares be and they are hby forfeited, that is to say, — shares numbered — to —, standing in the name of — shares numbered — to — (and so on).

Form 532.

To forfeit
shares.

That Messrs. — and — be and they are hby appointed a committee with power to arrange with Mr. — the terms on which he shall supply, &c., and make a contract with him accordingly.

Form 533.

To appoint
committee.

That Mr. —'s offer to supply the coy with, &c., be and the same is hby accepted, and that the secretary do give Mr. — notice of this resolution.

Form 534.

To accept
offer.

That an offer be made to Mr. — on behalf of the coy to, &c.

Form 535.

To offer.

That the seal of the coy be affixed to the proposed agreemt with A. B. providing for, &c.

Form 536.

To seal
agreement.

That the draft agreemt with Messrs. — for the sale of — be, and the same is hby approved, and that such agreemt be engrossed in duplicate and that the seal of the coy be affixed thereto, and that one part of such agreemt be handed over to Messrs. — upon their executing the other part.

Form 537.

Another.

That an extraordinary general meeting of the coy be convened for the — day of — for the purposes following (set them out), and that the notice convening the same submitted to this meeting be, and the same is hby approved.

Form 538

To call
meeting.

Form 539.

To pay
interim
dividend.

That an interim dividend of — per share be pd on the — day of —, to the members who are on the register on the — day of —, and that with a view to making out the requisite cheques the transfer books be closed from the — day of — to the — day of —.

Form 540.

Resolution
of directors
giving in-
structions to
bankers as to
mode of com-
pany's deal-
ings with
them.

1. That Messrs. — & Coy be instructed to pay and honour all cheques expressed to be drawn on behalf of this coy upon the banking account or accounts kept, or to be kept, in the name of this coy with the sd bank, at any time or times, whether the banking account or accounts of this coy are overdrawn by the payment thof or are in credit or otherwise, provided they are signed by two directors and countersigned by the secretary for the time being.

2. That the sd bank be instructed to pay and honour all bills and promissory notes payable at the sd bank, and expressed to be accepted or made on behalf of this coy, at any time or times, whether the banking account or accounts of this coy are overdrawn by the payment thof or are in credit or otherwise, provided they are signed by two directors, and countersigned by the secretary for the time being.

3. That as regards bills and promissory notes expressed to be made, drawn, endorsed, or accepted on behalf of this coy, the sd bank be instructed to treat such bills and promissory notes as having been duly made, drawn, endorsed, or accepted, as the case may be, on behalf of this coy, and to discount or otherwise deal with the same accordingly, provided they are signed by two directors, and countersigned by the secretary for the time being.

4. That the sd bank be instructed to treat all cheques, drafts, and orders expressed to be endorsed on behalf of this coy as having been duly endorsed on behalf of this coy, provided they are signed by one director and the secretary for the time being.

5. That the said bank be furnished with a list of the names of the directors, secretary, and other officers of this coy, and that they be from time to time informed in writing, signed by the chairman and secretary of this coy, of any change which may take place in them.

6. That these resolutions be communicated to the sd bank and remain in force until notice in writing to the contrary, signed by the chairman and secretary of this coy for the time being, be given to the sd bank.

Share-Warrants.**Form 541.**

Resolutions as
to conditions
for issue of
share-
warrants.

Resolutions declaring the conditions on which share-warrants will be issued:—

The following are conditions suitable to be made by the directors under Form 251, clause 40, *supra*, p. 680.

That the following conditions as to the issue of share-warrants be made pursuant to clause — of the arts of assen of the coy.

Form 541.

Upon whose request warrant to be issued.

1. No share-warrant shall be issued except upon a request in writing by the person for the time being upon the register of members as the holder of the share or stock in respect of which the share-warrant is to be issued, and it shall be no objection that the request is signed by the person making the same before his name was entered in the register as such holder.

For form of share-warrant, see *infra*, p. 1150.

There can be no doubt that if the company issue a share-warrant to a person who is not entitled it will be estopped from denying the right of any purchaser from him. See further, introductory notes to Chap. XIV. The utmost care ought therefore to be used. Sometimes these clauses are embodied in the articles of association.

2. The request shall be in such form, and authenticated by such statutory declaration or other evidence as to the identity of the person making the same, and of his right or title to the share or stock, as the directors shall from time to time require, and shall be lodged at the office of the coy.

Regulations as to request.

3. Before the issue of a share-warrant the certificate (if any) then outstanding in respect of the shares or stock inter led to be included in it shall be delivered up to the directors, unless they dispense with this condition.

Certificates to be surrendered

If the certificate is left outstanding it will involve a risk to the company, and the directors may reasonably require an indemnity.

4. Any person applying to have a share-warrant issued shall at the time of application pay to the directors the stamp duty payable in respect thereof, and also such fee, not exceeding 1s. for each share-warrant, as the directors shall from time to time fix.

Stamp duty.

By the schedule to the Stamp Act, 1891, a share-warrant is chargeable with duty of an amount equal to three times the amount of the *ad valorem* stamp duty which would be chargeable on a deed transferring the share or shares or stock specified in the warrant or certificate if the consideration for the transfer were the nominal value of such share or shares or stock.

By the same Act:—"If a share-warrant is issued without being duly stamped, the company issuing the same, and also every person who at the time when it is issued is the managing director, or secretary, or other principal officer of the company, shall forfeit the sum of 50l."

Under sect. 115 of the Stamp Act, 1891, a composition in respect of this duty may be made in some cases.

5. Share-warrants shall be issued under the seal and be signed by one director and countersigned by the secretary or some other officer in the place of the secretary appointed by the board for that purpose.

Execution.

6. Each share-warrant shall contain such number of shares or amount of stock, and be in such language and form as the directors shall think fit. The number originally attached to each share shall be stated in the share-warrant.

Number.

Form 541. Coupons.	7. Coupons payable to bearer of such number as the directors shall think fit, shall be attached to share-warrants providing for the payment of the dividends upon and in respect of the shares or stock included therein, and the directors shall provide as they shall from time to time think fit for the issue of fresh coupons to the bearer, for the time being of share-warrants when the coupons attached thereto shall be exhausted.
Number of coupons.	8. Each coupon shall be distinguished by the number of the share-warrant to which it belongs, and by a number showing the place it holds in the series of coupons belonging to the warrant. The coupons shall not be expressed to be payable at any particular period, nor shall they contain any statement as to the amount which shall be payable.
Payment of dividends.	9. Upon any dividend being declared to be payable upon the shares or stock specified in any share-warrant, the directors shall publish an advertisement in one daily newspaper published in London, and in such other newspapers, if any, as they shall think fit, stating the amount per share or per cent. payable, the date of payment, and the serial number of the coupon to be presented; and thereupon any person presenting and delivering up a coupon of that serial number at the place, or one of the places, stated in the coupon, or in the sd advertisement, shall be entitled to receive at the expiration of such number of days (not exceeding five) after so delivering it up as the directors shall from time to time direct, the dividend payable on the shares or stock specified in the share-warrant to which the sd coupon shall belong, according to the notice which shall have been so given by advertisement.
Bearer of coupon alone recognized.	10. The coy shall be entld to recognize an absolute right in the bearer for the time being of any coupon so advertised as afd for payment to such amount of dividend on the share-warrant whereto the sd coupon shall belong as shall have been as afd declared payable upon presentation and delivery of the coupon, and the delivery of such coupon shall be a good discharge to the coy accordingly.
As to worn or defaced warrant.	11. If any share-warrant or coupon be worn out or defaced, the directors may, upon the surrender thof for cancellation, issue a new one in its stead.
As to lost or destroyed warrant.	12. If any share-warrant or coupon be lost or destroyed, the directors may, upon the loss or destruction being established to their satisfaction, and upon such indemnity being given to the coy as they shall think adequate, issue another share-warrant or coupon in lieu thof.
Fee on issue of new warrant.	13. In every case provided for by conditions 11 and 12 a fee of 2s. 6d., exclusive of all expenses attending the investigation of evidence of loss or destruction, and of an indemnity to the coy, shall be pd to the coy by the person availing himself of those conditions.
On what conditions holder of warrant may vote.	14. No person shall as bearer of a share-warrant be entld to attend, or vote, or exercise in respect thof any of the rights of a member, at any general meeting of the coy, or sign any requisition for or aid in

calling any general meeting, unless three days at least before the day appointed for the meeting, in the first case, and unless before the requisition is left at the office, in the second case, he shall have deposited the share-warrant at the office, or such other place as the directors appoint, together with a statement in writing of his name and address, and unless the share-warrant shall remain so deposited until after the general meeting, or any adjournment thereof shall have been held. The names of more than one as joint holders of a share-warrant shall not be received. **Form 541.**

This and the following clause are found to work well. They prevent peroration, and are convenient both to the holders of share-warrants and to the company. The certificate requires no stamp.

15. There shall be delivered to every person so depositing a share-warrant a certificate stating his name and address, and the number of shares or the amount of stock represented by the share-warrant so deposited by him, and such certificate shall entitle him to attend and vote at a general meeting in the same way as if he were a registered member of the company in respect of the shares or stock specified in the said certificate. Upon delivering up of the said certificate to the company, the share-warrant in respect whereof it shall have been given shall be returned. **Certificates of deposit.**

The certificate may be as follows:—

The — Coy, Limtd.

No. —.

This is to certify that A. B., of —, has, in accordance with the regulations of the company, deposited the under-mentioned share-warrants, in respect of which he is entitled to attend the general meeting of the company, to be held at —, on the — day of —.

Dated, &c

—, Secretary.

[Particulars of share-warrants deposited.]

16. No person as bearer of any warrant shall be entitled to exercise any of the rights of a member (save as herebefore expressly provided in respect of general meetings) without producing such warrant and stating his name and address, and (if and when the directors so require) permitting an indorsement to be made thereon of the fact, date, purpose, and consequence of its production. **When warrant to be produced.**

The above clause is occasionally used.

17. If the bearer of a share-warrant shall surrender it to be cancelled, and shall therewith lodge at the office a declaration in writing, signed by him, in such form, and authenticated in such manner as the **Surrender of warrants.**

Form 541. directors require, requesting to be registered as a member in respect of the shares or stock specified in the sd share-warrant, and stating in such declaration his name, address, and occupation, he shall be entld to have his name entered as a member in the register of members of the coy in respect of the shares specified in the share-warrant so surrendered.

Sect. 37 (3) of the Act provides that "The bearer of a share-warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members" [hence it is necessary to provide for the surrender], "and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register of members the name of any bearer of a share-warrant in respect of the shares or stock specified therein without the warrants being surrendered and cancelled."

Meaning
of share-
warrant.

18. In the above conditions, share-warrant means a warrant in respect of a share or shares, or of stock of the coy, issued pursuant to the Cos (Consolidation) Act, 1908, s. 37, and the arts of asson of the coy.

Share-warrants to bearer are always treated as negotiable instruments. Whether they are so or not, under the Act of 1908, is not quite clear, but there is a valid mercantile custom to treat them as negotiable, and this is effective *Webb, Hale & Co. v. Alexandria Water Co.* (1905), 21 T. L. R. 572.

Holding a share-warrant will not qualify a director where a share qualification is required. Companies (Consolidation) Act, 1908, s. 37 (4).

The Companies (Consolidation) Act, 1908, provides in sect. 26 as to the particulars to be contained in the annual summary where share-warrants have been issued; and sect. 38 provides penalties for forgery and personation.

Forged Transfers Acts.

Form 542.

Adoption of
Forged Trans-
fers Acts.

That the coy do adopt the provisions of the Forged Transfers Acts, 1891 and 1892, and that the directors be and they are hby authorized, subject to the provisions of those Acts, to make compensation out of the funds of the coy for any loss arising from a transfer of any of the stock or security of the coy in pursuance of a forged transfer, or of a transfer under a forged power of attorney, whether such loss shall arise, and whether the transfer or the power of attorney were forged before or after the passing of the Forged Transfers Acts, 1891 and 1892, and that, subject to further resolution at any future general meeting, no additional charge be made upon the registration of transfers. And also that the directors be and are hby further authorized, if they think fit, to provide a fund to meet claims, proved to their satisfaction, for such compensation by insurance, or in any other manner that the directors may resolve upon. *Supra*, p. 673.

CERTIFICATES.

CHAPTER XIV.

INTRODUCTORY NOTES.

The articles of a company usually give the members the right to a Certificate of share certificate. See *supra*, p. 653. Moreover, under sect. 92 of the Act (1908), a company is bound under penalty to issue certificates within two months after allotment or registration of transfer. And *prima facie* the shareholder is entitled to a "clean" certificate, *e.g.*, one undefaced by a memorandum that the company is entitled to a lien on the shares. *W. Kay & Son, Ltd.*, (1902) 1 Ch. 467.

This power of granting certificates is to give shareholders the opportunity of more easily dealing with their shares in the market, and to afford facilities to them of selling their shares by at once showing a marketable title; and the effect of this facility is to make the shares of greater value. The power of giving certificates is, therefore, for the benefit of the company in general; and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it should be so used by the person to whom it is given, and acted upon in the sale and transfer of shares." Per Cockburn, C. J., *Bahia, &c. Ry. Co.*, L. R. 3 Q. B. 595.

By sect. 23 of the Act of 1908, a certificate under the common seal of the company, specifying any shares or stock held by any member, is to be *prima facie* evidence of the title of the member to the share or shares or stock; and sect. 30 provides for the keeping of a register of members.

Certificates
prima facie
evidence of
title;
object of.

"A certificate" is "a solemn affirmation under the seal of the company that a certain amount of shares or stock stands in the name of the individual mentioned in the certificate." Per Lord Cairns, L. C., in *Shropshire Union, &c. Co. v. The Queen*, L. R. 7 H. L. 196, 509. And Lord Hatherley (p. 512) adds: "The certificate does not tell you anything more than the register itself told you. The register told you that he was owner, and the certificate tells you he is owner. The certificate tells you that he is on the register, and that he is on the register for a certain number of shares; that is apparent upon the face of the register itself."

The difference is that the register remains at the office of the company. The share certificate the member can take about with him as evidence of ownership.

The certificates "in companies of this kind are the proper (and indeed the only) documentary evidence of title in the possession of a shareholder." Per Lord Selborne, *Société Générale de Paris v. Walker*, 11 App. Cas. 20, 29.

And in the same case (p. 44) Lord Fitzgerald says: "The statute and the articles must be taken together. The former shows that the certificates are to be *primâ facie* evidence of the title to the shares; and the latter that the certificates are the only instruments and evidence of title which the member is entitled to have delivered to him."

Responsi-
bilities in
issuing.

Forged
transfer.

Liability of
company.

The share certificate being thus made the proper evidence of a member's title, it behoves the directors to use the utmost care in issuing certificates; for on the principle illustrated by *Pickard v. Sears*, 6 Ad. & E. 649, and *Freeman v. Cooke*, 2 Ex. 654, the company is estopped from denying the truth of the representation contained in the certificate as against any person dealing with the shares in reliance thereon. Thus in *Bahia, &c. Ry. Co.*, *ubi supra*, the company, acting upon a forged transfer, issued a certificate to the transferee. A., in reliance on this certificate, purchased and paid for the shares specified in it, and they were duly transferred into his name. The forgery was subsequently discovered, and the company was, under sect. 35 of the Act of 1862 (now sect. 32 of the Act of 1908), ordered to restore the name of the real owner to the register. It was held, in an action by A. against the company, that he was entitled to recover as damages for the loss of the shares the value of the shares at the time the company first refused to recognize him as a member, with interest at 4 per cent. from that time.

See also *Burkinshaw v. Nicolls*, 3 App. Cas. 1004, 1011; *Hart v. Frontino*, L. R. 5 Ex. 111; *Eaglesfield v. Marquis of Londonderry*, 4 Ch. Div. 693; *Cottam v. Eastern Counties Rail. Co.*, 1 J. & H. 243; *Johnston v. Renton*, 9 Eq. 181; *Ottos Kopje Diamond Mines*, (1893) 1 Ch. 618; *Re Coasters, Ltd.*, (1911) 1 Ch. 86; *Seton*, 6th ed. 2310.

The rule, however, does not apply where the person to whom the certificate is issued is a trustee for the company, for the certificate does not say that the company has no equitable interest. In such a case the company may refuse to register the transfer. *Shropshire Union, &c. Co. v. The Queen*, L. R. 7 H. L. 496.

Nor is there any estoppel where the seal of the company is affixed without authority, *e.g.* by the secretary of the company for his own purposes. *Ruben v. Great Fingall Co.*, (1906) A. C. 430, overruling *Shaw v. Port Philip Co.*, 13 Q. B. D. 103.

And it must be shown that the party acted on the certificate; for if he merely relies on a forged transfer, and is registered and receives a

certificate of title, the company is not estopped as against him, unless he acts on the certificate. *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. Div. 188; *Coates v. L. & S. W. Rail. Co.*, 41 L. T. 553; *Vulcan Ironworks Co.*, W. N. (1885) 120. But where the plaintiff claiming under a forged transfer, received a certificate from the company and *bonâ fide* acted thereon by selling the shares, he was held by the House of Lords entitled to recover damages from the company. *Tompkinson v. Balkis*, (1893) A. C. 396. As to forged transfers, see further, pp. 667, 673-676, *supra*.

So, also, where the plaintiff had been put to rest by the certificate issued to him until it was too late to get redress against the real wrongdoer, it was held that the company was estopped. *Dixon v. Kennaway & Co.*, (1900) 1 Ch. 833.

Again, where B. advanced money to a company upon the footing that he was to have as security 10,000*l.* of paid-up shares, and the company issued to him a certificate that he was entitled to 10,000*l.* of paid-up shares, it was held that, although these shares were not in fact paid up, the company were estopped by its certificate on which B. had advanced *bonâ fide* in the belief that it was true. *Bloomenthal v. Ford*, (1896) A. C. 156. The company has no right in such a case to say: "I told you so-and-so, but you ought not to have believed me." See also *Parbury's case*, (1896) 1 Ch. 100, in which the company was held estopped in favour of an original allottee who had acted on the certificate issued to him.

Where a certificate has been issued describing a share as fully paid up or partly paid up, a purchaser of the share acting on the faith of the certificate is entitled to hold the share as paid up, or partly paid up, as the case may be. *Burkinshaw v. Nicolls*, 3 App. Cas. 1004; *Bloomenthal v. Ford*, *supra*. But where A., being entitled to an allotment of paid-up shares under a contract which required filing but was not filed, procured an allotment to B., who received a certificate accordingly, the company was held not to be estopped as against B. *Rowland's case*, W. N. (1880) 80. See also *Markham & Darter's case*, (1897) 1 Ch. 414.

A person who acts with knowledge or notice that the representation in a certificate is not correct, cannot invoke the doctrine of estoppel in his favour. *Crickmer's case*, 10 Ch. 614. But the onus of proving knowledge or notice lies on the person setting it up. *Hall & Co.*, 37 C. D. 712.

Where directors issue a certificate of title to shares or stock which do not in fact exist, or which the company has no power to issue, they may be held personally liable in damages on an implied warranty of authority to any person who acts on such certificate. *Firbank v. Humphreys*, 18 Q. B. Div. 54, and cases there cited. And see *supra*, Chap. XIV.

So, too, where directors issued shares at a discount, and issued certificates stating the shares to be fully paid, whereby the company

Notice.

Non-existent shares.

Directors' liability.

was estopped, the directors were held liable to compensate the company. *Hirsche v. Sims*, (1894) A. C. 654.

As to compelling the company to reinstate the true owner as the holder where his name has been wrongfully removed by reason of a forged transfer, see *Barton v. L. & N. W. Rail. Co.*, 38 C. D. 144.

Stamp.

A certificate that a person is the holder of shares or stock in a company does not require any stamp. It is not a deed. *The Queen v. Morton*, L. R. 2 C. C. R. 22. But a scrip certificate or other document entitling any person to become the proprietor of any share of any company or proposed company, requires a 1*d.* stamp; and any person who executes, grants, issues, or delivers out any such document before the same is stamped, is liable to a penalty of 20*l.* Stamp Act, 1891, s. 79. See clauses as to certificates, *supra*, p. 65.

Scrip
certificate.

Deposit.

As to the effect of depositing share certificates as security for an advance, see *Colonial Bank v. Whinney*, 11 App. Cas. 426; *France v. Clark*, 20 Ch. D. 263; *Williams v. Colonial Bank*, 38 Ch. D. 395; *London Joint Stock Bank v. Simmons*, (1892) A. C. 201; *Sheffield v. London Joint Stock Bank*, 13 App. Cas. 333; *De Verges v. Sandeman, Clark & Co.*, (1902) 1 Ch. 579; and *infra*, p. 1186.

Certification.

As to certifying transfers of shares, namely, noting on the transfers that the certificates for the shares therein have been deposited with the company, see *supra*, p. 675.

As to estoppel by such "certification," see *supra*, p. 675.

Lost
certificate.

As to renewing lost or defaced certificate, see *supra*, p. 653.

A share certificate commonly has a foot-note to the effect that before any transfer is registered the certificate must be produced. This note is only a warning to the shareholder to take care of the certificate. It is not addressed to outsiders, and therefore does not create a contract or estoppel against the company on which they—outsiders—can rely that the company will not register a transfer without production of the certificate. *Rainford v. James Keith*, (1905) 1 Ch. 296.

PRECEDENTS.

THE COY., LIMTD.

Form 543

Ordinary
certificate.

No. — —.

Ledger folio — —.

Incorporated under the Cos (Consolidation) Act, 1908.

Capital 100,000*l.*, divided into 5,000 shares of 20*l.* each

Registered off.

Bankers, — —.

No. — —.

20*l.* shares.

THIS IS TO CERTIFY that A. B., of — —, is the registered holder of
 shares, numbered — — to — — inclusive, in the above-named coy.,
 subject to the memorandum and articles of association, and that the sum
 of £— — has been paid up upon each of the sd shares.

Given under the common seal of the sd coy. this — — day of — —.

The common seal of the sd coy was
 hereunto affixed in the presence of:—

— { Directors.

(Seal of the coy.)

—, Secretary.

NOTE.— No transfer of any portion of the shares comprised in this
 certificate can be registered unless accompanied by this certificate.

A company cannot safely disregard such a rule. *Société Générale v. Walker*,
 1 App. Cas. 20; *Colonial Bank v. Whinney*, *ibid.* 441. But according to
 Farwell, J., in *Rainford v. James Keith and Blackman Co.*, (1905) 1 Ch. 296,
 303, such a note as above is only "addressed as a warning to the registered
 owner of the shares bidding him take care of his certificate because he cannot
 compel the company to register a transfer without its production," and is not a
 contract with all persons to whose hands the certificate may come. The case
 was appealed, but the point was not dealt with by the Court on appeal, (1905)
 2 Ch. 147. However, in *Guy v. Waterlow Brothers*, 25 T. L. R. 515, where
 shares were transferred to A. with the certificate, and afterwards to B., who
 by means of a forged certificate got first on to the register, it was held that B.
 had a complete title, and stood first. So, in a way, the note is somewhat
 misleading.

A definitive certificate requires no stamp. *Queen v. Morton*, L. R. 2
 C. C. R. 22.

Form 544.Certificate of
preference
shares.

THE — COY, LIMTD.

No. —.

Ledger folio —.

Capital 100,000*l.*, divided into 5,000 preference shares of 10*l.* each,
and 5,000 ordinary shares of 10*l.* each.

THIS IS TO CERTIFY that A. B., of —, is the registered holder of
— of the above-mentioned preference shares, numbered, &c., in the
— Coy, Limtd, subject to the memorandum and articles of association, and
that upon each of the said shares the full amount of 10*l.* has been
paid up.

Given, &c.

Note, &c. [as above].

In the case of preference shares, the certificate sometimes states the rate of
dividend, and whether cumulative or not.

Form 545.Provisional
certificate
where
instalments.

THE — COY, LIMTD.

No. —.

No. of shares —.

Issue of 150,000*l.* in 15,000 ordinary shares of 10*l.* each.*Provisional Certificate.*

THIS IS TO CERTIFY that — is the registered holder of —
ordinary shares of 10*l.* each, numbered — to — inclusive, in the
— Coy, Limtd, upon which the sum of 1*l.* per share has been paid.

The remaining instalments are due as follows:—

3*l.* on the 1st October, 19—.3*l.* on the 1st December, 19—.3*l.* on the 1st February, 19—.

Given under the common seal of the said company this — day of —,
19—.

—, Director.

—, Secretary.

Bankers' Receipt.

Received the sum of £—, being the instalment due in respect of
the above shares on 1st October, 19—.

For the — Bank, Limtd.

[1*d.* stamp.]

[Two more receipts for subsequent instalments.]

N.B.—This provisional certificate must be produced to the bankers
of the company upon payment of each instalment, and will be returned
receipted.

It is sometimes thought convenient to issue provisional certificates as above.
As to scrip certificates to bearer for debentures and debenture stock, see *infra*,
p. 1146 *et seq.*

THE — COY, LIMTD.

[1d. stamp.]

Form 546.

Provisional Certificate.

Another.

Issued in respect of Allotment Letter, No. —

Preference Shares, part of the 100,000 5*l.* per cent. cumulative Preference Shares offered for sale by prospectus, dated 22nd April, 1905

THIS IS TO CERTIFY that Messrs. A. & Co., of B., bankers, have received from —, of —, hinftr called the allottee, the sum of £—, viz., 3*l.* per share on — of the sd preference shares allotted to him, and that on payment of the remaining instalments as below mentd. the allottee will be entld to be registered in respect of such shares.

The remaining instalments are to be pd to Messrs. A. & Co., of B., as follows:—

On 1st June, 19—, 3*l.* 15*s.* per share.

1st July, 19—, 4*l.* „

Failure to pay any instalment when due will render the allotment liable to cancellation, and the deposit to forfeiture.

The remaining instalments may be pd in advance.

For the Vendors,

A. & Co.

NOTE.—When the above payments have been completed, Messrs. A. & Co. will, on presentation and delivery of this certificate, procure the allotment to the allottee of the shares, and the issue to him of a definitive certificate of title.

Bankers' Receipts.

Received from the allottee above named the sum of £—, being the amount of the instalment due 1st June, 19—.

For Messrs. A. & Co.

Date —.

Memorandum.

[To be detached by Bankers.]

The — Coy, Limtd.

Allotment No. —.

Amount payable on allotment,

£—.

Date —.

Received from the allottee above named the sum of £—, being the amount of the instalment due 1st July, 19—.

For Messrs. A. & Co.

Date —.

Memorandum.

[To be detached by Bankers.]

The — Coy, Limtd.

Allotment No. —.

Amount payable on allotment,

£—.

Date —.

This is a specimen of a provisional certificate issued by a bank or company which buys an issue and offers same to the public.

Form 547.Certificate of
stock.

THE --- COY., LIMTD.

[No stamp.]

No. ---.

Capital 100,000*l.* stock.

£ ---

THIS IS TO CERTIFY that A. B., of ---, is the registered holder of the sum of £ --- stock of the above-named coy, subject to the memorandum and acts of assen thof. Given, &c.

NOTE.—No transfer of any part of the stock comprised in this certificate will be registered until this certificate is delivered up at the coy's office

Form 548.Certificate of
debenture
stock.

THE --- COY., LIMTD.

No. ---.

£ ---

100,000*l.* mortgage debenture stock, 19---, bearing interest at the rate of --- p.c.p.a. payable every --- [January] and --- [July].

[The stock is redeemable at £ --- per cent. at any time after the --- day of --- on six calendar months' notice from the coy.]

THIS IS TO CERTIFY that --- of --- is the registered holder of £ --- of the above-mentd stock, which stock is constituted and secured by trust deed dated the --- day of ---, and made between the coy of the one part and --- and --- (trees) of the other part, and is issued subject to the provisions contained in that deed.

Given under the common seal of the coy this --- day of ---.

NOTE.—This certificate must be surrendered before any transfer of the whole or any part of the stock comprised in it can be registered, and no fraction of [one] pound can be transferred.

See further as to such certificates, Part III. of this work, on Debentures and Debenture Stock.

Form 549.Certificate to
bearer, debenture
stock.

THE --- COY., LIMTD.

No. ---.

£ ---

100,000*l.* mortgage debenture stock, bearing interest at the rate of --- p.c.p.a. payable every --- [January] and --- [July].

[The stock is redeemable at. &c.]

THIS IS TO CERTIFY that the bearer is the proprietor of £ --- of the above-mentd debenture stock, which stock is constituted and secured by trust deed, dated the --- day of ---, and made between the coy of the one part and --- and --- (trees) of the other part, and is issued subject to the provisions contained in that deed.

Given under the common seal of the coy this --- day of ---.

Form of Interest Coupon.

Form 549a

The — — Coy. Limtd

No

Six months' interest on debenture stock

Certificate to bearer, No

Payable at —, less income tax £

Secretary

See further as to such certificates, Part III. of this work, on Debentures and Debenture Stock.

[Transfers of this scrip are liable to stamp duty.]

Form 550.

100,000*l.* 4 per cent. First Mortgage Debenture Stock

of

[1*l.* stamp.]

THE — — COY. LIMTD.

Provisional
certificate
debenture
stock to regis-
tered holder.

Scrip No.

For — — pounds, on which 50 per cent. has been paid

THIS IS TO CERTIFY that — — of — —, or other the registered holder for the time being hof, will on payment to Messrs. — —, or any of their branches, of the final instalment of 50*l.* p.c. on 31st July, 19—, and lodgment of this scrip certificate, become entld to be registered as the holder of — — pounds of the above-mentd debenture stock.

If the above-mentd final instalment is not duly pd, the sums previously pd on applicon and allotment and on this certificate will be liable to forfeiture without further notice.

Dated the — — day of — —.

For the — — Coy, Limtd,

— —, Secretary.

Transfer of this scrip must be in writing in the usual common form, or as near thereto as circumstances will admit, and must be signed by the transferor and the transferee, and must be left at — — for registration accompanied by this certificate, and every such transfer when registered will be retained by the coy, and a note or memorandum thof shall be endorsed hereon. A fee of 2*s.* 6*d.* will be charged for the registration of each transfer, and must be pd to the coy before registration.

Fractional certificates not involving fractions of one pound will be issued where desired to the registered holder hof in exchange for the present certificate on payment of the — — there.

Form 550. Final instalment due 31st July, 19—. Received the — day of —, 19—, the sum of £—.

For Messrs. —.

For Messrs. —.

For Messrs. —.

—, Cashier.

This is a form which has found favour with the Revenue authorities, as it involves payment of transfer duty, whereas a scrip certificate to bearer, as in the following Form 551, avoids such duty.

Form 551. No. —.

£—.

Provisional
certificate to
bearer for
debentures
to bearer.

THE — COY, LIMTD.

Issue of 120,000l. 5 p.c. debentures at par under prospectus
dated — January, 19—.

Scrip certificate for £— 5 p.c. debentures to bearer, on which
40 p.c. has been pd.

THIS IS TO CERTIFY that the bearer has on payment of a further 60 p.c. in accordance with the prospectus of the coy dated — January, 19—, to The — Bank, Limtd, No. —, or to Messrs. — of —, or to Messrs. — of —, by instalments as follows:—

30 p.c. on the 15th May, 19—,

30 „ „ 15th November, 19—.

(such payments to be shown by the receipts at the back hereof) will upon surrender to the coy of this scrip certificate receive in exchange therefor 5 p.c. debentures to bearer for £—, being pt of the above-mentd issue of 120,000l. to be secured under the provisions of a trust deed dated the — of —, and made between the above-mentd coy of the one pt, and — and —, as trustees of the other pt, and bearing interest at the rate of 5 p.c.p.a. payable half-yearly on the 1st January and the 1st July, 19—, or may at the option of the coy be redeemed at a premium of 10 p.c. on or at any time after the 31st December, 19—, on six months' previous notice.

Default in payment of any of the above instalments at its due date will render this certificate liable, and all previous payments in respect of the sd debenture or debentures, to forfeiture.

The debenture or debentures will be deliverable at the sd registered office after all instalments have been punctually pd as afd, and due notice will be given when such debenture or debentures shall be ready.

Signed by order of the Board.

For the — Coy, Limtd.
—, Director.
—, Secretary.

Instalment due —, 19—.

Received the — day of —, 19—, the sum of — pounds.

For The — Bank, Limtd.

(or)

For Messrs. —.

£—.

Instalment due 15th November, 19—.

Received the — day of —, 19—, the sum of — pounds.

For The — Bank, Limtd.

(or)

For Messrs. —.

The Revenue authorities do not object to bearer scrip where the debentures are to be to bearer. But they throw every possible obstacle in the way of those who desire, in accordance with the established practice of nearly half a century, to issue bearer scrip in respect of securities not intended to be to bearer. Yet such scrip, it is well settled, is negotiable by the law merchant. *Rumball v. Metropolitan Ry.*, 2 Q. B. D. 194; *Goodwin v. Roberts*, 1 App. Cas. 476; *Ellerby's Claim*, 20 W. R. 835.

THE — COY, LIMTD.

Scrip Certificate.

The above-named coy (hnfr called "the new coy") hby certifies that The — Coy, Limtd (hnfr called "the old coy"), is absolutely and unconditionally entld to have allotted to it or to its nominees the shares following, that is to say:—

- fully pd up preference shares of 1*l*. each in the capital of the new coy numbered — to — inclusive.
- fully pd up ordinary shares of 1*l*. each in the capital of the new coy numbered — to — inclusive.

And that the old coy is entld to have such allotment made from time to time in such blocks or numbers as the old coy may think expedient.

And that the right to such allotment hby acknowledged arises under the agreemt dated 'he — day of —, and made between, &c.,

Form 552.

Certificate in
favour of
liquidators.

Form 552. and that this certificate is issued to the old coy as an inducement to convey certain of its assets to the new coy prior to the actual allotment of the shares afd, which form part of the consen for the sale of such property, and as a means of raising money on such shares or otherwise dealing with them before allotment; and accordingly that the absolute and unconditional right to the allotments hby acknowledged can under no circumstances be questioned by the new coy, and that the old coy and all other persons are hby invited to act accordingly.

Given, &c.

In the above case it was desired to give possession to the purchasing company, and to postpone the issue of the debenture stock forming part of the consideration, money in the meantime being raised thereon. Accordingly, the above certificate was framed.

Form 553.

Form of
share-
warrant.

THE — — COY, LIMTD.

Capital, &c.

No. ———.

£—— shares.

Share-Warrant.

THIS IS TO CERTIFY that the bearer of this warrant is entld to — — fully pd-up shares of £—— each in the above-named coy, numbered — — to — — inclusive, subject to the articles of the coy, and to the conditions indorsed hereon. [See *supra*, pp. 680, 681.]

Given, &c.

Under the Stamp Act, 1891 (54 & 55 Vict. c. 39), a share-warrant to bearer is liable to three times the *ad valorem* duty on a transfer for a consideration of the nominal value of the share or stock.

For the *ad valorem* duty on transfers, see now the Schedule to the Stamp Act, 1891, under "Conveyance or Transfer on Sale." It is as follows:—

Where the amount or value of the consideration for the sale does			£	s.	d.
not exceed £5			0	0	6
Exceeds £5 and does not exceed £10			0	1	0
" 10	"	15	0	1	6
" 15	"	20	0	2	0
" 20	"	25	0	2	6
" 25	"	50	0	5	0
" 50	"	75	0	7	6
" 75	"	100	0	10	0
" 100	"	125	0	12	6

And so forth.

Sect. 73 of the Finance (1909-10) Act, 1910, does not double the duty. See p. 339, *supra*.

Sect. 107 of the Stamp Act, 1891, provides that: "If a share warrant is issued without being duly stamped the company issuing the same, and also every person who, at the time when it is issued, is the managing director or secretary, or other principal officer of the company, shall incur a fine of 50/."

But the duty may be commuted under sect. 115 of the Stamp Act, 1891.

Sects. 4 and 5 of the Finance Act, 1899 (62 & 63 Vict. c. 9), extend the above duty to instruments having like effect.

Form 553.

THE --- COY. LIMITED.

Form 554.

Dividend Coupon, No. ---.

Coupon
to share-
warrant.

On --- shares included in the share-warrant numbered as below.
Payable at the coy's office at a time to be fixed by advertisement

No. ---

Secretary

It is not uncommon to annex to a share-warrant a series of coupons numbered consecutively. When they are exhausted fresh coupons are issued. Such coupons require no stamp.

Where --- are issued it is desirable in the conditions (*supra*, p. 1135) to provide that the delivery of a coupon shall be a good discharge to the company for the corresponding dividend. Sometimes a note is added to the coupons stating that the coupon must be brought to the company's office upon the dividend being declared, in order that it may be examined and vouched."

After all the attached dividend coupons have been paid or advertised for payment, the coy will, on presentation of this warrant and surrender of the voucher, issue to the bearer a new sheet of coupons to be attached to this warrant with a similar voucher.

Form 555.

Voucher for
fresh coupons.

The voucher will be so printed that, after all the coupons have been used, such voucher may be detached and handed to the company in exchange for fresh coupons and voucher.

Where share-warrants are likely to be dealt in abroad they are generally printed in two or more languages side by side.

To the --- Coy. Limtd. and A., B. and C., the directors thof.

Form 556.

GENTLEMEN,—I have lost the certificate of title dated the --- day of --- relating to the --- shares of --- each, numbered --- to --- inclusive, in the above-named coy, of which I am the proprietor, and I request you to issue to me a fresh certificate of title to such shares, and in conson thof I undertake to indemnify you against all actions, proceedings, claims, and demands which may be brought or made against you or any of you in consequence of your having issued

Letter of
indemnity in
issue of fresh
certificate.

Form 556. such fresh certificate, or in consequence of your permitting at any time hereafter a transfer of the above shares, or any of them, without the production of the original certificate above referred to.

And I, —, of —, concur in the above request, and guarantee the performance by the sd — of the above undertaking.

(Signature.)

Dated the — day of —.

6d. stamp if under hand, or if under seal 10s.

Form 557. I HEREBY CERTIFY that the — Coy, Limtd, is this day incorporated under the Cos Act, 1908, and that this coy is limtd.
 Certificate of incorporation.
 Given under my hand this — day of —.

Sect. 17 of the Act of 1908 makes the Registrar's certificate of the incorporation conclusive evidence that all the requisitions of the Act in respect of registration have been complied with. See *supra*, p. 24.

Form 558. I HEREBY CERTIFY that A. B. & Co., Limtd (which was constituted by arts of asson dated —), is this day incorporated under the Cos Act, 1908, and that this coy is limtd.
 Certificate of registration under Part VII. of Act of 1908.
 Given under my hand at London this — day of —.

When the deed is called a "deed of settlement" the certificate is framed accordingly. It is conclusive under sect. 17, *supra*, sect. 192 of the Act of 1862 being repealed.

Form 559. THE — BREWERY COY, LIMTD.
 Incorporated under British statute known as the Cos (Consolidation) Act, 1908.
 Capital 1,000,000£., divided into — ordinary shares of £— each, and — preference shares of £— each.

Certificate of shares held in trust by American corporation.

THIS IS TO CERTIFY that the bearer is enttd to — 10£. shares in the above-named coy, hnfr called the — Coy, which shares are numbered — to — inclusive.

The sd shares form part of the 20,000 ordinary shares in the coy comprised in the trust deed dated the — day of —, and made between A. B. and others of the one part, and the — Trust Coy of Boston (hnfr called the Trust Coy) of the other part, and this certificate is issued subject to the provisions of the sd deed.

Dividends from time to time payable in respect of the sd shares will be pd on presentation to the sd trust coy of the appropriate coupons. With this certificate there are issued [20] coupons, together with a voucher for further coupons; and as and when the coupons for the

time being belonging to this certificate are exhausted, further coupons with a further voucher will, on presentation of this certificate, be issued to the bearer in exchange for the voucher. **Form 559.**

The delivery to the sd trust coy of each coupon shall be a good discharge for the dividend therein referred to. This certificate is transferable by delivery, and the sd trust coy are to be entld to regard the bearer hof for the time being as the absolute owner thof.

If at any time the bearer hof desires to have several certificates for the same shares instead of one, the sd trust coy will, on presentation and surrender of this certificate and all coupons, issue to him further certificates and coupons, but the sd trust coy shall be entld to charge a fee of — for each certificate issued.

In accordance with the provisions of the sd trust deed, the trust coy will at any time, on the request of the bearer thof, and on the surrender of this certificate to be cancelled, transfe. to such bearer or his nominee the shares comprised in this certificate by instrument of transfer framed in accordance with the regulations of the coy, to the intent that, by registration of such transfer in the books of the coy, the legal title in the shares shall become vested in the transferee named in such certificate.

Notice of any dividend from time to time payable in respect of the sd shares comprised in this certificate will be advertised in the — newspapers.

Given under the common seal of the — Trust Coy this — day of —.

Where an English company acquires the undertaking of an American company, or all the shares in an American company, and a considerable part of the price consists of shares in the English company, the vendor may want to sell such shares in America. In some cases, to facilitate this, the vendor has obtained share-warrants to bearer at great expense (3% per cent.), but has found that such warrants, bearing a British revenue stamp, are not liked, and are found inconvenient, as they cannot be split. Accordingly, in other cases the vendor has vested the shares in an American trust company, and obtained certificates on the lines of the above. Such certificates can be freely sold and dealt with in America, and they want no stamp there, nor does the transfer from the vendor to the trustee want more than a 10s. stamp.

Form 560. *CERTIFICATE of REGISTRATION of ORDER of COURT, confirming
Alteration of Objects or Form of Constitution.*

(Pursuant to Sects. 264 and 9 (6) of the Companies
(Consolidation) Act, 1908.)

No. --- .

The --- Stock Bank, Limtd, having by special resolution altered the form of its constitution by an Order made in the High Court of Justice, Chancery Division, bearing date the --- day of ---, I hereby certify the registration of the sd Order and of a printed copy of the memorandum and articles of association as substituted for its deeds of settlement.

Given under my hand at London this --- day of ---, 19 ---.

A. B.,

Registrar of Cos.

The above is the form of certificate issued where a company adopts, under sects. 264 and 9 (6) of the Companies Act, 1908 (replacing the Companies (Memorandum of Association) Act, 1890), a memorandum and articles in place of a deed of settlement.

POWERS OF ATTORNEY.

CHAPTER XV.

INTRODUCTORY NOTES.

Powers of attorney are frequently required in connection with companies. *Primâ facie* any company can appoint an attorney to act on its behalf, for the attorney is an agent, and, as a company can only act by agents, it has an implied power to appoint such agents (*supra*, p. 36).

Power for company to appoint.

Whether, however, in any particular case the directors of a company have power to execute a power of attorney on the company's behalf depends on the articles. The general rule is *Delegatus non potest delegare*. But directors are generally invested with wide general powers (see *supra*, pp. 746, 747), and in virtue of such powers they are usually in a position to grant a power of attorney; otherwise the sanction of a general meeting must be obtained. See *supra*, p. 37. Sect. 78 of the Act of 1908 gives express power to any company to appoint an attorney to execute deeds abroad. See also sect. 79, replacing the Companies Seals Act, 1864, *infra*.

The following extracts from the Conveyancing Acts, 1881 and 1882, should be borne in mind:

I. CONVEYANCING, &c. ACT, 1881.

46. (1) The donee of a power of attorney may, if he thinks fit, execute and do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

Execution under power of attorney.

(2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

47.—(1) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died, or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was

Payment by attorney under power, without notice of death, &c., good.

not at the time of the payment or act known to the person making or doing the same.

(2) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(3) This section applies only to payments and acts made and done after the commencement of this Act.

Deposit of
original
instruments
creating
powers of
attorney.

48.—(1) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court of Judicature.

(2) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

(4) An office copy of an instrument so deposited shall, without further proof, be sufficient evidence of the contents of the instrument and of the deposit thereof in the Central Office.

(5) General rules may be made for purposes of this section, regulating the practice of the Central Office, and prescribing with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein. [See ANNUAL PRACTICE.]

(6) This section applies to instruments creating powers of attorney executed either before or after the commencement of this Act.

II. CONVEYANCING ACT, 1882.

Effect of
power of
attorney, for
value, made
absolutely
irrevocable.

8.—(1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser—

(i) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy, of the donor of the power; and

(ii) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Effect of
power of

9.—(1) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable

for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser—

- attorney for value or not, made irrevocable for fixed time.
- (i) The power shall not be revoked for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and
 - (ii) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power, without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and
 - (iii) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.
- (2) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

As to the Construction of a Power of Attorney.

Such an instrument is strictly construed. Its operation may for example be limited by a recital, *e.g.*, where the instrument recites that the appointor is going abroad and desires to appoint an attorney to act during his absence, the power, however wide, may be held ineffective after the appointor's return, and therefore evidence of his non-return may have to be produced (see *Danby v. Coutts*, 29 C. Div. 500), unless, indeed, the instrument otherwise provides.

So, where the instrument gives authority to do certain specified things, or appears to have been intended to be used for certain specified purposes, any general words contained in it may be cut down in their operation, and held only to authorize the doing of what is incidental to that which is specifically mentioned. *Attwood v. Munnings*, 7 B. & C. 278; *Esdaile v. La Nauze*, 1 Y. & C. Ex. 394; *Harper v. Godsell*, 5 Q. B. 422; *Jonmenjoy v. Watson*, 9 App. Cas. 561; *Bryant v. Banque du Peuple*, (1893) App. Cas. 170; *Jacobs v. Morris*, (1902) 1 Ch. 816; 86 L. T. 275; *Hambro v. Burnand*, (1904) 2 K. B. 14.

Thus, under a power to sell, assign, or transfer certain shares or securities, the attorney cannot pledge them (*De Bouchout v. Goldsmid*, *ubi supra*; *Jonmenjoy v. Watson*, 9 App. Cas. 561); or barter them (*Guerreiro v. Serle*, 3 B. & Ad. 616); or sell them on credit (*Wiltshire v. Sims*, 1 Camp. 258). A power to buy, sell, and charter vessels does not include power to borrow (*Bryant v. Banque du Peuple*, *supra*); and a power to sell property gives no power to sell under a mortgage (*Hippisley v. Knee Bros.*, (1905) 1 K. B. 7; but see *Davy v. Waller*, 81 L. T. 107). A power to receive all salaries and money belonging to the principal does not enable the attorney

to negotiate or indorse a bill (*Hogg v. Smith*, 2 Taunt. 347); nor does a power given by a mortgagee to recover and receive all sums of money and "to sell any real or personal property now or hereafter belonging" to the principal enable the attorney to exercise the power of sale contained in the mortgage (*Dowson and Jenkins' Contract*, 1904, 2 Ch. 219); and a power to borrow for certain purposes does not import a general power to borrow. (*Jacobs v. Morris*, 1907, 1 Ch. 261.)

It was held, however, in *Bank of Bengal v. Macleod*, 7 Moo. P. C. 35, 71, that a power to sell, indorse, and assign, is a power to sell, a power to indorse, and a power to assign. And it seems that a power to sell a business as a going concern probably gives power to insert a clause in the contract restraining the vendor from competing within a certain distance. Per Lindley, L. J., *Hawkesley v. Outram*, (1892) 3 Ch. 359. Instructions by a principal to an agent to receive payment in cross cheques and not in cash must be explicit to bind a customer. *International Sponge Importers v. Watt*, (1911) A. C. 279. *Prima facie* the death of the principal *ipso facto* revokes the power. *Watson v. King*, 4 Camp. 272.

So also the bankruptcy of the principal is *prima facie* a revocation. *Parker v. Smith*, 16 East, 382; *Elliott v. Turquand*, 7 App. Cas. 79.

In equity, however, apart from the above events, a power of attorney for valuable consideration cannot be revoked. *Bromley v. Holland*, 7 Ves. 28; *Abbott v. Stratton*, 3 Jo. & Lat. 613; *Carter v. White*, 20 C. D. 228.

Thus where an agreement is entered into for sufficient consideration, and either forms part of a security or is given for the purpose of securing some benefit to the donee of an authority, the authority is irrevocable. *Frith v. Frith*, (1906) A. C. 254.

As to validity of acts done before notice of revocation, see *Salle v. Field*, 5 T. R. 215; *Elliott v. Turquand*, 7 App. Cas. 79; *Oriental Bank*, 28 C. D. 634; *Salton v. New Beeston Cycle Co.*, (1900) 1 Ch. 43, and the Conveyancing Act, 1882.

A power of attorney executed in one country with a view to its use in another country is *prima facie* to be construed in accordance with the law of the country where it is to be used. *Brazilian Submarine Telegraph Co., Limited*, 63 L. T. 275; 39 W. R. 65.

The Court will not take judicial cognizance of the notarial seal of a notary public of a foreign country. *Earl's Trust*, 4 K. & J. 300. There must be an affidavit verifying the attestation, or a certificate, e.g., by the British consul. *Haggett v. Miff*, 5 D. M. & G. 910; *Cooke v. Welby*, 25 C. D. 769; *Magee*, 15 Q. B. D. 332; and see Ann. Pr.; notes to Ord. XXXVIII. r. 6 of the R. S. C.; and Stringer's Oaths.

In *Lord Kinnaird v. Lady Saltoun* (1816), 1 Madd. 227, a power of attorney executed in Paris in the presence of two witnesses, and

authenticated by a notary public there, was ordered to be acted on in England on an affidavit being forthcoming that the notary was such. According to the law of England, the mere production of the certificate of a notary public stating that a deed had been executed before him would not in any way dispense with the proper evidence of the execution of the deed. Per Lord Cairns, L. C., *Nye v. Macdonald*, 1 R. 3 P. C. 331.

Prima facie those who deal with a person acting under, or purporting to act under, a power of attorney are bound to inquire into the authenticity of the power. *De Bouchout v. Goldsmid*, 5 Ves. 213, per Lord Eldon; *Sheffield v. Joint Stock Bank*, 13 App. Cas. 333; *Bryant v. Banque du Peuple*, (1893) App. Cas. 170; and see sect. 25 of 1708 of Exchange Act, 1882, as to bills and notes.

But where the agent is acting under a written authority, and what he does comes within the terms of that authority, the principal cannot repudiate the act on the ground that the agent acted in his own interests and not in those of the principal, and this rule applies even where the other party to the transaction was not aware of the written authority. *Hambro v. Burmand*, (1904) 2 K. 10.

And where the agent has powers exercisable in special circumstances, it seems that a person dealing with him *bona fide* need not inquire whether those special circumstances have arisen. *Montaignac v. Shilla*, 15 App. Cas. 357.

By sect. 77 of the Act of 1908, "A bill of exchange or promissory note is to be deemed to have been made, accepted, or indorsed on behalf of a company if made, accepted, or indorsed in the name of or by or on behalf of or on account of the company by any person acting under its authority." But, according to *Premier Industrial Bank v. Crabtree*, (1909) 1 K. B. 106, the authority in such case must be an authority in fact. Surely, however, the rule in *Royal British Bank v. Turquand*, 6 E. & B. 327, *supra*, p. 79, applies, and entitles a person dealing with the company in good faith to assume that the person signing on the company's behalf is duly authorized. That rule applies to contracts made under sect. 76, and the wording of the two sections is substantially the same.

As to a stockbroker's liability to indemnify the Bank of England where he had induced the bank to act on a forged power of attorney, see *Olicer v. Bank of England*, (1902) 1 Ch. 610; also *Bank of England v. Cutler*, (1908) 2 K. B. 208; and S. C., 25 T. L. R. 509.

Although the execution of a deed by an attorney may be presumed from the antiquity of the deed, there is no presumption, if the power of attorney is not produced, that the attorney was duly authorized. *Drey*, (1897) 1 Ch. 164.

An attorney is an agent, and is therefore subject to the well settled rule that an agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency beyond his proper remuneration (see *supra*, p. 732), nor is

Attorney
accountable
for profits.

be allowed to put himself in a position in which his interest and duty will—or may—conflict (*Parler v. McKenna*, 10 Ch. 96, 118; *Gray v. Ford*, (1896) A. C. 44; *King v. Howell*, 27 T. L. R. 114, C. A.), and he is accountable for any secret profits (see the cases collected *supra*, p. 732); so also if he delegates his authority to a sub-agent that sub-agent may be liable to the principal for any secret benefit he obtains. *Powell & Thomas v. Evan Jones & Co.*, (1905) 1 K. B. 11.

Powers of attorney, whether executed here for use abroad, or executed abroad for use here, are usually executed in the presence of a notary public, who certifies the execution. If executed abroad a further certificate should be obtained from the British consul identifying and certifying as to the status of the notary; and a power of attorney executed here may be fortified by the certificate of the consul or agent-general of the foreign country or colony where it is to be used. The great point is to afford those who deal with the attorney the fullest assurance that the instrument is authentic; and it is desirable with this view in each case to ascertain whether the local law or practice requires any special formalities.

Under the Stamp Act, 1891, a power of attorney generally requires a 10s. stamp.

PRECEDENTS

POWER to MANAGE PROPERTY ABROAD.

TO ALL TO WHOM THESE PRESENTS SHALL COME, the — Coy. Limtd, **Form 581.**
 having its registered office at, &c., and that it called "the Coy.," sends Ordinary

WHEREAS the — on, &c., was incorporated under the Coa (Con-
 solidation) Act, 1908, as a coy limited by shares; AND WHEREAS the
 Coy is desirous of making such appointment as is hereinafter contained.
 THESE PRESENTS WITNESS, that the Coy do hereby appoint A. B.,
 of, &c., and E. F. of, &c., and any two of them, the
 Coy in and on behalf of the Coy to do all
 such deeds and instruments, and all such deeds and instruments,
 and such attorney or any two of them, may be neces-
 sary in connection with carrying on and transacting the business
 of the Coy. AND THE COY DO HEREBY EXPRESSLY DECLARED, that with-
 out prejudice to the general powers heretofore conferred, the sd attorneys
 or any two of them, shall have power in the name and on behalf of
 the Coy to do all or any of the following things:

Authority to fifteen persons jointly or severally to execute such policies as
 they think proper if them should jointly or severally think proper was held to cover
 a policy issued by four of them. *Guthrie v. Armstrong* (1822), 5 B. & Ald.

purchase or otherwise acquire any real or personal ppty
 for the purposes of the Coy

To work, manage and develop the ppty of the Coy for the time
 being in — in such manner as they may think fit.

To let on lease, mortgage, charge, exchange, improve, or other-
 wise deal with the ppty of the Coy for the time being in —, to
 borrow money, and to draw, accept and indorse bills of exchange,
 promissory notes, and other negotiable instruments

4. To appoint any managers, inspectors, workmen —
 such terms as may seem expedient, and to remove — any
 person so appointed.

5. To collect rents, royalties, and other moneys due to the Coy, and
 to distrain for rents or royalties in arrear.

6. To commence and prosecute, and to defend, compound and
 abandon all actions, suits, claims, demands, and proceedings in regard

Form 561 to the ppty of the coy for the time being in , or otherwise , relation to the affairs of the coy.

7. To adjust, settle, compromise, and submit to arbitration all accounts, debts, claims, demands, disputes, and matters which may subsist or arise between the coy and any person or persons in

8. To make and give receipts, releases, and other discharges for moneys payable to the coy, and for any claims and demands of the coy

9. To carry into effect any agreements under the seal of or otherwise binding on the coy

10. To enter into, make, sign, and do all such contracts, agreements, receipts, payments, assignments, transfers, conveyances, mortgage, assurances, instruments and things as may in the opinion of the sd attorneys, or any two of them, be necessary or convenient for carrying on the business of the coy in

AND IT IS HEREBY DECLARED, that the sd attorneys, in exercising the powers hby conferred on them, shall conform to the regulations and directions for the time being imposed on or given to them by the coy, and may sub-delegate to any person or persons any of the powers hby conferred, upon such terms and conditions as may seem expedient, and may at any time revoke any such sub-delegation. PROVIDED ALWAYS, that no person dealing with the sd attorneys, or any of them, or any such sub-delegate, shall be concerned to see or inquire whether they are or are not acting in accordance with such regulations or directions and notwithstanding any breach of such regulations or directions committed by the sd attorneys or sub-delegates, or any of them, in regard to any act, deed, or instrument, the same shall, as between the coy and the person or persons dealing with such attorneys or sub-delegates, or any of them, be valid and binding on the coy to all intents and purposes.

IN WITNESS, &c.

A power of attorney to be sent abroad should be attested by a notary public and it may be well to ascertain from the consul or agent-general of the place of destination whether any special formalities have to be observed.

POWER under SECT. 79 of the COMPANIES CONSOLIDATION ACT, 1908 (replacing the COMPANIES SEALS ACT, 1864)

Form 562. To ALL TO WHOM THESE PRESENTS SHALL COME, the Coy, Limited whose registered offices are at, &c., sends greeting.

Foreign seal. WHEREAS the coy is a coy incorporated under the Cos (Consolidation) Act, 1908, whose objects comprise the transaction of business in countries not situate in the United Kingdom. AND WHEREAS the coy has caused to be prepared an official seal for use in the city of ,

in the colony of _____, and an impression of such seal is contained in the schedule hto. AND WHEREAS by its arts of assen the coy is expressly authorized to exercise the powers given by sect. 79 of the Companies (Consolidation) Act, 1908. AND WHEREAS under the sd articles the directors of the coy have power from time to time to provide for the management of the affairs of the coy abroad in such manner as they may think fit, and in particular to appoint and remove any local directors, managers, and agents, and delegate to such persons such of the powers and authorities of the directors as they consider expedient. AND WHEREAS the directors of the coy, in accordance with such powers, have duly appointed A. B., of, &c., C. D., of, &c., E. F., of, &c., G. H., of, &c., local directors for the transaction of the business of the coy in _____. AND WHEREAS the coy is desirous of empowering such local directors to use and affix the sd official seal as hitherto. Now KNOW YE that the _____ Coy, Limtd, doth hereby, in exercise of the power given to it by sect. 79 of the Companies (Consolidation) Act, 1908, and of any other power or authority thereunto enabling it, authorize and empower the sd local directors, or any two of them, to affix the sd official seal of the coy to any deed, contract, or other instrument to which the coy is or shall be made a party in the city of _____ a/sd. *Power to sub-delegate*

Form 562

T. statum

IN WITNESS, &c.

THE SCHEDULE

POWER in relation to MINING PROPERTY in NEW ZEALAND

TO ALL TO WHOM THESE PRESENTS SHALL COME. The _____ Gold Mine, Limtd (hitherto called "the Coy"), whose registered office in England is at _____, London, sends greeting:

Form 563.

New Zealand.

WHEREAS the coy is a coy incorporated in England under the Companies (Consolidation) Act, 1908, whose objects comprise the acquiring and working of claims or mines in New Zealand, and carrying on business there. AND WHEREAS copies of the certificate of incorporation and of the memorandum and arts of assen of the coy with which the coy was registered, including copies of all special resolutions which have been passed for altering, adding to, or modifying the sd arts of assen, and a copy of the Companies (Consolidation) Act, 1908, is annexed hto. AND WHEREAS the coy has caused to be prepared an official seal for use in the Colony of New Zealand, and an impression of such seal is contained in the schedule hto. AND WHEREAS the coy is desirous of appointing A. B., of _____, to be the attorney of the coy for the purposes following:—

Wide powers.
Official seal.

Form 563. Now THESE PRESENTS WITNESS that the coy doth hby appoint the sd — or other the members for the time, and from time to time, of the sd local board or any two members from time to time of the sd local board the attorneys of the coy in the name and on behalf of the coy to do all or any of the things following:

1. To keep in New Zealand a branch register of members of the coy resident in such colony in accordance with the provisions of sects. 34, 35 of the Companies (Consolidation) Act, 1908.

2. To exercise the powers conferred by and to comply with any regulations made under the requirements of the New Zealand Act known as the Mining Cos Amendment Act, 1898, and in particular to keep any branch register required to be kept, and to register transfers of shares entered in such branch register, and to issue certificates of title to the holders of shares entered in such branch register.

3. To perform and observe on behalf of the coy the provisions of the Mining Act, 1891, the Mining (Act Amendment) Act, 1894, the Mining Cos Acts Amendment Act, 1897, and any other Acts of the New Zealand Legislature applicable to the coy.

4. To procure the transfer to the coy of all ppty in the sd colony to which the coy is or may from time to time become entitled.

5. To work and develop and turn to account all claims, mines, and other ppty of the coy in the sd colony.

6. To lease, exchange, mortgage, charge, sell, and dispose of all or any of the ppty or rights of the coy in New Zealand.

7. To purchase and sell ores, metals, goods, wares, merchandize effects, and other things necessary or convenient for carrying on the business of the coy in New Zealand.

8. To appoint and at their discretion to remove or suspend such managers, secretaries, clerks, servants, and other employes of the coy in New Zealand for permanent, temporary, or special services as such attorneys may from time to time think fit, and from time to time to vest in them and delegate to them such of the powers hby conferred on the sd attorneys as they may think expedient, and to determine their duties and fix the salaries and emoluments of such employes, and to revoke or vary from time to time such delegation or determination.

9. To pay into and draw upon any bank or banks in New Zealand, and to draw out of such bank or banks any moneys for the time being standing to the credit of the coy or which the coy may be entitled to receive in New Zealand, and to apply the same to the payment of all expenses incurred hereunder.

10. To draw, subscribe, indorse, and negotiate all cheques, bills of exchange, promissory notes, bills of lading, and other negotiable or mercantile instruments for the purposes of the coy in New Zealand.

11. To raise or borrow or secure the payment of any money on behalf of the coy in New Zealand.

12. To demand and receive all and every sum and sums of money,

goods, chattels, and effects due and owing and belonging to the coy in New Zealand, and upon receipt thof to give and execute effectual releases and discharges for the same.

Form 563.

13. To commence and prosecute, and to defend, compound, and abandon all actions, suits, claims, demands, and proceedings in relation to the ppty.

14. To adjust, settle, compromise, and submit to arbitration all accounts, actions, suits, proceedings, claims, demands, disputes, and matters which may subsist or arise between the coy and any person or persons in New Zealand.

15. To carry into effect any agreements under the seal or otherwise binding on the coy whether made by the sd attorneys on the coy's behalf or otherwise.

16. To affix the sd official seal to any deeds, contracts, or other instruments to which it may be, in the opinion of the sd attorneys, desirable to affix such seal in New Zealand.

17. To enter into, make, sign, and do all such things, contracts, agreements, receipts, payments, assignments, transfers, conveyances, mortgages, releases, assurances, instruments, notices, and things as may in the opinion of the sd attorneys be necessary or convenient for procuring for the coy any legal recognition or status as a body corporate in New Zealand or for carrying on the business of the coy there.

18. AND IT IS HBY DECLARED, that the sd attorneys, in exercising the powers hby conferred on them, shall [*etc., as in Form 561, supra*, p. 1162].

IN WITNESS, &c

POWER OF ATTORNEY to LOCAL BOARD

TO ALL TO WHOM THESE PRESENTS, &c., the --- Coy, Limtd, sends greeting: WHEREAS [*recite registration branch office in N.*]: AND WHEREAS the directors of the coy, in exercise of the powers vested in them by the arts of asson of the coy, have immediately before the execution hof passed at a meeting of such directors a resolution constituting a local board, hnfr called a local board, to manage and carry on the business of the coy in N., and appointing — to be the first members of such local board, and a copy of such resolution is set forth in the schedule hto. Now these presents witness and declare that the coy doth appoint the sd — and/or other the persons for the time being constituting the local board asfd to be the attorneys of the coy in the name and on behalf of the coy to do all such acts and things as in the case of the sd attorneys should be necessary or

Form 564.

Power of
attorney to
local board.

Form 564. convenient for managing and carrying on the business of the coy in N.; and it is expressly declared, &c.:—

- (1) To appoint secretaries, officers, &c.
- (2) To make and give receipts, &c.
- (3) To open a banking account at the — Bank, in Dublin, in the name of the coy, and to pay into such account all moneys, balance, and notes of the coy, and to draw on such account, but not to overdraw the same, to work, manage and develop the business of the coy in Ireland.
- (4) To borrow money, and to draw, accept, and indorse bills of exchange and promissory notes, and other negotiable and transferable instruments.
- (5) To collect debts, rents, royalties, and other moneys from persons in Ireland due to the coy, and to sue for or otherwise enforce payments thereof.
- (6) To invest the procured dividends, &c.

And it is hereby declared, &c.

Power from reconstructed ENGLISH COMPANY to obtain INCORPORATION and carry on Business in SOUTH AFRICA.

Form 565. To ALL TO WHOM THESE PRESENTS SHALL COME, the South African Coy, Limtd (hmftr called the new coy), having its registered office at —, in the City of London, sends greeting: WHEREAS the new coy was incorporated under the British statutes, known as the Cos Acts, 1862 to 1900, on or about the — day of —: AND WHEREAS a certified copy of the certificate of incorporation of the new coy is annexed hto: AND WHEREAS a certified copy of the memorandum and articles of association of the new coy is also annexed hto: AND WHEREAS on the — day of —, 19—, the new coy entered into an agreement with — & Co., Limtd (hmftr called the old coy), and A. B., the official liquidator of the old coy, and a certified copy of that agreement is also annexed hto: AND WHEREAS the recitals contained in the said agreement are correct: AND WHEREAS the new coy has duly executed a deed poll in accordance with clause — of the scheme set forth in the schedule to the said agreement: AND WHEREAS the new coy is now entitled to a transfer of the assets of the old coy in accordance with the terms of the said agreement: AND WHEREAS the new coy is desirous of making such appointment as hmftr contained.

Reconstruction.

NOW THESE PRESENTS WITNESS that the new coy hereby appoints C. D., of, &c., to be the attorney of the new coy, in the name and on behalf of the new coy to do all such acts and things, and to execute and sign all such deeds and documents as may, in the opinion of the said

attorney, be necessary or convenient for carrying on the business of the new coy in South Africa; and it is hby expressly declared that, without prejudice to the general powers hbefore conferred on the sd attorney, such attorney shall have power, in the name and on behalf of the new coy, to do all or any of the following things:

[Set out specific powers.]

IN WITNESS, &c

Form 565.

Power from an ENGLISHMAN going Abroad; an AGREEMENT for SALE of PROPERTY to a COMPANY to be carried out.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, —, of —, send greeting: WHEREAS [recital of agreement]: AND WHEREAS I am about to proceed to S., as provided by the sd agreemt as aforesaid, and am desirous of appointing an attorney in manner hinftr appearing. NOW THESE PRESENTS WITNESS that I, the sd A., do hby appoint B., of —, to be my attorney, in my name and on my behalf to manage my affairs in so far as the same are or may be directly or indirectly connected with or arising out of my connection with the sd coy, and for that purpose to do all such things as my sd attorney shall in his absolute discretion think expedient in my interest; and without prejudice to the general powers hbefore conferred, I EXPRESSLY DECLARE that my sd attorney shall have power to do any of the following things, that is to say:

Form 566.

In relation to particular company.

1. To act on my behalf in relation to the sd agreemt, dated the — day of —, and to enforce the carrying into effect by the coy of its obligations thereunder.

2. To accept the allotment of shares in the capital of the coy as provided by the sd agreemt, and to receive all dividends payable in respect thof, and to give valid receipts for the same.

3. To sell or otherwise dispose of and deal with all or any of the sd shares for any kind of conson, and upon any terms whatsoever, and to give valid and effectual receipts for any moneys or other conson payable or receivable in respect thof.

4. To bring, prosecute, conduct, compromise, or abandon any actions or proceedings.

5. To make any compromises or arrangements.

6. To vary such agreemt, or to make any further or supplemental or substituted agreemt or agreemts.

7. To execute and sign all deeds, notices, protests and documents.

8. To invest and deal with any moneys belonging to me.

AND IT IS HBY DECLARED that these presents shall be irrevocable for the period of twelve calendar months from the date hof, and there-

Form 566. after the same shall remain in force, until duly revoked, and that the sd attorney in exercising any of the sd powers conferred on him shall, &c. See Form 561.

Form 567. *Power by MINE OWNER going Abroad to concur in converting*
PARTNERSHIP BUSINESS into a COMPANY.

Conversion of
business into
a company.

TO ALL TO WHOM THESE PRESENTS SHALL COME, A., of —, sends greeting: WHEREAS the sd A. is carrying on business in partnership with B. and C. at — and elsewhere, under the style and firm of A., B., C. and Co.: AND WHEREAS the business of the sd partnership firm is that of colliery owners: AND WHEREAS it is proposed that the sd partnership undertaking, and the assets and liabilities thof, shall be transferred to a joint stock coy to be registered with limtd liability under the Cos (Consolidation) Act, 1908: AND WHEREAS the sd A. is about to go abroad, and desires to make the appointment huftr expressed.

NOW THESE PRESENTS WITNESS that the sd A. doth hby appoint N., of —, to be the attorney of the sd A., in his name and on his behalf to concur with the sd B. and C. in arranging the terms and conditions on which, and the manner in which, the sd undertaking shall be transferred to such coy, and to carry out the arrangement so made in such manner as to the sd attorney in his absolute discretion shall seem expedient.

AND IT IS HBY EXPRESSLY DECLARED that without prejudice to the general powers huftr conferred on the sd attorney, such attorney shall have power in the name and on behalf of the sd A. to do all or any of the following things, that is to say:—

1. To arrange the terms of the memdum and arts of asson of such coy.
2. To arrange what assets and liabilities of the sd partnership undertaking shall be made over to the sd coy, and whether the leaseholds or any pt thof shall be made over by assignment or by way of sub-demise, or how otherwise, and the terms and consons of all conveyances, assignments, sub-demises, and other instruments.
3. To arrange the consen for the transfer, and whether the same shall consist of cash, shares, debenture stock, debentures, or other consen, and when the transfer shall be completed, and when possession shall be given, and either with or without power of rescission, and whether the sd shares shall be freely transferable, or subject to any restrictive conditions.
4. To arrange how the sd persons shall be secured and indemnified

against their liabilities under or in respect of any leases, agreements, **Form 567.** and contracts in relation to the sd partnership undertaking.

5. To borrow or raise money on the security of the sd premises to be applied for any of the purposes hof.

6. To give complete receipts and discharges for all moneys, shares, debentures, debenture stock, or other consen for any such transfer.

7. To arrange as to the distribution amongst the partners of all moneys, shares, debentures, debenture stock, and other consen for the transfer.

8. To arrange with all landlords and others for their consent to the assignment or sub-demise of any leasehold premises, pt of the assets of the sd partnership undertaking.

9. To arrange the terms for the dissolution of the sd partnership undertaking, and for the winding-up of the affairs thof.

10. To assent from time to time to any modifications of any agreements or contracts, or transfers, and in the exercise of any power of rescission contained therein to rescind the same.

11. To obtain legal advice, and to act thon or not as may seem expedient.

12. Generally to do all such acts and things not specifically mentd as in the opinion of the sd attorney may be necessary or convenient for any of the purposes afsd.

AND IT IS HBY DECLARED that this power of attorney shall be irrevocable for the period of one year from the date hof, and, &c. See Form 566.

POWER from ENGLISH COMPANY to execute Debenture Security
CAPE COLONY.

KNOW ALL MEN BY THESE PRESENTS that we, The — Coy, Limtd, **Form 568.** of —, do hby nominate and appoint —, of —, and —, To create debenture security. of —, jointly, or either of them singly, with power of substitution, to be our true and lawful attorneys or attorney, in our name, place, and stead, to appear at the office of the registrar of deeds of the colony of the Cape of Good Hope, in Capetown, in the sd colony, and then and there as our act and deed to declare as follows, namely:
THAT WHEREAS we the sd coy have, under the powers conferred by our memorandum and arts of assen, borrowed a sum of £ — on debentures issued in accordance with the law of England, under seal of the sd coy: AND WHEREAS, to secure the due repayment of such sum of £ —, we on the — day of —, have entered into an indenture or deed of trust with the — in their capacity of trustees for the debenture holders, by which deed of trust it is stipulated, *inter alia*, that we will, with all convenient speed, and to the satisfaction of the trustees afsd, give further effect to the provisions of the same by doing all such

Form 568.

assurances and things according to the laws of the colony of the Cape of Good Hope as may be required by the trees, to vest in them the powers and authorities expressed by the sd trust deed to be vested in them: AND WHEREAS to carry out such stipulation we have agreed to pass a mortgage bond to be executed in accordance with the powers and authorities hby given: Our said attorneys, or attorney, shall therefore further declare under renunciation of the benefits, *non causâ debiti* and *non numeratâ pecuniâ*, the force and effect of which renunciation we are aware of, that we the sd coy are truly and lawfully indebted to the sd ---, as trees for debenture holders in our coy, and the trees or tree for the time being, in the sum of £--- sterling, arising from and being for so much money duly lent and advanced to our coy on the conditions and subject to the terms and provisions of the afsd deed of trust, dated the --- day of ---, in the year of our Lord ---, a copy whereof is hereunto annexed and marked A., the terms and provisions of which deed of trust shall be considered and taken to be inserted in the sd mortgage bond, and our sd attorney or attorneys shall further declare that, in the event of the sd trees or tree for the time being, under the sd deed of trust, so desiring, they shall be entld, in lieu of and in addition to the remedies and rights given to them by the sd deed of trust, to take action in any court of law of competent jurisdiction, either in England or in this colony, or in both, to recover the sd sum of £--- sterling, or the balance thof, and all interest due at such time upon the happening of any event which under the sd deed of trust would entitle the trees or tree for the time being to enter upon and take possession of the mortgaged premises, and to sell, collect, and convert in'o money the same, or any part thof, and for the security of the afsd sum of £---, and interest thereon; and for the course of recovering the same, we, the sd coy, empower our attorneys, or attorney, to mortgage and hypothecate, and further to appoint generally all the ppty of us the sd coy such as we are already, or may at any time or times hereaf or become, possessed of, moveable and immoveable, personal and real, without exception, and submit them all and the choice thof to constraint and execution as the law directs.

The above is based on a form settled by the Attorney-General of the colony some years since.

Power, from MINING OWNER abroad, for promoting COMPANY in ENGLAND to purchase the Property.

Form 569.

Promotion of
com. any in
England
and to sell.

TO ALL TO WHOM THESE PRESENTS SHALL COME, A. B., of, &c., sends greeting: WHEREAS A. B. is the registered proprietor in --- of certain mining claims, whereof the following are the particulars, namely: The exclusive right to, &c., &c., granted by, &c. [Instru-

ment or licence giving the concession.] AND WHEREAS C. D., of, &c., **Form 569.**
about to proceed to England, and A. B. has determined to appoint
him to be his attorney for the purposes and in manner hereinafter appearing.
Now THESE PRESENTS WITNESS that A. B. doth hereby appoint
C. D. to be the attorney of A. B., in his name and on his behalf
to do all or any of the things following, that is to say:

1. To contract for the sale of the sd mining claims on such terms
as C. D. may think fit.

2. To make any such sale, either on conditions or unconditionally,
to any person, or partnership, or assen, or coy, whether incorporated
or not.

3. To arrange the terms of sale, and, in particular, the price or
consen, and whether the same shall consist of cash, shares, debentures,
debenture stock, or other consen, and when the purchase shall
be completed, and when the ppty shall be conveyed, and either with
or without power of rescission.

4. To execute all conveyances, transfers, or other assurances for
carrying the sale into effect.

5. To promote any coy for the purpose of its acquiring the sd ppty,
and, in particular, to subscribe for any shares or securities of any
such coy, and to pay, or contract to pay, the whole or any part of
the expense of forming and floating any such coy, and of placing
the capital thof, and to grant, or agree to grant, to any promoter
any remuneration, whether in cash, shares, or otherwise, for services
rendered, or to be rendered, in relation to any such coy, and to give
any guarantee as to the placing or subscription of any such coy's
capital or securities.

6. To borrow or raise money on the security of the sd premises, to
be applied for any of the purposes aforesaid.

7. To give complete receipts and discharges for all moneys, shares,
debentures, or other consen for any such sale, or borrowed or raised
as aforesaid.

8. To assent to any modification of any agreement or contract for
sale, and, in the exercise of any power of rescission contained therein,
to rescind the same, and to resell the premises.

9. To take proceedings to enforce or rescind, or obtain damages for
the breach of any such agreement or contract, and to compromise,
settle, discontinue, or abandon any such proceedings.

10. To do all such other things as may seem expedient in the
exercise of any of the above powers.

AND IT IS HEREBY DECLARED that the sd attorney shall be at liberty, in
contracting for the sale of the sd mining claims, or in promoting any
coy for the purpose of its acquiring the same, to make stipulations
for his own remuneration out of the consen for such sale or acquisition,
whether such consen shall be in cash, shares, debentures, debenture
stock, or otherwise, and either directly with such coy, or with
any person, persons, syndicate, or other coy, which may promote

Form 569. such coy, but so nevertheless that such remuneration shall not exceed — p.c. of the principal sum or nominal value of the shares, debentures, or other conson receivable by the said A. B. or his assigns in respect of such sale: AND ALSO that the said attorney may accept office as a director of any such coy, at such remuneration for his services and on such terms as he may arrange. AND IT IS HBY ALSO DECLARED, &c. *as in Form 561.*

IN WITNESS, &c.

If the attorney is to be at liberty to obtain remuneration as above, express power must be given, for, being an agent, he cannot otherwise make any such bargain. See *supra*, p. 732. Sometimes the power of attorney fixes a reserve price, and says that the attorney may get anything he can beyond that. See also the form next following.

POWER to LOCAL BOARD in COLONY *vide*

Form 570.

To local board.

TO ALL TO WHOM THESE PRESENTS SHALL COME, The — Coy, Limited of — (hntfr called the coy), sends greeting. WHEREAS the coy was incorporated in England on the — day of —, under the British statute known as the Cos (Consolidation) Act, 1908, with the object amongst others, of, &c. AND WHEREAS the directors of the coy (hntfr referred to as the board of directors), acting under the powers in that behalf vested in them by the arts of asson of the coy, have appointed A., B., C., and D., all of —, South Africa, to be a local board in South Africa, with such powers, authorities, and discretions as might be from time to time delegated to them by the Board of Directors. AND WHEREAS it is desirable to vest in the said A., B., C., and D. the powers, authorities, and discretions hntfr expressed to be vested in them. NOW THESE PRESENTS WITNESS and declare that the coy hby appoints the sd A., B., C., and D., and every two and every three of them, to be the attorneys of the coy in South Africa, on behalf of the coy to do all such things as in the opinion of such attorneys may reasonably be necessary for the purposes of carrying on the coy's business in South Africa, and, without prejudice to the generality of the foregoing expressions, to do all or any of the things following, that is to say:

- (1) To accept, execute, and authenticate, and to register and record in the proper offices in South Africa, all proper transfers and assurances to the coy, or as it may direct, of any ppty real or personal, which the coy may from time to time acquire.
- (2) To negotiate and make with persons and coys, authorities and others requiring the supply of — such contracts and arrangements as may seem to the sd attorneys expedient.

- (3) To apply for and obtain all such concessions, sanctions, powers, and authorities from any government, municipal, or local authority in South Africa as may be desirable for carrying on or enlarging or extending the operations of the coy.
- (4) To do all such things as in the opinion of the sd attorneys may be necessary or convenient for protecting and furthering the interests of the coy in South Africa.
- (5) To appoint, employ, and instruct solers and counsel for all or any of the purposes of this power, and for such other purposes as the sd attorneys may think expedient in the interest of the coy.
- (6) To open, in the name of the coy, one or more accounts with such bank or banks in South Africa as the sd attorneys may think fit, and to pay into such account or accounts all moneys of the coy in the hands of the sd attorneys, and to draw out of such bank or banks any moneys of the coy which may be standing to the credit of such account or accounts (but not to overdraw such account or accounts).
- (7) To subscribe, indorse, and negotiate all cheques, bills of exchange, promissory notes, bills of lading, and other negotiable and mercantile instruments payable or receivable by or for the purposes of the coy.
- (8) To insure all or any pt of the ppty of the coy which may be of an insurable nature against such risks as the sd attorneys may think fit to insure against, and to pay the premiums on such insurances.
- (9) To open a suitable office at _____, and to engage and from time to time dismiss such clerks as may be requisite for such office.
- (10) To commence, prosecute, and sue and be sued in respect of, defend, compound, and abandon all actions, suits, claims, demands and proceedings, and to appear and be pleaded in any Ct in any civil or commercial proceedings whatsoever, or before any arbitrator or persons having, by law or consent of parties, authority to hear evidence.
- (11) To adjust, settle, compromise, and submit to arbitration all actions, suits, claims, disputes, and matters which may arise at any time as afd between the coy and any person or persons in South Africa.
- (12) To enter into and make, execute, and do all such contracts, agreements, receipts, payments, instruments, and things whatsoever, and also all such assurances, transfers, and conveyances to the coy, and to do such other things as may, in the opinion of the sd attorneys, be necessary or convenient for any of the purposes of this power.

Form 570.

Provided, &c. [as in Form 561].

*Power from the Receiver and Manager under Order of Court
for CARRYING ON the BUSINESS of the COMPANY abroad*

Form 571.

By receiver
and manager
in debenture
holders'
action.

TO ALL TO WHOM, &c., A., of — sends greeting (*recitals of debenture covering deed*). AND WHEREAS shortly after the execution of sd indenture the coy issued divers debentures framed in accordance with the form set forth in the second schedule to the sd indenture; AND WHEREAS on or about the — day of —, B. suing on behalf of himself and all other holders of mortgage debentures of the dit coy commenced an action in the Chancery Division of His Majesty's High Ct of Justice in England against the coy, and S. H. B. & H. claiming to have the trusts of the sd indenture carried into execution under the order and direction of the Ct and for the appointment of a receiver and manager of the ppty and undertaking of the coy; AND WHEREAS by a judgment of the sd Ct made in the sd action on, &c., it was declared that the plt and the other holders of mortgage debentures of the coy issued under and in pursuance of the sd indenture of, &c., were entitled to a first charge on the ppty and undertaking of the coy comprised in the sd deed for securing the principal moneys and interest in the sd mortgage debenture, and it was amongst other things ordered that the sd A. be appointed (on his giving security) receiver and manager on behalf of the sd plt and other debenture holders of the coy of all the property and assets of the coy comprised in and subject to the trusts of an indenture dated, &c. and also to manage the business of the coy comprised in the sd securities until further order; AND WHEREAS pursuant to the sd judgment the sd A. has given security in the sum of £—, as appears by the certificate of the chief clerk, dated, &c.; AND WHEREAS the sd A. as such receiver and manager is desirous that F. of K., South Africa, merchant, should be appointed as attorney in the manner and for the purposes here appearing; AND WHEREAS by an order made in the sd action on the application of the sd plt and dated the — day of —, it was ordered that the sd A. should be at liberty to execute the power of attorney which had been settled and approved by the judge as a proper power of attorney, as appeared by the memorandum signed by the Master, meaning thereby this power of attorney. NOW THESE PRESENTS WITNESS that in pursuance of the sd order, the sd A. as such receiver and manager as aforesaid doth hereby appoint the sd F. the attorney of the sd A. in the name and on behalf of the sd A. as such receiver and manager as aforesaid, to take possession of, protect, and collect all the ppty of the coy in South Africa, and to carry on and manage the coy's business and affairs there; AND IT IS HEREBY EXPRESSLY DECLARED that without prejudice to the general power heretofore conferred, the sd attorney shall have power in the name and on behalf of the sd A. as such receiver and manager as aforesaid, to do all or any of the following things (that is to say), &c.

**Power from Liquidator appointing Three Persons to
Carry on the Business in Bombay.**

To ALL TO WHOM THESE PRESENTS SHALL COME, The — Coy in- **Form 572.**
corporated, &c., and also A. B., of, &c., the liqr of the sd coy, send
greeting.

*Recitals of winding-up order of the company and appointment of
L. B. as liquidator, and approval of these presents by Registrar.*

NOW THESE PRESENTS WITNESS that the coy and the liqr do, and each
of them doth hby, constitute and appoint E. F., G. H., and L. K., and
every two of them without the third, and every one of them without
the other two, to be the lawful attorneys and attornes of the coy and
of the liqr, and each of them in the names or name of the coy and
of the liqr or either of them in the Presidency of Bombay, *general
powers*, and without prejudice, &c., to do all or any of the following
things, that is to say:—

1. To bring or defend any action, suit, or proceeding, or other
legal proceedings, civil or criminal, on behalf of the coy
for the protection or recovery of any assets of the coy.
2. To carry on the business of the coy so far as may be necessary
for the beneficial winding-up of the same, &c., &c.

**Power from Shareholder for Attorney to appoint Proxies at
Meetings.**

THE — COY, LIMITED

KNOW ALL MEN BY THESE PRESENTS, that I, A. B. of, &c., a share- **Form 573.**
holder in the above-named coy, do hby appoint C. D. of, &c., to be my
attorney, and in my name and on my behalf to appoint any person or
persons to act as my proxy at any general meeting of the above-
named coy which may be held before the — day of —, 19—, and
at which I shall not be present in person or by proxy appointed under
my own hand; and I authorize my sd attorney at his discretion, to
revoke any appointment made by him under these presents; and I
declare that this power of attorney shall be operative only up to and
including the sd — day of —, 19—.

IN WITNESS, &c.

Where the articles of a company are framed as above (p. 705), it is open to a
shareholder to execute a power of attorney in this form, but where the clause as
to proxies is as in the old Table A of 1862, it was not clear that an instrument
of proxy could be signed by the shareholder's attorney, for Table A. (clause 49)
says that the instrument appointing a proxy shall be in writing "under the
hand of the appointor"; and it may be that this expression means under the
appointor's own hand. See *Wilson v. Wallcut*, L. R. 5 Ex. 164, and *supra*,
p. 705. The new Table A. (1908) (following the writer's form, *supra*, p. 705)
meets the difficulty by adding (clause 65) the words after "under the hand
of the appointor" "or of his attorney duly authorized in writing."

Power from Shareholder to Fill up Blanks in Proxies.

Form 574.

TO ALL TO WHOM THESE PRESENTS SHALL COME, The — — Trust, Limtd (huftr called "The Trust"), sends greeting. WHEREAS the Trust holds shares in A. B. & Co., Limtd (huftr called "the coy"), and is desirous of being represented by proxy at meetings of that coy hereafter held: AND WHEREAS, by the arts of assen of the coy, it is provided that the instrument appointing a proxy shall be in writing under the hand of the appointor or his attorney, or, if such appointor is a corporation, under its common seal: AND WHEREAS, with a view to complying with the sd regulation, the Trust has sealed twenty instruments of proxy, each framed in accordance with the form set forth in the schedule hto, and with the blanks therein appearing. AND WHEREAS the Trust desires to appoint J. K., of — —, in the City of London, Esq., its attorney for the purposes following: Now it is hby AGREED and declared that the Trust doth hby appoint the sd J. K. to be the attorney of the Trust, on behalf of the Trust as and when he from time to time thinks fit to fill up the blanks in the sd several instruments of proxy, or any one or more of them, in such manner as he may think expedient, and in particular to insert therein the name and address of the proxy or proxies, and the date of the general meeting, and the date of the instrument of proxy, and generally to complete the instrument of proxy, and deliver and deposit the same at the registered office of the coy, in accordance with the requirements of the coy's arts of assen: AND it is hby EXPRESSLY DECLARED that the sd attorney may insert in any such proxy his own name as the proxy, or one of the proxies thereby appointed, and that the sd attorney, in lieu of inserting his own name, may insert that of any other person or persons who may be selected by him for the purpose.

AS WITNESS the common seal of the Trust this — day of —

NOTARY'S CERTIFICATE of EXECUTION

Form 575.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, — —, of the City of London, notary public, duly admitted and sworn, do hby certify that the foregoing power of attorney was signed and sealed, and in due form of law delivered, on the day of the date hof, by the constituent therein named and described, before me the sd notary, and in the presence of — —, of — —, and — —, of — —, subscribing witnesses thof, in faith and testimony whof I have hereunto set my hand and seal

Dated in London this — day of —, and in the year of our Lord

NOTARY'S CERTIFICATE of DECLARATION.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, A. B., notary **Form 576.**
 public duly authorized, admitted and sworn, residing and practising
 in the city of —, in the county of —, in the United Kingdom of
 Great Britain and Ireland, do hereby certify that C. D., the person
 named in the paper, writing or declaration hereunto annexed, did
 duly and solemnly declare to the truth thereof before me on the day of
 the date thereof, and that the name C. D. thereto subscribed is of the
 proper handwriting of the said C. D.

In testimony whereof I have hereunto subscribed my name, and
 affixed my seal of office, this — day of —, in the year of our
 Lord —.

(Seal)

A. B., Notary Public.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, —, of —, in **Form 576a.**
 the City of London, notary public by Royal authority, duly admitted **Another.**
 and sworn, and by the Statutory Declarations Act, 1835 (5 & 6 Will. 4,
 c. 62), specially authorized and empowered to receive declarations for
 use in all British colonies and dependencies testifying the execution
 of all deeds and instruments or proving debts, obligations, and other
 matters, also declarations for use in suits or actions brought in such
 places relating to debts, accounts, lands, and other property therein, which
 declarations are to be of the same force and effect as though sworn
in open Court there, do hereby certify that on the day of the
 date thereof before me personally came and appeared —, a person
 well known and of good credit, named and described in the declara-
 tion hereunto annexed, who by solemn declaration which he then made
 before me did solemnly and sincerely declare to be true the several
 matters and things mentioned and contained in the said annexed
 declaration.

In testimony whereof I have hereunto set my hand and seal of office, &c.
 London, the — of —

Commissioner of the
 Supreme Court of

NOTARY'S STATUTORY DECLARATION of EXECUTION of POWER of
ATTORNEY

I, —, of —, do solemnly and sincerely declare as follows **Form 577.**

1. On the — day of — I was personally present with A. B., of **Notary's**
 —, in the City of London, notary public, &c., and did see the **statutory**
 annexed power of attorney duly sealed with the common seal of The **declaration.**

Form 577. — Coy, Limtd, therein named and in the presence of its proper authorized officers who are personally known to me as such, namely, --- and ---, two of its directors, and ---, its secretary.

2. The seal impressed at the foot of the sd power of attorney is the common seal of the sd coy, and the signatures --- and --- and --- subscribed opposite such seal, are of the common proper handwriting of the sd two directors and secretary resply, the same having been subscribed in my presence.

3. I am an attesting and subscribing witness to the sd power of attorney, and the signatures A. B. and --- thereto subscribed as witnesses are of the common and proper handwriting of the sd A. B. and of me the sd declarant resply.

4. Lastly, the sd power of attorney was so executed fully, freely and voluntarily in pursuance of a resolution of the board of directors of the sd coy, and in conformity with the arts of asson thof.

I make this solemn declaration conscientiously believing the same to be true, and by virtue of the Statutory Declarations Act, 1835.

Declared this -- day of --, at my office, No. --, -- Street, in the City of London, before me,

Notary Public, London, and Commissioner
of the High Court of

BANKING AND ADVANCE SECURITIES.

CHAPTER XVI.

INTRODUCTORY NOTES.

AN enormous and constantly increasing volume of business in the way of temporary advances is done every year chiefly by banks and finance and other companies registered under the Act of 1862, now replaced by the Act of 1908, and a very large proportion of the loans are made to companies so registered.

Advance
business

The securities for such advances vary with the circumstances. Where the borrower does not object to give a legal mortgage, the lender is not likely to refuse to make the advance on what his lawyer will tell him is the safest kind of security; but where the loan is only required for a short time, the borrower very commonly objects to the expense and delay incident to a legal mortgage, especially of land, and in these days of competition and low rates of interest, people with capital lying idle are often not inclined to impose onerous conditions on a borrower lest by doing so they should drive good business elsewhere. Accordingly, temporary advances are, to a large extent, secured by equitable mortgages or charges to the mutual satisfaction of borrowers and lenders.

Legal
mortgages

Equitable
mortgages

No doubt the security afforded by an equitable mortgage or charge is as good as that of a legal mortgage, but experience has shown that dishonesty is comparatively rare, and that where advances are made with discrimination equitable securities, though occasionally displaced and nullified by fraud, can generally be relied on as a convenient and effective mode of affording to lenders an adequate assurance for the repayment of their advances.

How, then, may an equitable mortgage or charge be created?

How created

Subject to the subordinate rules below mentioned, it may be stated that a valid equitable mortgage or charge on property can in England be created by contract in writing, or even by verbal contract. All that is required, according to the principles of equity, is that there shall be a binding contract charging the property, and that the property charged shall be capable of identification (either

the time when the charge is created, or, in the case of future property, at the time when it comes into existence as that which it is intended to charge. If these two conditions are fulfilled the property is bound in equity. Nor is equity particular as to the words used.

Thus, if A. says to B., "lend me 1000*l.*, and you shall have a charge on my shares in the Company, Limited" or, "on my share in the partnership business of ," and B. advances the amount, he has in equity a valid charge. But the charge would in equity have been just as valid if A. had said, "you shall have as security my shares," or "I will give you a mortgage on my shares," or "I consider my shares as a security for the amount," or "I make over to you as security my shares," or "I bind my shares with the payment," or "I charge my shares with the payment" (*Florence Land Co.*, 10 C. Div. 330, 546), for equity looks to the intention and not to the particular form of words used. *Strand Music Hall* 3 D. J. & S. 447, *infra* p. 1186; *Fleming v. Bank of New Zealand*, 1904 A. C. 577.

And if the intention to charge is sufficiently clear the absence of words of charge will not defeat the intention. *Cordock v. Seal* 10 Prob. C. 69 L. T. 30, and see *infra* p. 1186.

Consideration

Where a charge is created by deed no consideration is requisite to support the deed, but, where the charge is created by contract, whether under seal (*i.e.* by what is called a simple contract), whether in writing or oral, a valuable consideration for the charge must be proved; for consideration is, under English law, an essential element in a simple contract. Consideration here means some consideration, which, in a legal sense, is of value.

A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Currie v. Misa*, L. R. 10 Ex. p. 162. "Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff with the consent, either express or implied, of the defendant, is a consideration in point of law." *Per Tindal, C. J., Laythorpe v. Bryant*, 3 Scott, 250.

Hence, if A. is indebted to a bank, and the bank requests him to give security, and he complies with this request by writing to the bank a letter saying that it shall have a charge for the amount on a specified property, the Court will treat the transaction as importing a contract that A. shall give the security, and that in consideration thereof the bank shall forbear for a time to enforce payment, and inasmuch as this giving of time or forbearance is an inconvenience sustained by the bank at the implied request of the debtor, it affords a sufficient consideration for the contract.

Thus, in *Alliance Bank v. Broom*, 2 Dr. & S. 289, a banker had

required security from his customer for an overdrawn account. The customer, by letter, promised to hypothecate certain goods. Upon proceedings by the bank to enforce this promise, it was objected that there was no consideration for it, since the bank did not in terms agree to give time; but it was held that the circumstances implied an understanding that there should be some forbearance, and that this was sufficient to prevent the promise to hypothecate from being void as a *nudum pactum*.

Kindersley, V.-C., said: "The ground of the demurrer to this bill is, that the contract said to have been contained in the letter of the 19th of September was *nudum pactum*, and one which the Court could not therefore enforce, and it was contended that the promise to hypothecate the goods was without consideration, and there was no promise on the part of the plaintiffs that they would abstain even for a single day from bringing their action against the defendants for the money owing to them and which they might no doubt have brought. It is true there is nothing beyond the demand for payment and the promise to give security, but the question is, whether there must be a promise on the part of the plaintiffs to abstain from bringing an action in order to constitute a valid consideration. According to the statements in the bill it appears that there was a demand by the creditors for payment and a promise by the debtors that they would hypothecate certain goods, and upon being asked for the documents necessary for constituting a valid security the debtors made an excuse on the ground of their not being able at that time to obtain the papers. Now what is the effect of the letter written by the defendants? It appears to me that when a creditor demands payment of a debt, and the debtor in consequence of that demand agrees to give a certain security, although there is no promise by the creditor to abstain from suing for any given time, yet the effect is that the creditor does in fact give or must be assumed to give, and the debtor receives or must be assumed to receive the benefit of some degree of forbearance, although for no definite or fixed period. If the debtor had refused to give any security at all, the creditor might, of course, have taken immediate steps to enforce payment, but in consequence of the promise to hypothecate the debtor does receive some degree of forbearance. It is true that at any time notwithstanding the promise the creditor might insist upon immediate payment, and bring an action, even after the security given, but still the circumstances necessarily imply or involve the attainment on the part of the debtor of a certain amount of forbearance which he would not otherwise receive; and that, in my opinion, prevents this transaction from being a *nudum pactum*. On these grounds the demurrer must be overruled."

And in *Oldershaw v. King*, 2 H. & N. 399, 517 E.R. 1 and

"Looking at the whole letter and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion that the consideration contemplated was that further advances should be made, and time given by the creditor before he would press for payment of the existing debt. Though the contract did not bind the creditor to make further advances or to give time, unless he chose to do so, it is clear that, if he did make the advances and did give time, that which was contingent at the time when the instrument was written became an absolute and binding contract."

These cases were approved and illustrated in *Fullerton v Provincial Bank of Ireland*, (1903) A. C. 309. In that case the

Above case approved in House of Lords

customer of a bank in Ireland having overdrawn his account and being pressed by the bank undertook by letter addressed to the bank manager to deposit a title deed of an Irish estate as security for his overdraft.

He deposited the deed with the bank, which did not register the charge. It was held that there was a binding agreement by the customer to give this security. "In such a case as this it is not," said Lord Macnaghten, "necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time and that forbearance for a reasonable time was, in fact, extended to the person who asked for it. That proposition seems to me to be established in the case of *Alliance Bank v. Broom*, *supra*; and . . . *Oldershaw v. King*, *supra*, with the observations on that case, and on the case in *Drewry and Smale* by Bowen, L. J., in *Miles v. New Zealand Alford Estate Co.*, 32 C. D. 266, 290, and I may add that the proposition seems to be good sense."

On the same principle, if A., not being indebted to B., writes a letter to B., stating that he sends B. certain title-deeds in order that B. may have a security for any advance he may make to A., B. on making any advance obtains a charge on the property comprised in the deeds, for the letter is regarded as a continuing offer which, when accepted by the making of an advance, matures into a contract. See *Carlill v. Carbolic, &c. Co.*, (1893) 1 Q. B. 270.

Again, if A. is indebted to B., and C. requests B. to forbear from suing A., and offers to give B. a security, and B., although he does not at the time bind himself not to sue, does in fact afterwards forbear to sue A. for a time, there is a good consideration for the contract. Per Lord Esher, M. R., *Crears v. Hunter*, 19 Q. B. D. 341, 344.

This case shows that the request, compliance with which affords a sufficient consideration to support the contract, may be either express or implied. "If a request is to be implied from the circumstances, it is the same as if there were an express request." Per Lord Esher, M. R., *Crears v. Hunter*, 19 Q. B. D. p. 345.

What
property to
be charged.

As to the property to be charged, equity allows the utmost freedom. It matters not whether the property be real or personal; whether it be present, future or contingent; whether it be situate in England or abroad. Whatever the property may be, it can, as a general rule, be bound in equity by a contract of charge made in England. Thus, if the property be land, or some interest in land or chattels, or stock-in-trade, or ships, patents, copyrights, book debts, policies, salaries, shares, stocks, securities, or reversions, it can, as a general rule, be charged in equity. But equity goes still further, for it allows a charge on future property, or on an expectancy or a possibility. Hence, a valid charge in equity may be given

by A. on "any legacy that may be left me by A. B.," or, for that matter, "on any legacies that may hereafter be left me by anyone." *Bennett v. Cooper*, 9 Beav. 252; *Holroyd v. Marshall*, 10 H. L. C. 191; *Tailby v. Official Receiver*, 13 App. Cas. 523. So, a charge can be created on future property, as in the everyday case of a debenture issued by a company charging all its property present and future for the repayment of an advance. See p. 401, *infra*. And a charge may be given by apt words on uncalled capital, although the uncalled capital is in a strict sense not property of a company, only potentially property. See *infra*, p. 1233.

And, as we have seen above, there is no difficulty in equity in creating a charge good in this country on property situate abroad, even though according to the local laws the charge would be ineffective. See Part III., p. 62.

The creation, however, of an equitable charge on property is subject to certain subordinate rules, for the most part established by statute. Of these rules the following may be specified as those which are most frequently applicable:

1. In the case of personal chattels within the Bills of Sale Acts, 1878 and 1882, the charge, if in writing, will be ineffective unless the requirements of these Acts, where applicable, are satisfied. But a company under the Act of 1908 may give an effective charge on chattels without complying with the Bills of Sale Acts of 1878 and 1882. *Standard Manufacturing Co.*, (1891) 1 Ch. 627.

Subordinate rules as to equitable charges.

Bills of Sale Acts.

2. Where the charge is given by such a company, it must, if requiring registration under the Companies (Consolidation) Act, 1908 (*supra*, p. 616), be duly registered.

Registration under Act of 1908.

3. A floating charge created by a limited company within three months of winding-up is only valid to the extent of any cash paid to the company at the time of, or subsequently to, the creation of the charge. Companies (Consolidation) Act, 1908, s. 212; and see *Orleans Motor Co.*, (1911) 2 Ch. 41.

4. The rules as to fraudulent or undue preference of creditors within three months of a bankruptcy or winding-up, as established by sect. 48 of the Bankruptcy Act, 1883, and the Companies (Consolidation) Act, 1908, s. 210, must be borne in mind.

Fraudulent preference.

5. If the charge is a charge on land, or any interest in land, the provisions of the Statute of Frauds, s. 4, must be borne in mind. See further as to this, *infra*.

Statute of Frauds.

6. As to various classes of property, it must be borne in mind that unless the charge is made effective according to the special statutory provisions it will be liable to be displaced: - *e.g.*, in the case of a charge on landed property in a register county which is not duly registered (Part III., p. 130); a charge on ships which is not in the statutory form, and duly registered under the Merchant Shipping Act, 1894; a charge on a patent which is not duly registered as required by the Patents Act, 1883; a charge on shares in any company

Other special statutory provisions.

which is not made effective by transfer or by notices when notices are receivable; a charge on a chose in action which is not perfected by notice to the trustee or debtor; or a charge on property abroad which is not duly registered or perfected in accordance with the requirements of the local law.

As to the Statute of Frauds in relation to Equitable Charges.

Statute of
Frauds as to
land.

Sect. 4 of this Act (29 Car. 2, c. 3) provides (*inter alia*) that no action shall be brought upon any contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. The object of this statute was not vexatious, but to prevent certain important classes of contracts resting on "the frail testimony of memory." With reference to the construction and application of this section to equitable mortgages, the following propositions are established:

(1) The section applies, subject as below mentioned, to a contract by way of equitable mortgage of land, or of any interest in land.

(2) The section does not make a contract which is within its provisions void if not in writing; it only requires that if one party sues another on the contract, the plaintiff must, if required, (a) prove that the contract was in writing signed by the defendant or his duly authorized agent, or (b) must show that by some memorandum in writing so signed the parties to and terms of the contract have been admitted. See *infra*, and *Maddison v. Alderson*, 8 App. Cas. 471.

Hence, a proposal in writing signed by one party and accepted orally by the other party is a sufficient memorandum within the statute. *Reuss v. Pickshy*, L. R. 1 Ex. 342. The memorandum need not be contemporaneous with the agreement; all that is wanted is evidence under the hand of the party sued, or his agent duly authorized, that he entered into the agreement. For instance, a letter by the defendant, before action brought, to a third person admitting or casually mentioning the terms of the agreement is sufficient. *Gibson v. Holland*, L. R. 1 C. P. 1. And so is a minute of a resolution of the directors of a company mentioning the terms of the agreement. *Jones v. Victoria Dock Co.*, 2 Q. B. D. 314. An acknowledgment in the will of the party to be charged will suffice. *Hoyle v. Hoyle*, (1893) 1 Ch. 84.

An acknowledgment in an affidavit or pleading in proceeding against some third party will be sufficient. *Barkworth v. Young & Drew*, 1.

"And I should say that an entry in a man's own diary, if it were signed by him, and the contents were sufficient, will do." Per A. L. Smith, L. J., *Hoyle v. Hoyle*, *supra*.

Equity, led by the imperious Thurlow, L. C., has by certain important decisions qualified and relaxed the operation of the section, and enabled parties in some cases to sue on agreements without complying with the requirements of the statute. Thus,

a) It is well settled that a parol agreement may be sometimes enforced when the plaintiff shows that he has partly performed his obligations under the contract. *Lester v. Forcroft*, 1 Coll. P. C. 108; 1 White & Tudor, L. C. Eq. 768. But it is not every act of part performance which will suffice to take a contract out of the statute. For example, payment by the plaintiff of part of the consideration is not sufficient. *Chinn v. Cooke*, 1 S. & L. 40; *Hughes v. Morris*, 2 De G. M. & G. 356.

The acts of part performance relied on must be unequivocally, and in their own nature, referable to some such agreement as that alleged per Lord Selborne, L. C., *Maddison v. Alderson*, 8 App. Cas. 467, 479, *e.g.*, when the plaintiff has been admitted into possession pursuant to the contract the statute does not apply, and *a fortiori* it does not apply where he has, pursuant to the contract, laid out money or built on the premises. *Lester v. Forcroft*, *ubi supra*. The reason is that such acts are explicable on no other hypothesis than that there was a contract between the parties.

But part performance, to take a case out of the statute, always presupposes a complete agreement. There can be no part performance where there is no complete agreement in existence. *Thyne v. Earl of Glenall*, 2 H. L. C. 158. Companies are equally bound with individuals by acts of part performance. *Wilson v. West Hartlepool Ry. Co.*, 2 De G. J. & S. 475.

b) It is also well settled that a contract for an equitable mortgage of land, evidenced by the deposit of title deeds, can be enforced by the depositor without compliance with the requirements of the Statute of Frauds. *Russel v. Russel*, 1 Bro. C. C. 269; 1 White & Tudor, L. C. 674. Such a deposit of deeds to secure money imports *prima facie* a contract that the depositor's interest shall be liable to the debt and that he will perfect the security. *Pryce v. Bury*, 2 Drow. 42; *Adton v. Dalton*, 2 Coll. 568; *Wallwyn v. Shepherd*, 4 Ves. 119; *Farmer v. Pitt*, 1902 1 Ch. 954.

The section does not apply to personality. Hence a valid charge may in the case of personality be created by parol. *Parish v. Parish*, 31 L. T. 37.

As to oral or parol agreements, see also pp. 335-337, *supra*.

Equitable Mortgages by Deposit generally.

A valid equitable mortgage by deposit may be created, though some only of the documents necessary to prove the title be deposited. *Lacon v. Allen*, 3 Drow. 379; *Daw v. Terrell*, 33 Beav. 218; and a deposit

Equitable mortgages by deposit.

of documents of earlier date will give a good charge, even though those of later date be not deposited. *Dixon v. Muckleston*, 8 Ch. 15 and see *Robert v. Croft*, 21 Beav. 223; 2 De G. & J. 1, in which the conveyance to the depositor was not deposited. A deposit will only affect the beneficial interest of the depositor. *Ex parte Farley*, 1 M. D. & De G. 683.

The deposit of deeds with A., as trustee for B., who advances the money, will create a valid security in favour of B. *Ex parte Whitbread*, 19 Ves. 209.

Equitable mortgages by deposit are not confined to title deeds relating to land. An equitable mortgage of stock, shares, debentures, debenture stock, policies, bonds, and other securities may be and are every day created without writing by depositing the certificates or instruments relating thereto. *Ex parte Moss*, 3 De G. & Sm. 599 (shares); *Carter v. Wake*, 4 Ch. D. 605 (railway bonds); *Pryce*, 1 C. D. 685 (debentures); *Shand v. Stansfield*, Seton, 1702 (policy of assurance); such a mortgage gives the right to foreclosure. *Harrold v. Plenty*, (1901) 2 Ch. 314; *London & Midland Bank v. Mitchell*, (1899) 2 Ch. 161.

If, however, the deposit is made without any written memorandum or agreement as to its object, there is ample room for dispute in the future (*Farmer v. Pitt*, (1902) 1 Ch. 954), and accordingly the depositor should take care to get an agreement or memorandum specifying the terms of deposit duly signed by the depositor. Where there is such a contract or memorandum it defines and governs the arrangement. *Shaw v. Foster*, L. R. 5 H. L. 321; *Burton v. Gray*, 8 Ch. Ap. 932. And parol evidence is not admissible to contradict it (*Ex parte Cumble*, 17 Ves. 369); though such evidence is admissible to extend the security, e.g., to further advances. *Ex parte Kensington*, 2 V. & B. 79; *Ex parte Nettleship*, 2 M. D. & De G. 121.

Where the memorandum stated that the deeds relating to freeholds and leaseholds were deposited, both properties were held charge though only the deeds relating to the leaseholds were in fact deposited. It is a question, of intention which must govern, thus, where the memorandum only related to one set of deeds, whereas all the deeds were deposited, the charge was held to extend to the one set only. *Wylde v. Radford*, 9 Jur. N. S. 1169.

A good equitable security may also be created by a written agreement to deposit, e.g., an agreement to deposit a lease when granted (*Ex parte Orrett*, 3 M. & A. 153); or by deposit of an agreement for a lease. *Unity, &c. Assoc. v. King*, 25 Beav. 72, and see *Finck v. Tranter*, (1905) 1 K. B. 427.

A deposit of a lease containing a proviso against assignment is effective as against the depositor and does not avoid the lease. *Ex parte Baglehole*, 1 Rose, 432; *Ex parte Sherman*, Buch. 462.

Where deeds are deposited to secure the payment of accommodation bills, and the bills are renewed at the request of the depositor, the

security will extend to the fresh bills. *Ex parte Skinner*, 1 D. & C. 103.

A mortgage by deposit may be created in the case of lands abroad when the depositor is here (*Ex parte Pollard*, 1 Deane 27), for a Court of Equity acts *in personam*.

As regards a mortgage by deposit of negotiable instruments, the rule is that the title of the mortgagor, if he takes in good faith and for value, is unimpeachable. *London Joint Stock Bank v. Simmons*, 1892 A. C. 201; *Venables v. Baring Bros.*, (1892) 3 Ch. 527; *Bentock v. London Joint Stock Bank*, (1893) 2 Ch. 120. Nor is negligence or forgetfulness sufficient to affect his title. *Raphael v. Bank of England*, 17 C. B. 161.

Where a person, whose honesty there is no reason to doubt, offers negotiable securities to a bank or any other person, the only question likely to engage his attention is whether the security is sufficient to justify the advance required; and I do not think that the law lays upon him the obligation of making any inquiry into the title of the person he finds in possession of them. Of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction, the case would be different." Per Lord Herschell, *London Joint Stock Bank v. Simmons*, *ubi supra*. And see *Sheffield v. London Joint Stock Bank*, 13 App. Cas. 333, where a bank, knowing that it was dealing with an agent having limited authority, were held bound to inquire into the extent of his authority.

An equitable security is not lost where the debt is barred by statute. *London and Midland Bank v. Mitchell*, (1899) 2 Ch. 161.

An equitable mortgage of leaseholds does not come under liability to the lessor. *Car v. Bishop*, 8 De G. M. & G. 815; *Hand v. Blow*, (1901) 2 Ch. 721.

Equitable Mortgages by Registered Companies and Societies.

In making advances to statutory companies and societies, including those registered under the Act of 1908, it must be borne in mind that the lender is fixed with notice of the contents of the company's memorandum and articles, or rules or Act of Parliament, and accordingly it is necessary to see

Deposits by companies.

- (1) That the company has by its constitution the necessary powers to borrow and give security (see *supra*, pp. 472, 509, 685 *et seq.*); and
- (2) That the directors are in a position to exercise the company's powers (see *supra*, pp. 686, 746 *et seq.*).

Usually the company has express or implied power (*supra*, p. 509), and the directors have either specific or general powers (see *supra*, pp. 686, 746 *et seq.*) without any limit, and such general powers



justify an equitable mortgage, whether by deposit or otherwise *Patent File Co.*, 16 Ch. 13.

Sometimes, however, though the company has the requisite powers, the directors' power to borrow or mortgage is limited by the articles, so that the power cannot be extended except by special resolution. In such case the lender should require the passing of a special resolution.

More commonly the directors' powers are limited in a qualified manner: *e.g.*, they may borrow and give security, but so that the amount owing shall not, *without the sanction of a general meeting*, exceed a specified amount. In such case the lender is not bound to ascertain whether the proposed loan is within the limit, for he is entitled to assume that if it is beyond the limit the requisite authority has been obtained (see *supra*, p. 79); but if he has notice that the loan will be beyond the limit, and that no resolution of a general meeting has been passed, he cannot hold the company to the contract; and this being so, there are cases in which it is considered desirable to inquire and ascertain whether the loan is within or beyond the prescribed limit, and in the latter case whether the requisite resolution has been passed.

Where there is by the articles a fixed limit to the directors' borrowing powers (*i.e.*, not capable of extension by resolution of a general meeting), a bank or individual who takes a mortgage to secure a current account or future advances must be extremely careful. In strictness the bank or other lender should, whenever making a further advance, ascertain that it is within the limit. Otherwise it may find that, although originally its advance was fully secured, yet by subsequent events its further advances are not secured. For instance, suppose the directors' powers are limited to 100,000*l.*, and they borrow from the bank by way of overdraft 100,000*l.*, and afterwards by payment into their general account the balance is reduced to 50,000*l.*, and subsequently the directors, without the knowledge of the bank, raise 50,000*l.* elsewhere, and afterwards the bank allows further overdrafts up to 100,000*l.* in all: in such case the loan of the last 50,000*l.*, being in excess of the limit, will be *ultra vires* the directors, and the bank will have no claim for it as against the company, though it may sue the directors personally for damages for breach of their implied warranty of authority.

That, however, which has been done by the directors in excess of *their* powers is capable of ratification by the company, *e.g.*, by special resolution or by resolution of a single meeting (see *supra*, p. 37); but that which has been done *ultra vires* the company cannot be ratified and is absolutely void (see *supra*, pp. 463, 464); but in the latter case there may be a personal remedy against the directors (see *supra*, p. 710), and the lender may have a right of surrogation, that is, to stand in the place of creditors of the company or society who have been paid out of the *ultra vires* borrowed moneys. See *Baroness Wenlock v. River Dee*, 19 Q. B. D. 155.

Investigation of Title.

Where temporary advances are made on the security of deposited title deeds or other documents, it is not usual to investigate the title, as in the case of a legal mortgage. Nevertheless, lenders' legal advisers generally look through the documents and satisfy themselves that the title appears *prima facie* good.

A banker in dealing with a customer is not fixed with notice of the contents of a document deposited with him as security by another customer. *Valletort Sanitary Laundry Co.* (1903) 2 Ch. 654.

Investigation of title.

Fortifying Equitable Securities.

An equitable security may be fortified in various ways, for example:—

Fortification of equitable securities.

1. Where it is not in writing, by getting a memorandum of the terms of the contract signed by the mortgagor.
2. By obtaining possession of the title deeds or other documents relating to the property mortgaged, or by having an indorsement made thereon.
3. By giving notices to prior mortgagees (if any).
4. In case of any charge on choses in action, by giving prompt notice of the charge to the trustees or debtors.
5. By giving notice, in the case of shares or stock, to the company. See *supra*, p. 651.
6. By distringas proceedings in the case of shares and securities. See *infra*, p. 1220.
7. In the case of bills and other securities to order, deposited without indorsement, by procuring the depositor to indorse the same.
8. In the case of a company, by getting the company to pass a special or extraordinary resolution referring to the charge, and declaring that no mortgage or charge in priority thereto shall be created. This in effect gives notice to all persons dealing with the company. See *supra*, p. 77.
9. In the case of patents, or land in a register county, by registering the security at the patent office or in the proper register.
10. By getting the mortgagor to convert the security into a legal mortgage, or by taking a transfer from some other mortgagee who has got the legal estate.
11. By issuing a writ and registering the action as a *lis pendens* pursuant to 2 & 3 Vict. c. 11, s. 7. A purchaser or mortgagee is treated as having notice of a duly registered *lis pendens* so far as regards the land, but not as regards personal property. *Wigram v. Buckley*, (1894) 3 Ch. 483.

12. By bringing an action for sale or foreclosure, and obtaining a receiver or an injunction restraining the mortgagor from parting with the legal estate *pendente lite*. *London and County Banking Co. v. Lewis*, 21 C. D. 490. Such an injunction should be obtained where there is danger that the mortgagee will part with the legal title.
13. By registering where registration is required. *Supra*, p. 616

Appropriation of Payments.

Appropriation of payments.

In relation to banking and other securities, *where there is an account current between the parties* (*Cory Bros. & Co. v. Mecca Owners*, (1897) A. C. 286, 295), it is necessary to bear in mind the rules as to appropriation of payments made by a debtor to a creditor. These are as follows:-

- (a) The debtor in making payment can direct its appropriation as he chooses, *e.g.*, to a debt not guaranteed in preference to one that is guaranteed (*Kirby v. Duke of Marlborough*, 2 M. & S. 18; *Re Sherry*, 25 C. D. 692); to a debt bearing interest in preference to one that does not (*Chase v. Box*, Freem. Rep. 261); to a new instead of to an old debt (*Peters v. Anderson*, 5 Taunt. 596); to a debt barred by statute in lieu of one not so barred (*Mills v. Fowkes*, 5 Bing. N. C. 455), but as to appropriation by the creditor to statute-barred items, see *Friend v. Young*, (1897) 2 Ch. 421; to a secured debt instead of to an unsecured debt. *Peters v. Anderson*, 5 Taunt. 596; see also as to what is appropriation *Galata v. Plutus*, 104 L. T. R. 57. An express statement by the debtor is not necessary. *Parker v. Guinness*, 27 T. L. R. 120. Appropriation once made by agreement cannot be altered except by consent. *Mahomed Jan v. Ganga Reshun Singh*, L. R. 38 Ind. App. 80 P. C.
- (b) If the debtor at the time of payment makes no appropriation, express or implied, the creditor may at any time appropriate as he thinks fit (*Mills v. Fowkes*, 5 Bing. N. C. 455; *Cory Bros. & Co. v. Mecca Owners*, (1897) A. C. 286; *Deeley v. Lloyds Bank*, (1910) 1 Ch. 648); the creditor may make the appropriation up to the "very last moment," even when being examined as a witness in an action by him against the debtor (*Seymour v. Pickett*, (1905) 1 K. B. 715, C. A.); but the appropriation once made by him and communicated to the debtor, *e.g.*, by letter or by writ, is final. *Ibid.* Entries made by a man in books which he keeps for his own private purposes are not conclusive against him until he has made a communication on the subject of those entries to the opposite party (*e.g.*, by send-

ing him a pass book or account showing the appropriation), and until that time he continues to have the option of altering the appropriation. *Simson v. Ingham*, 2 B. & C. 65. Even the accounts rendered are only evidence of the appropriation to the earlier items, which may be rebutted by evidence to the contrary. *Henniker v. Wigg*, 4 Q. B. 792; *City Discount Co. v. McLean*, L. R. 9 C. P. 692; *Cory Bros. & Co. v. Mecca Owners*, *supra*. How the money is to be applied is governed by the intention of the creditor, expressed, implied, or presumed. *Cory's case*, *supra*.

- (c) When neither party makes an appropriation, the English law will appropriate the payment to the earlier, and not, as the Roman law, to the most burdensome, debt. *Clayton's case* (*Devaynes v. Noble*), 1 Mer. 585; Tudor's L. C. Merc. 3rd ed. 1, 25; Smith's Merc. Law, 11th ed. 747.

In the case of a banking account . . . all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying 'This draft is to be placed to the account of the 500*l.* paid in on Monday, and this other to the account of the 500*l.* paid in on Tuesday.' There is a fund of 1,000*l.* to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments takes place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts." Per Sir William Grant, M. R., *Clayton's case*, 1 Tud. L. C. Merc. 15.

The rule in *Clayton's case* is very material to bankers, especially where the bank holds a security from the customer or from a surety. *Clayton's case*. For, if the debt secured is brought into the account, payments in will *prima facie* go in satisfaction thereof, and in the result the security will be discharged. *Kinnaird v. Webster*, 10 C. D. 139; *Medewe's Trust*, 26 Beav. 588; *The Mecca*, (1897) A. C. 286; *London and County Banking Co. v. Radcliffe*, 6 A. C. 722. But the rule in *Clayton's case* is based on the pre-umed intention of the parties, and accordingly it may be excluded or modified by arrangement or by evidence of intention, express or implied. *City Discount Co. v. McLean*, L. R. 9 C. P. 692; *Re Sherry*, 25 C. D. 692; *Cory Bros. & Co. v. Mecca Owners*, *supra*. For instance, it is not to be applied in a case where it is proved by the conduct of the parties that the creditor had no such intention. *Deeley v. Lloyds Bank*, (1910) 1 Ch. 648.

By sect. 104 (2) of the Companies (Consolidation) Act, 1908, debentures deposited by a company whether before or after the Act

to secure advances "on current account or otherwise," are not to be deemed redeemed by reason only of the company's account ceasing to be on debit.

The intention to appropriate to a later rather than to an earlier item may be inferred from the course of business between the parties (*Taylor v. Kynner*, 3 B. & Ad. 333), or from the fact that the earlier item was secured and intended to be kept separate. *City Discount Co. v. McLean*, L. R. 9 C. P. 692.

Order of appropriation where intention not shown.

Unless some other appropriation is made or arranged, payments by the debtor will be taken to be appropriated as follows:—

- (a) To payment of interest before principal (*Bower v. Morris*, 1 Cr. & Ph. 351), unless the account is overdrawn. *Parr's Banking Co. v. Yates*, (1898) 2 Q. B. 460.
- (b) The earlier items of one entire account before the later items. *Clayton's case*, 1 Mer. 585.
- (c) Money from realization of a particular security will be taken to be appropriated to the payment of the amount thereby secured (*Pearl v. Deacon*, 24 Beav. 186; 1 De G. & J. 461; *Young v. English*, 7 Beav. 10); but where there is one security for several debts, the creditor can appropriate. *Ex parte Dickinson*, 20 Eq. 767.

The rule in *Clayton's case* only applies to an entire unbroken account, and not to several accounts. *Re Sherry*, 25 C. D. 702; *Cory's case*, *supra*.

And the way to avoid the application of the rule is to break the account and open a new and distinct account. This, in the absence of contract with the surety to the contrary, may be done. *Re Sherry*, *ubi supra*. And there is nothing to prevent the appropriation of subsequent payments to the new account, thus stopping the flow of payments into the guaranteed account in relief of the surety and of the security.

Combining two or more accounts.

Although, in the absence of notice of fraud or irregularity, a bank is bound to honour its customer's cheque if his account be in funds (*Gray v. Johnson*, L. R. 3 H. L. 1), yet where a customer has several accounts at a bank, the bank, unless otherwise agreed, may at any time combine them, so as to apply the credit balance on one to the satisfaction of the debit balance on the other (*Garnett v. McKewan*, L. R. 8 Ex. 10; *European Bank, Agra Bank claim*, 8 Ch. 41; *British Guiana Bank v. British Guiana Ice Co.*, 104 L. T. R. 754), unless there is a waiver of the right. *Johnson & Co.*, (1902) 1 Ir. R. 439; *Mutton v. Peat*, (1900) 2 Ch. 79.

But not where the bank knows that one of the accounts is a trust account. *Ex parte Kingston*, 6 Ch. 632; *Forton v. Manchester, &c. Banking Co.*, 44 L. T. N. S. 406, 408; *Coleman v. Bucks. &c. Bank*, (1897) 2 Ch. 253. And see *Union Bank of Australia v. Murray*

Aynsley, (1898) A. C. 693; *Bank of New South Wales v. Goulburn Valley Co.*, (1902) A. C. 543.

As to what is closing an account, see *Barry v. Halifax Commercial Banking Co.*, (1900) 1 Ch. 188.

Sect. 82 of the Bills of Exchange Act, 1882, protects from liability a banker who in good faith and without negligence receives payment "for a customer" of a cheque crossed generally or specially to himself, although the customer has no title or a defective title thereto; and the banker does not lose this protection because the customer's account is overdrawn at the time, even when the cheque is applied in reduction of the overdraft. *Clarke v. London and County Bank*, (1897) 1 Q. B. 552.

Crossed
cheques to
which
customer
not entitled.

Compound Interest.

In order to justify a claim for compound interest a contract must be shown. A customer is not bound or affected by his bankers charging interest upon interest, by making periodical rests, unless it be proved that he was aware that this was their custom. *Moore v. Foughton*, Stark. 487; *Bruce v. Hunter*, 3 Camp. 467; *Fergusson v. Fyffe*, 8 C. & F. 121.

Compound
interest.

Where the account of a customer is kept at compound interest, and the customer dies or closes the account, the final balance only carries simple interest, unless otherwise agreed. *Crosskill v. Bower*, 32 Beav. 86; *Williamson v. Williamson*, 7 Eq. 542, 545. Hence it seems wise to provide expressly for half-yearly rests. It appears, too, that the debt does not carry interest at all from the time of the death of the debtor, unless there is a special contract to that effect. But an agreement for payment may be inferred from the course of dealing, e.g., if it has been frequently charged and paid without objection in former and similar accounts. *Calton v. Bragg*, 15 East, 223; *Bruce v. Hunter*, 3 Camp. 467; *Eaton v. Bell*, 5 B. & Al. 34.

As to Notice before Calling In or Paying Off.

In the case of a mortgage with a regular proviso for redemption, the mortgagee, after default, is entitled to six months' notice before he is bound to accept payment, or to six months' interest in lieu of notice (*Browne v. Lockhart*, 10 Sim. 420); but this is not so in the case of an equitable mortgage by deposit (*Fitzgerald's Trustee v. Meilersh*, (1892) 1 Ch. 385); or where the mortgagee takes proceedings to enforce payment (*Re Alcock*, 23 C. D. 372); or where the mortgagee has entered into possession. *Bovill v. Endle*, (1896) 1 Ch. 648. The rules as to disentitling a mortgagee to notice applies whether the time fixed for payment in the proviso for redemption has expired or not. *Ib.* Where there are several accounts the rule applies to each account whilst they are kept separate.

A mortgagee who has given notice to the mortgagor to pay off the principal money and interest, is not entitled to withdraw the notice without the mortgagor's consent. *Santley v. Wilde*, (1899) 1 Ch. 477.

Statute of Limitations.

Limitation.

Where a bank had an equitable charge on shares in a limited company to secure a simple contract debt, and after the debt was barred brought an action to enforce their security by foreclosure or sale, *Stirling, J.*, held that the bank were not deprived of their remedy against the property by the fact that the personal remedy for the debt was barred, and that, there being no Statute of Limitations applicable to foreclosure of a mortgage of personal property, the security was enforceable. *London and Midland Bank v. Mitchell*, (1899) 2 Ch. 161. And see *Higgins v. Scott*, 2 B. & Ad. 413; *Smith v. Betty*, (1903) 2 K. B. 317; and *Lloyd's Estate*, (1911) 1 Ir. R. 153. C. A.

Bankers' Lien.

Bankers' lien.

In framing bankers' securities, the fact must be remembered that "bankers most undoubtedly have a general lien on all securities deposited with them, as bankers, by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with the lien." *Brandao v. Barnett*, 12 Cl. & Fin. 787; *Leese v. Martin*, 17 Eq. 224; *City Bank case*, 3 D. F. & J. 629; *London Chartered Bank v. White*, 4 App. Cas. 422 (J. C.); *Currie v. Misa*, 1 A. C. 564.

The implied lien is excluded where the securities are deposited for a specific purpose (*Brandao v. Barnett, ubi supra*), e.g., for safe custody (*Leese v. Martin, ubi supra*), or were left casually or by mistake. *Lucas v. Dorrien*, 7 Taunt. 278.

And where an agent deposits securities belonging to his principal in his bank with the object of raising a loan on behalf of his principal for a special purpose and the banker is cognizant of the special purpose, the banker cannot hold the securities against the principal as security for an overdraft of the agent for his own purposes. *Cuthbert v. Roberts, Lubbock & Co.*, 25 T. L. R. 583; W. N. (1909) 11.

But even where the securities are deposited by way of specific security the lien will, it seems, attach for any balance due after the specific security is satisfied, unless the deposit was for a purpose inconsistent with such lien. *Young v. Bank of Bengal*, 1 Dea. 622, 677; *Jones v. Peppercorne, Johns*, 430, 438; *European Bank*, 8 Ch. 41; *London Chartered Bank of Australia v. White*, 4 App. Cas. 413; *Bowes*, 33 C. D. 586.

In the case last mentioned, it was held that a deposit with a banker

of securities, accompanied by a memorandum to the effect that they were deposited to secure money advanced or to be advanced, not exceeding a specified amount, excluded by implication the bankers' general lien, *i.e.*, disabled the bankers from claiming a lien on the deeds in respect of any sum beyond the specified limit.

Sometimes such a construction is negated by the insertion of a special provision in the security, *e.g.*, that the security is not by implication or otherwise to exclude or cut down the general lien of the bank.

The lien arises where the customer is in debt to the bank, even though the indebtedness is only made out by aggregating several accounts of the customer. *European Bank*, 8 Ch. 44; *Garnett v. McKean*, L. R. 8 Ex. 10. But a banker has no lien upon a trust account (to be such) for the debt due on an overdrawn private account. *Re Kingston*, 6 Ch. 632.

The lien extends to promissory notes, bills of exchange (indorsed in blank and payable to bearer), and exchequer bills (*Brandao v. Barnett*, *ubi supra*), coupons, bonds of foreign governments (*Jones v. Peppercorne*, 28 L. J. Ch. 150), cheques (*Scott v. Franklin*, 15 East, 428), share certificates (*United Service Co.*, 6 Ch. 212), debentures, debenture stock, mortgages, conveyances, leases, and money (*Roxburghe v. Cox*, 17 C. D. 520 C. A.), and marginal receipt notes. *Jeffreyes v. Agra, &c. Bank*, 2 Eq. 674.

The lien is not a mere right to retain possession; it more resembles the right of a pawnee (*Donald v. Suckling*, L. R. 1 Q. B. 585; *Halliday v. Holgate*, L. R. 3 Ex. 299), for the banker may realize the security, and may sue on it. *Holland v. Bygrave*, 6 M. & G. 653; *Scott v. Franklin*, 15 East, 428. And it seems that he may sell the security when the customer makes default in payment after notice. *Kemp v. Walbrook*, 1 Ves. 278; *Martin v. Reid*, 11 C. B. N. S. 730; *Piggott v. Cubley*, 15 C. B. N. S. 701.

As regards bills of exchange, the question whether there is a lien or not is only material when the bills are the property of the customer. As to this, bills paid into a bank before maturity are *primâ facie* the property of the customer. *Giles v. Perkins*, 9 East, 14. But if indorsed to the bank the property in the bill *primâ facie* passes to the bank. *Ex parte Schofield*, 12 C. D. 337. It is for the banker to make out the intention with which a bill was paid in (*Ex parte Sargeant*, 1 Roll. 153); entries in his books may afford evidence against him, though such entries, if not communicated to the customer, cannot be evidence in the banker's favour.

The implied lien is subject to the rule in *Hopkinson v. Rolt*, 9 H. L. C. 514, *supra*, p. 663.

Guarantees.

Guarantees.

In many cases temporary advance to a borrower are further secured by guarantees, sometimes given by one, and sometimes by several persons. Occasionally, the guarantors give the lender security by equitable mortgage, or otherwise, for the due payment of the debt guaranteed. See Form 602, *infra*.

A guarantee is a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person, who is himself in the first instance liable to such payment or performance. Sect. 4 of the Statute of Frauds (29 Car. 2. c. 3) requires that an agreement to answer for the debt of another person, or some memorandum or note thereof, shall be in writing, signed by the person to be charged therewith, or some other person thereunto by him lawfully authorized. See *supra*, p. 1184. But the consideration for the promise need not appear in writing, or by necessary inference from a written document. Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 3). As to the Scotch law, see Mercantile Law (Scotland) Amendment Act, 1856, s. 6, and *Wallace v. Gibson*, (1895) A. C. 354.

Unless, however, the guarantee is under seal, valuable consideration must be shown. See *supra*, p. 1180.

In framing a guarantee by a firm it is necessary to bear in mind sect. 4 of 19 & 20 Vict. c. 97, which is as follows:

"No promise to answer for the debt, default or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise."

Hence, in the case of a firm, it is desirable to add the words, "the guarantee is to continue, notwithstanding any change in the constitution of the firm, whether by retirement or admission of partners."

In the case of a guarantee for advances, the lender is not, as a rule, bound to make full disclosure of all material facts to the proposed surety (*Davies v. London and Provincial Co.*, 8 C. D. 475; *North British Insurance Co. v. Lloyd*, 10 Ex. 923), e.g., a suspicion that the principal has been guilty of forgery. *Bank of Scotland v.*

Morrison (1911), 8 C. 593, Ct. of Sess. But any misrepresentation, or any concealment of some material part of the principal's contract, at any rate if it amounts to fraud, will avoid the guarantee. *Pidcock v. Bishop*, 3 B. & C. 605; *Lee v. Jones*, 17 C. B. N. S. 482.

Thus the guarantee was avoided when the surety was informed, contrary to the fact, that the borrower was not at the time indebted to the lender. *Stone v. Compton*, 5 Bing. N. C. 142.

And a guarantee will not hold good where the lender stands by and allows a fraud to be practised on the proposed guarantor. *Oman v. Homan*, 4 H. L. C. 997.

And where there was a continuing guarantee by A. for the liabilities of B., and the fact that B. was already largely indebted was concealed, and the documents were misleading and showed a studied effort to conceal the truth, it was held that the guarantee was void. *Lee v. Jones*, 17 C. B. N. S. 482.

It is not necessary, unless questions are asked, for bankers who are about to be guaranteed to inform the guarantor how the account of the customer has been kept, or whether the debtor was in the habit of overdrawing, whether he was punctual in his dealings, &c. *Hamilton v. Watson*, 12 Cl. & F. 109, 119. In this case the guarantee was for a cash account, and the amount was applied in paying off an old debt to the bank, and it was held by the House of Lords that there was no obligation on the bank to disclose the information to the proposed surety.

Nor is the person guaranteed bound to inform the proposed guarantor that the guaranty is to be substituted for a previous one given by another person. *North British, &c. Co. v. Lloyd*, 10 Ex. 523.

But a contract of guarantee may under special circumstances be one of those contracts in which *uberrima fides* is required on the part of the person with whom the contract is made, e.g., in the case of guarantee policy for a premium paid by the lender. *Seaton v. Heath*, (1899) 1 Q. B. 782, reversed *sub nom. Seaton v. Burnand*, (1900) A. C. 135.

Payment to a surety, before he has been called upon to pay as such, may be a fraudulent preference. *Ex parte Read. Re Paine*, (1897) 1 Q. B. 122. But a payment made to a creditor with the dominant motive of relieving a surety for the debt is not a fraudulent preference. *Re Warren*, 7 Manson, 137.

Where a father joined with a son in a promissory note to secure as guarantor an advance to the son, the note is enforceable against the father, though the son, as a minor, is protected by the Infants' Relief Act. *Wauthier v. Wilson*, 27 T. L. R. 582.

Generally a continuing guarantee, unless containing an express stipulation to the contrary, is revocable by the surety (*Offord v. Davies*, 12 C. B. N. S. 748), but a continuing guarantee under seal, where the consideration is given once for all, is not determined by the

death of the guarantor. *Re Crace, Balfour v. Crace*, (1902) 1 Ch. 733.

As to the effect of the Statute of Limitations on a guarantor's liability for interest, see *Parr's Banking Co. v. Yates*, (1898) 2 Q. B. 460.

See further as to guarantees, *infra*, p. 1244 *et seq.*, and Smith's Mercantile Law, 11th ed. p. 611.

Building Societies.

The recent catastrophe of the Birkbeck Building Society has drawn a good deal of attention to borrowing by building societies, and emphasised the importance of using great care in making advances to such societies. The following are some precautions recommended.

As to societies under the Act of 1836.

1. As to those certified under the Act of 1836 (6 & 7 Will. 4, c. 32), and not subsequently re-registered under the Building Societies Act, 1874

- (a) It must be seen that the society was certified prior to the 1st January, 1857, for by sect. 25 (2) of the Building Societies Act, 1894, passed 25th August, 1894, the Act of 1836 is repealed as from 25th August, 1896, as to all societies certified under the Act of 1836 after the year 1856. Hence, a society registered after the 31st December, 1856, is irregular, unless, prior to 25th August, 1896, it was re-registered under the Act of 1874.
- (b) The rules must be examined to ascertain whether they give borrowing powers, for, unless there is in the rules an express or implied power, borrowing is *ultra vires*. *Murray v. Scott*, 9 App. Cas. 519; *Cunliffe Brooks & Co. v. Blackburn Building Society*, 9 App. Cas. 857; *Re Mutual Aid P. B. B. Society*, 29 Ch. D. 182; *Re National P. B. B. Society*, 5 Ch. 309.
- (c) A borrowing rule usually gives a limited power to borrow, but an unlimited power is valid. *Murray v. Scott*, *supra*.
- (d) A lender is fixed with notice of the rules, and accordingly, if there is no power in them to borrow, a lender cannot safely lend, and if there is a limited power a lender must ascertain that his loan is within the limits. *Chapleo v. Brunswick, &c. Society*, 6 Q. B. D. 696.
- (e) To borrow where there is no power given by the rules, and to borrow in excess where there is limited power given by the rules, is *ultra vires*, and the lender has no remedy against the society, except by subrogation, and any security given to him by the society must be given up (*Cunliffe Brooks & Co. v. Blackburn Building Society*, 9 App. Cas. 857; *Chapleo v. Brunswick Building Society*, 6 Q. B. D. 696); and where a

security is given for an *ultra vires* loan, the fact that the society has subsequently acquired borrowing powers is not sufficient to validate a new security for the loan. *Ex parte Watson*, 21 Q. B. D. 301. As to subrogation, see *Cunliffe Brooks & Co. v. Blackburn Building Society*, and *Baroness Wenlock v. River Dee*, 19 Q. B. D. 155, *supra*, pp. 43, 686.

- (f) It should also be seen that there is power express or implied to give security for money borrowed. As a general rule, a power to borrow would seem to imply a power to give security. See *Durham County Society*, 12 Eq. 516, and the cases mentioned *supra*, p. 509; but Blackburn, J., in *Murray v. Scott*, 9 App. Cas. 519, at p. 556, doubted whether this implication arose. It was not, however, necessary to decide the point.
- (g) It should also be seen that the rules do not contain a provision to the effect that all loans and advances are to rank *pari passu* in point of security on the properties, or any provision to the like effect; for such a provision negatives any implied power to give specific security to any one lender. *Murray v. Scott*, 9 App. Cas. 519.
- h) An overdraft from the society's bankers is a borrowing of money. *Cunliffe Brooks & Co. v. Blackburn Building Society*, 9 App. Cas. 857.
- (i) Where the rule only allows borrowing for specified purposes, the lender must see that the money is borrowed for such purposes. *Durham County Society*, 12 Eq. 516. It is not easy to reconcile this view with the decisions in regard to companies referred to above at p. 79.
- (j) Where a society borrows in excess of its powers, the directors may be held personally liable on an implied warranty of authority. *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Chapleo v. Brunswick, &c. Society*, 6 Q. B. D. 696. And see *Firbank v. Humphreys*, 18 Q. B. D. 154.
- (k) Where the rules only give a limited power of borrowing, it is dangerous to allow a building society an overdraft on its current account.

2. As to those societies which are registered under the Acts of 1874 and 1894, the following points must be borne in mind:—

As to societies under the Acts of 1874 and 1894.

- (a) It must be seen that the rules give power to borrow and fix a limit (see sect. 16 (2) of Act of 1874, and sect. 1 (2) of Act of 1894), and that the limit is within the limits prescribed by the Building Societies Acts.
- (b) As to the limits prescribed by the Acts, see sect. 15 of the Act of 1874, and sect. 14 of the Act of 1894.

Reading the two sections together, the limits prescribed are as follows:—

- (1) In a permanent society the total amount for the time being owing on deposit or loan is not to exceed two-thirds of the amount for the time being secured to the society by mortgages from its members. See *West Riding, &c. Building Society*, 45 C. D. 463.
- (2) In a terminating society the total amount for the time being owing in respect of deposits or loans is not to exceed two-thirds of the amount for the time being secured to the society by mortgages from its members, or a sum not exceeding twelve months' subscriptions on the shares for the time being in force.
- (3) In calculating the amount for the time being "secured to the society by mortgages from its members," the amount secured on properties the payments in respect of which were upwards of twelve months in arrear at the date of the society's last preceding annual account and statement, and the amount secured on properties of which the society had been twelve months in possession at the date of such account and statement, are to be disregarded. And see *Neath Building Society v. Luce*, 43 Ch. D. 158; and *West Riding of Yorkshire P. B. B. Society*, 39 W. R. 74.
- (4) An unlimited power to borrow is *ultra vires*. See the above sections. That a lender is fixed with notice of the rules, see *supra*, p. 79.
- (5) Borrowing in excess of the limits is *ultra vires*, and the lender has no remedy save so far as he can prove that the amount has been applied in paying off valid debts of the society. See *supra*, p. 686, and the cases following; see also *Owen v. Roberts*, 57 L. T. 81; and *Re Sheffield P. B. B. Society*, 21 Q. B. D. 301.
- (6) Overdrawing is borrowing. *Cunliffe Brooks & Co. v. Blackburn Building Society*, 9 App. Cas. 857; *Lock v. Wrigley*, 9 Q. B. D. 397.
- (7) Sect. 43 of the Act of 1874 provides that if any society under this Act receives loans or deposits in excess of the limits prescribed by this Act, the directors or committee of management of such society receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess. See *Cross v. Fisher*, (1892) 1 Q. B. 467.
- (8) To allow a society which has only a limited power to borrow a continuing overdraft on a current account with a bank is dangerous, for it is not practicable for the directors of the bank to watch the transactions of the society from day to

day; and although the overdraft when first allowed may be within the limits, yet at some subsequent period the overdraft may exceed the limits, and to that extent the bank will have no security.

- (9) The statutory receipt given by a building society under sect. 42 of the Building Societies Act, 1874, on payment off of a legal mortgage vests the legal estate in the person having the best right to call for a conveyance thereof, and for this purpose a third party who pays off such a legal mortgage at the request of the mortgagor has a better title than the mortgagor. *Crosbie-Hill v. Sayer*, (1908) 1 Ch. 866.

A borrowing power must not be used for a purpose which is outside the objects of the society, *e.g.*, banking. *Birkbeck Permanent Building Soc.*, 28 T. L. R. 46.

These observations are sufficient to show that dealings with building societies require very great caution. If it is proposed to make a loan to a building society it is desirable to make the loan of specified amount on specified security, and not to make the loan by allowing an overdraft on a current account. If a loan is made on specified security, to secure such loan the lenders will, of course, ascertain that the loan is within the limits prescribed at the time when it is made, and if the society should afterwards transgress those limits as regards other persons, the security to the bank will not be affected.

Advances on Bills of Lading, Dock Warrants, and other Documents of Title.

In making such advances, questions frequently arise as to the operation of the Factors Act, 1889 (52 & 53 Vict. c. 45), and it may, therefore, be convenient here to set it out. The Factors Act, 1889.

AN ACT TO AMEND AND CONSOLIDATE THE FACTORS ACTS.

BE it enacted, &c.

Preliminary.

1. For the purposes of this Act—

Definitions.

- (1.) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods:
- (2.) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any person subject to his control or for him or on his behalf:
- (3.) The expression "goods" shall include wares and merchandise:
- (4.) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order

for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented:

- (5.) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability:
- (6.) The expression "person" shall include any body of persons corporate or unincorporate.

Dispositions by Mercantile Agents.

Powers of mercantile agent with respect to disposition of goods.

2.—(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same: provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3.) Where a mercantile agent has obtained possession of any document of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

Effect of pledges of documents of title.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

Pledge for antecedent debt.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Rights acquired by exchange of goods or documents.

5. The consideration necessary for the validity of a sale, pledge, or other disposition of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

Agreements through clerks, &c.

6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

Provisions as to consignors and consignees.

7.—(1.) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods

in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2.) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition by a mercantile agent.

Dispositions by Sellers and Buyers of Goods.

8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same. (Re-enacted in sect. 25 (1) of the Sale of Goods Act, 1893.)

Disposition by seller remaining in possession.

9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. (Re-enacted by sect. 25 (2) of the Sale of Goods Act, 1893.)

Disposition by buyer obtaining possession.

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

Effect of transfer of documents on vendor's lien or right of stoppage in transitu.

Supplemental.

11. For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

Mode of transferring documents.

12.—(1.) Nothing in this Act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

Saving for rights of true owner.

(2.) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with

whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3.) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent.

Saving for
common law
powers of
agent.
Repeal.

13. The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

14. The enactments mentioned in the schedule to this Act [4 Geo. 4, c. 83; 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39; 40 & 41 Vict. c. 39] are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act under any enactment hereby repealed.

Commence-
ment.

15. This Act shall commence and come into operation on the first day of January, one thousand eight hundred and ninety.

Extent of Act.
Short title.

16. This Act shall not extend to Scotland.

17. This Act may be cited as the Factors Act, 1889.

Operation of
the Act.

The above Act repeals and re-enacts, with extensive and far-reaching amendments, the prior Factors Acts (4 Geo. 4, c. 83; 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39; and 40 & 41 Vict. c. 39). In relation to those Acts there were a great number of decisions, and if it were necessary to keep all those decisions in mind in interpreting the Act of 1889, the difficulty of interpretation would indeed be great. But it is well settled that in construing a statute like the Factors Act, 1889, we are, in the first place, to look to the language of the Act itself without reference to the old cases, and that it is only necessary and proper to refer to them on some special ground, *e.g.*, where there is some ambiguity in the Act which the old cases may assist in solving. Thus, in *Bank of England v. Vagliano*, (1891) App. Cas. 144, Lord Herschell said:—

“I think that the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. . . . I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning or been used in a sense other than their ordinary one in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to *interpret the language of the statute*, and that an appeal to earlier decisions can only be justified on some special ground.”

Same prin-
ciple applies
both to codi-

These observations were made in relation to the Bills of Exchange Act, 1882, which was intended to codify the law as to bills of ex-

change, but the same principle applies to a consolidating and amending Act. In considering such an Act in *Thames Conservators v. Smad, Dean & Co.*, (1897) 2 Q. B. 346, Chitty, L. J., said:—

“fying, and consolidating and amending Acts.”

“In this Act clauses of the repealed Acts are found repeated, but often in altered form and with amendments whereby the sense may be in great measure changed. Speaking generally, I think that the enactments must be dealt with as they now stand, and that a minute critical examination of repealed clauses ought not to be entered upon for the purpose of interpretation except upon special grounds.”

See also *Ex parte Griffith, Re Wilkinson*, 23 C. D. 69; *Aveling v. Wood*, (1891) 1 Ch. 115; *Greaves v. Tofield*, 14 Ch. D. 571; *Dale's case*, 6 Q. B. D. 453; *Rosenberg v. Northumberland Land Building Co.*, 22 Q. B. D. 373; *Hodgson v. Bell*, 24 Q. B. D. 528; and *Re v. Abrahams*, (1904) 2 K. B. 859.

It should be remembered, however, that some provisions of the Factors Act, 1889 (ss. 8 and 9), have been re-enacted in sect. 25 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71): that by that section and in it the term “mercantile agent” has the same meaning as in the Factors Acts (which sect. 62 defines as meaning the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same); and that decisions on the Sale of Goods Act may often be usefully referred to to interpret the Factors Acts. Indeed, one eminent commercial judge includes the Sale of Goods Act in the legislation known as the Factors Acts.

“That the Factors Acts, commencing as they do in the year 1823 (4 Geo. 4, c. 83), and finishing up with the Sale of Goods Act, 1893, were passed to afford protection to persons dealing in good faith and without notice with factors, cannot be disputed; and that *additional protection* to persons so dealing, not only with factors, but also with buyers of goods, has by these Acts from time to time been afforded is equally clear; and the first question is whether the plaintiffs are within the protection of the last of these Acts—namely, the Sale of Goods Act, 1893—coupled with the Factors Act, 1889. I would point out that it is only in cases where an owner has in some way been deprived of his goods without his authority that the Factors Acts are required; for if he is not so deprived, the Acts are not needed to protect *bonâ fide* transactions with agents and buyers.” Per A. L. Smith, L. J., in *Cahn v. Pockett's Bristol, &c. Co.*, (1899) 1 Q. B. 643, 652. And in the same case (p. 658) Collins, L. J., says: “The Factors Act, 1889, which is thus referred to, and as to part of it again enacted in the Sale of Goods Act, is the last of a series of statutes whereby the Legislature gradually enlarged the powers of persons in the actual possession of goods or documents of title, but without property therein, to pass the property in the goods to *bonâ fide* purchasers. Possession of, not property in, the thing disposed of is the

cardinal fact." And at p. 661 he adds: "The later legislation is clearly an attempt to bring the law more nearly into line with mercantile opinion, and to extend the statutory implication of mis-leading to the case where persons, not agents at all, have been permitted by the owners to obtain possession of goods or documents of title."

Further, it must be noted, that as Lord Halsbury says: "The [Factors] Act, which is a consolidation Act, and also an amending Act, is separated into [four] parts . . . and each of the sections included in [a] separate portion of the statute must be read as only applicable to the cases of persons indicated by that separate part of the statute." *Inglis v. Robertson*, (1898) A. C. 616, 624. The headings of the four parts "are not, in my opinion, mere marginal notes, but the sections in the groups to which they belong must be read in connection with them, and interpreted by the light of them." Per Lord Herschell, *ibid.* 630.

Questions on
the Act.

Premising thus much, it will be convenient to touch on a few of the leading questions that arise on the Act.

1. "Mercantile Agent."

Mercantile
agent.

A mercantile agent as defined by the Act is a "mercantile agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods." This definition does not qualify the provisions of sub-sect. (2) of sect. 2 of the Act so as to invalidate a transaction under that sub-section merely because the agent disregards the instructions, expressed or implied, of his principal. For example, a person entrusted with diamonds for sale, being a mercantile agent within the definition, can confer a good title to the diamonds on a pawnbroker with whom he pledges them, though the pledge is in fraud of his principal and contrary to the custom of the diamond trade. *Oppenheim v. Attenborough & Son*, (1908) 1 K. B. 221. This decision has recently been followed in *Weiner v. Harris*, W. N. (1909) 234, in which case jewellery was entrusted to a travelling agent for sale or return, but on terms which showed that he was not to be a purchaser, but an agent, and a pledge by such a mercantile agent with a money-lender advancing in good faith without notice, was held to be good against the principal. *Hastings v. Pearson*, (1893) 1 Q. B. 62, has been overruled.

2. Possession of Goods.

Possession.

When is a person to be deemed to be "in possession of goods or of the documents of title"? (See sects. 8 and 9, and paragraph (2) of sect. 1.) The concluding words of the sect. 1 (2) as to control are

intended *inter alia* to confirm the law established in *Portalis v. Tetley*, 5 Eq. 140, 147.

"If the factor pledges the goods to A. for half their value, and then pledges them for the remainder of their value or for some further security to B., it would, I apprehend, be an exceedingly narrow construction to say that he is not at that time in possession of the documents and goods, both of them being in his control as against his principal until the principal withdraws them." said Page-Wood, V.-C., in that case.

Possession of, not property in, the thing disposed of is the cardinal fact. From the point of view of the *bonâ fide* purchaser, the ostensible authority based on the fact of possession is the same, whether there is property in the thing, or authority to deal with it in the person in possession at the time of the disposition or not. Per Collins, L. J., in *Cahn v. Pockett's Bristol, &c. Co.*, (1899) 1 Q. B. 643, 658. "Actual physical custody" is the construction adopted by A. L. Smith, L. J., in the same case.

3. "Documents of Title to Goods."

"Documents of title" are defined by the Act, sect. 1 (4). Stock and share certificates are not documents of title to goods within the Act. *Freeman v. Appleyard*, 32 L. J. Ex. 175. A mere receipt for purchase-money is not a document of title (*Kemp v. Falk*, 7 App. Cas. 585); nor is a wharfinger's certificate that goods are lying at the works of the manufacturer ready for shipment (*Gunn v. Bolckow, Vaughan & Co.*, 10 Ch. 492), unless it can be made out that such a certificate is used in the ordinary course of business as proof of the possession or control of goods. *Merchant Banking Co. v. Phoenix, &c. Co.*, 5 C. D. 205.

A bill of lading is expressly mentioned in the definition in sect. 1 (4) of the Factors Act, and in the Sale of Goods Act "documents of title to goods" has the same meaning as it has in the Factors Act (sect. 62). And see *Cahn v. Pockett's Bristol, &c. Co.*, *supra*. As to delivery orders in blank, see *Union Credit Bank v. Mersey Docks and Harbour Board*, (1899) 2 Q. B. 205.

As to what is a pledge, see paragraph (5) of sect. 1. The term Pledge goes far beyond its technical meaning, for it includes "any security on goods," *e.g.*, an equitable security. As to the meaning of a pledge of goods, see sect. 3 and observations below. As to a pledgee's rights in Scotland, see *Inglis v. Robertson*, (1898) A. C. 616.

4. Power to Pledge.

Power of mercantile agent to pledge. See sect. 2 of the Factors Act, 1889, p. 1202, *supra*.

Agent's power to pledge.

Consent.

Paragraph (1) of the section is the vital one. In dealing with a mercantile agent under the Act, the first point to be borne in mind is whether the agent is, *with the consent of the owner*, in possession of goods or documents of title. Bankers very commonly assume consent, at any rate when they are dealing with a mercantile agent who is a customer; and it is apprehended that in most cases this assumption may safely be made even where goods or documents of title are placed by the owner in the possession or under the control of a mercantile agent not as such for sale or pledge, but for some other purpose, *e.g.*, for safe custody or for transmission. It would seem that such agent is, nevertheless, in possession "with the consent of the owner." The old law was different. *Cole v. L. & N. W. Bank*, L. R. 10 C. P. 369, 370; *Johnson v. Crédit Lyonnais Co.*, 3 C. P. D. 32. So, too, the agent is in possession with consent even though such consent has been obtained by fraudulent representations to the owner. *Sheppard v. Union Bank*, 7 H. & W. 661; *Baines v. Swainson*, 4 B. & S. 270 (approved by Collins, L. J., in *Cahn v. Pockett's Bristol, &c. Co.*, *sup.*).

The Act of 1889 goes somewhat beyond 5 & 6 Vict. c. 39; but even under that Act it was held that "an agent may be treated as the owner of the property in accepting from him a pledge of goods known to have been deposited with him, or transmitted to him as agent, if the transaction is *bonâ fide* (it is assumed to be in the ordinary course of business), and there is no notice that the agent is making the contract either *malâ fide* or beyond his authority." Per Lord St. Leonards, *Narulshaw v. Brownrigg*, 2 De G. M. & G. p. 450.

"Under the Act," said Lord Herschell, referring to 5 & 6 Vict. c. 39, in *Simmons v. London Joint Stock Bank*, (1892) A. C. 217, "a document of title to goods may safely be taken by way of pledge from one known to be an agent without any inquiry as to his authority. . . . The truth is, in my opinion, that what the Factors Acts have done is to attach some of the elements of negotiability to documents of title to goods, to render the mere possession of them evidence of authority, to deal with them in the ordinary course of business, and to preclude the necessity for any further inquiry."

The question was further considered in *Cahn v. Pockett's Bristol, &c. Co.*, (1899) 1 Q. B. 643. That case arose under sect. 25, subsect. 2, of the Sale of Goods Act, which is a re-enactment of sect. 9 of the Factors Act. There, in fulfilment of a contract for the sale of copper, the sellers forwarded to the buyer a bill of lading indorsed in blank for copper shipped on the defendant's ship, together with a draft for the price of the copper for acceptance. The buyer, who was insolvent, did not accept the draft, but he delivered the bill of lading to the plaintiffs in fulfilment of a contract which he had, previously to obtaining possession of the bill of lading, made for the sale to them of copper, and they thereupon paid him the price of the

copper. The plaintiffs took the bill of lading in good faith, and without notice of the rights of the original sellers in respect of the copper. The sellers stopped the copper *in transitu*. In an action by the plaintiffs against the defendants for non-delivery of the copper, the Court of Appeal held that, the buyer having obtained possession of the bill of lading with the consent of the sellers, the transfer of it by him to the plaintiffs gave them a good title to the copper under sect. 25, sub-sect. 2, of the Act of 1893, and that the sellers had no right to stop it *in transitu*.

That was the case of a buyer; but as A. L. Smith, L. J., said (p. 656), a mercantile agent includes a buyer, and he and the rest of the Court carefully considered the meaning of the Factors Act.

After reading sect. 2, sub-sect. 1, he says (p. 657): "In other words, as if the disposition had been made by the owner of the goods himself or by his lawfully authorized agent."

And (at p. 654) he says: "The bill of lading was not obtained by Pintscher," the original purchaser, "from Steinmann & Co.," the original vendors, "by any trick or device; in which case it could not, I think, be said that Pintscher had obtained the actual custody of it, with Steinmann & Co.'s assent."

Collins, L. J., probably did not intend to go further, but he is more explicit in the following observations (at p. 658): "The Legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods, or documents, or otherwise got possession of them without the consent of the owner. But if a mercantile agent, or one of the persons whose disposition is made as effectual as that of a mercantile agent, has obtained possession by the consent of the owner, even though it were under a contract voidable as fraudulent (see *Baines v. Swainson* and *Sheppard v. Union Bank of London*), he is able to pass a good title to a *bonâ fide* purchaser. However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser."

If, however, the documents have been stolen, there being no consent, there is no power to pledge; and so also where A., being in possession of goods stored in the cellars of B., and C., by false statements to B., obtains possession, he is not in possession "with the consent of A." *Robinson v. Restell* (1896), 12 T. L. R. 174, Mathew, J. See also *Oppenheimer v. Frazer*, (1907) 2 K. B. 50.

It is to be noted that if litigation ensues, the onus of proving that the goods or documents of title were not in possession of the agent with the consent of the owner is on those who aver the absence of consent; for the Act provides, in paragraph (4) of the same section.

Presumption
of consent.

that "for the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary." See *Robinson v. Restell*, *supra*, in which evidence to the contrary was given and held sufficient. See also *Oppenheimer v. Fraser*, (1907) 2 K. B. 50.

5. Ordinary Course of Business.

Ordinary
course of
business.

The next point is whether the pledge is "in the ordinary course of business of a mercantile agent," not, be it noted, in the ordinary course of business as between him and his principals. That it is in the ordinary course of business for brokers, factors, and other mercantile agents of various kinds to obtain advances is well known. The words "when acting in the ordinary course of business of a mercantile agent" in sect. 2 (1), mean acting as a mercantile agent in the way in which such an agent would act if that particular transaction were one duly authorized by his principal. *Oppenheimer v. Attenborough*, (1908) 1 K. B. 221; and see *Turner v. Sampson*, 27 T. L. R. 200.

Good faith
and no notice
of defect.

The next point is whether the bank or other party making the advance is acting in good faith without notice of want of authority.

See the proviso to paragraph (1) of sect. 2: "provided that the person taking under the disposition acts in good faith and has not, at the time of the disposition, notice that the person making the disposition has not authority to make the same." The test of good faith is honesty, and mere carelessness will not negative good faith. *Jones v. Gordon*, 2 App. Cas. 616; *Tatum v. Haslar*, 23 Q. B. D. 343; *London Joint Stock Bank v. Simmons*, (1892) A. C. 201. As to notice, there were similar words in 6 Geo. 4, c. 94, above referred to, and in relation thereto the following words were used by Lord Tenterden in *Evans v. Trueman*, 1 Moo. & R. 10:

"The expression of the statute is, that a party is to be entitled to its protection if he shall not have notice by the documents or otherwise that the pledgor was not the actual and *bona fide* owner of the goods pledged. A person may have knowledge of a fact either by direct communication, or by being aware of circumstances which must lead a reasonable man, applying his mind to them and judging from them, to the conclusion that the fact is so; knowledge acquired in either of these ways is enough, I think, to exclude a party from the benefit of the provisions of this statute; slight suspicion, I think, will not."

Lord St. Leonards, referring to these words in a subsequent case, said:—

"This last statement appears to be laid down a little too much at large; I do not mean to say that circumstances may not be equivalent to an actual notice, because they may be stronger than any words; but I should say that no mere suspicion would affect the transaction." *Navulshaw v. Brownrigg* (1852), 2 De G. M. & G. 451.

Nevertheless, it is not safe to act on the footing that suspicion can in all cases be ignored

"If the facts and circumstances are such that the jury, or whoever has to try the question, comes to the conclusion that he was not honestly blundering; but that he must have had a suspicion that there was something wrong; and that he refrained from asking questions, not because he was an honest blunderer, but because he thought in his own secret mind: I suspect there is something wrong, and if I make further inquiry it will be no longer my suspecting it but my knowing it, and then I shall not be able to recover. I think that is dishonesty." Per Lord Blackburn, *Jones v. Gordon* (1877), 2 App. Cas. at p. 629.

"One word I would say upon the question of notice and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him, and puts the suspicions aside without further inquiry." Per Lord Herschell in *London Joint Stock Bank v. Simmons*, (1892) A. C. 221.

No doubt that was said in relation to negotiable instruments, but if suspicion is enough in regard to them, it is *a fortiori* enough in regard to documents of title which have only some of the incidents of negotiability attaching. See *Sheffield v. London Joint Stock Bank*, 13 App. Cas. 333, as explained in *London Joint Stock Bank v. Simmons*, *supra*, as to the danger of dealing with an agent with notice of want of authority.

The equitable doctrines of constructive 'notice' are common enough in dealing with land and estates, with which the Court is familiar; but there have been repeated protests against the introduction into *commercial* transactions of anything like an extension of these doctrines, and the protest is founded on perfect good sense. In commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions, we should be doing infinite mischief and paralysing the trade of the country." Per Lindley, L. J., in *Manchester Trust v. Furness*, (1895) 2 Q. B. 539, 545.

Withdrawal of consent. See paragraph (2) of sect. 2. Under the old law, it was held that the secret revocation of the agent's authority prior to the pledge defeated the right of *bonâ fide* pledgees (*Fuentes v. Montis*, L. R. 4 C. P. 93); but this paragraph negatives that doctrine.

Where a mercantile agent "has been in possession with consent, the determination of the consent does not, while he retains possession,

Para. (2) of sect. 2.

defeat his disposition." Per Collins, L. J., in *Cahn and Mayer v. Pockett's Bristol, &c. Co.*, (1899) 1 Q. B. 643, 665.

Para. (3) of
sect. 2

Paragraph (3) of sect. 2, in effect, reproduces sect. 4 of 5 & 6 Vict. c. 39, passed to overrule *Hatfield v. Phillips*, 9 M. & W. 617. See *Cole v. N. W. Bank*, L. R. 10 C. P. 370.

As regards sect. 3, providing that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods," does not relate to all pledges of documents, but only to those effected by mercantile agents. *Inglis v. Robertson*, (1898) A. C. 616, 630.

Sect. 4
Antecedent
debt.
Sect. 5.

As to sect. 4, see *Jewan v. Whitworth*, 2 Eq. 692; *Macev v. Gorst*, 4 Eq. 315; *Kattenbach v. Lewis*, 10 App. Cas. 617.

As to sect. 5, note that this, like 5 & 6 Vict. c. 39, covers exchanges. *Bonzi v. Stewart*, 4 M. & Gr. 295, shows the necessity for the provision.

Sect. 6.

Clerks and subordinates, as to dealings through. See sect. 6.

As to sect. 9 of the Act, see *Lee v. Butler*, (1893) 2 Q. B. 318; and *Helby v. Matthews*, (1895) A. C. 471 (option to buy, not an agreement to purchase).

Transfer.

As to transfer by indorsement. See sect. 11.

Bills of Sale
Acts.

As to Bills of Sale Acts and their bearing on dealings by factors—

The expression "bill of sale" in the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), does *not* include "transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented." Sect. 4.

And these documents of title are not within the Bills of Sale Act (1878) Amendment Act, 1882. See sect. 3 of that Act.

An instrument charging or creating any security on or declaring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being re-shipped for export, or delivered to a purchaser not being the person giving or executing such instrument, shall not be deemed a bill of sale within the meaning of the Bills of Sale Acts, 1878 and 1882. Bills of Sale Act, 1890, s. 1, as amended by Bills of Sale Act, 1891. See further *supra*.

A few pre-
cautions.

In making advances to a mercantile agent on documents of title or goods, the lender will do well to adopt the following safeguards. Require evidence of the consent referred to in sect. 2 of the Act, unless he is prepared to take that risk. Where there is any suspicion, make

due inquiry. Where the lender's position can be fortified by notice or registration, take the requisite steps at once. Beware of prior lien charges for warehousing, &c., which may have accumulated.

**Registration of Mortgages and Charges under the Companies
(Consolidation) Act, 1908, s. 93.**

Registration
under Act of
1908.

See *supra*, pp. 616-618

Stamps.

The Stamp Act, 1891 (54 & 55 Vict. c. 39), imposes a duty of Stamp duties. 2s. 6d. per cent. on a mortgage other than an "equitable mortgage" as defined in sect. 86 (see *infra*); and by the section last referred to, the term "mortgage" is defined in very wide terms. Under sect. 88, "a security for the payment or repayment of money to be lent, advanced, paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited," and if not limited, the security is to be good for advances up to the amount of the duty impressed, and in respect of further advances there must be further duty impressed.

The Stamp Act, whilst imposing a duty of 2s. 6d. per cent. on Stamp duties. ordinary mortgages, provides that an "equitable mortgage" is only to require a duty of 1s. per cent., and in sub-s. (2) of sect. 86 of the Act an equitable mortgage is specially defined as follows:—

"For the purposes of this Act the expression 'equitable mortgage' means an agreement or memorandum, under hand only, relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security), or creating a charge on such property."

The revenue authorities hold, that to be an equitable mortgage, subject to the 1s. duty, the instrument must contain little, if anything, more than a memorandum of the deposit of the deeds, with an undertaking to execute a legal mortgage if called on, and that if a power of sale be inserted, the instrument can no longer be considered an equitable mortgage within the definition, and is liable, therefore, to the higher duty of 2s. 6d. per cent. It is not easy to understand how this construction of sub-s. (2) of sect. 86 of the Act can be justified, though a certain fable of the Wolf and the Lamb makes it quite intelligible. The words "relating to" are wide. They are used in other portions of the Act, and there have been various decisions in regard to their meaning. Thus, the Act contains an

exemption from the agreement duty of any "agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise," and on these words it has been held that the exemption covers an agreement by vendors of goods to indemnify the purchaser or broker against loss (*Curry v. Edensor*, 3 T. R. 524); a guarantee for payment of goods supplied to another (*Warrington v. Furber*, 8 East, 242); and an agreement to share in profit or loss upon goods already purchased. *Venning v. Leckie*, 13 East, 7. And it would seem that a provision in the agreement or memorandum by way of equitable mortgage conferring a power of sale is quite as much a matter relating to the deposit of the deeds as the agreements referred to in the above cases were agreements relating to the sale of goods. However, the commissioners always refuse to adjudicate an instrument as duly stamped with the 1s. duty where a power of sale is inserted, and no one has yet been courageous enough to obtain a legal decision on the question.

But there is, of course, nothing to prevent the giving of a power of sale to the equitable mortgagee by a separate power of attorney on a 10s. stamp, and this is not uncommonly done.

And as to security by written proposal, see *infra*, p. 1222.

Section 23 of the Stamp Act, 1891, provides as follows:—

- (1.) Every instrument under hand only (not being a promissory note or bill of exchange), given upon the occasion of the deposit of any share warrant or stock certificate to bearer, or foreign or colonial share certificate, or any security for money transferable by delivery, by way of security for any loan, shall be deemed to be an agreement, and shall be charged with duty accordingly.
- (2.) Every instrument under hand only (not being a promissory note or bill of exchange) making redeemable or qualifying a duly stamped transfer, intended as a security, of any registered stock or marketable security, shall be deemed to be an agreement, and shall be charged with duty accordingly.
- (3.) A release or discharge of any such instrument shall not be chargeable with any *ad valorem* duty.

This section, and more especially sub-s. (2) thereof, is largely made use of. In construing it, it should be remembered that by sect. 122 of the Act "stock" includes any share in any stocks or funds transferable at the Bank of England or at the Bank of Ireland, and India promissory notes, and any share in the stocks or funds of any foreign or colonial state or government, or in the capital stock or funded debt of any county council, corporation, company, or society in the United Kingdom, or of any foreign or colonial corporation, company, or society. And "marketable security" is by the same section declared to mean "a security of such description as to be capable of being sold in any stock market in the United Kingdom."

See also as to marketable securities, sect. 82 (1) of the Act, and *Brown, Shipley & Co. v. C. I. R.*, (1895) 2 Q. B. 598. The commissioners hold that the "duly stamped" transfer referred to in sect. 23 means a transfer bearing a duty of 10s.; or where the *ad valorem* mortgage duty would be less than 10s., then such less amount. They also hold that where the transaction is effected by the deposit of share certificates or scrip, or bills or notes with a covering memorandum under hand stating that the deposit has been made as security for a loan, the memorandum is liable to the duty of 6d. as an agreement merely. *Alpe*, p. 62.

PRECEDENTS.

THE ——— BANK, LIMTD.

*General Deposit Clauses.***Form 578.**

Agreement
for deposit
subject to
bank's usual
clauses (set
out) [appli-
cable to land].

1. Where documents of title are deposited with the bank by way of security the property comprised therein, or to which the same relates, is (unless otherwise arranged) to stand as a continuing security for the due satisfaction of the depositors' liabilities to the bank, whether incurred before or after the deposit, and whether matured or not, and whether incurred by the depositors alone or jointly with others, and whether as principals or sureties, and whether absolute or contingent, including liabilities in respect of advances and in respect of cheques, bills, notes, and other negotiable or non-negotiable instruments drawn, accepted, indorsed, or guaranteed, and in respect of interest, commission, and other usual banking charges.

Sometimes the words following are added: "and in respect of all costs, charges, and expenses incurred by the bank in paying any rent, rates, taxes, or other outgoings in respect of the mortgaged property, or in insuring, repairing, maintaining, managing, or realising any of the mortgaged property, or in investigating the title to such property."

Sometimes a less extensive clause is used, *e.g.*, for the due payment to the bank of the balance which shall for the time being be owing from the depositors to the bank on their account current with the bank for cheques, bills, or notes drawn, accepted, or indorsed by the depositors, or for advances made to them, or for their accommodation or benefit or otherwise, including interest with half-yearly rests, commission, and other customary banking charges.

An equitable mortgagee, as a general rule, is entitled to the same costs as a legal mortgagee. *Louis v. John*, 9 Sim. 366; *Wade v. Ward*, 4 Drew. 602. He has, by implication of law, and without special stipulation, a charge on the mortgaged premises—

- (1) For his costs of preparing a legal mortgage. *National, &c. Bank v. Games*, 31 C. D. 582.
- (2) For the expenses of investigating the title with a view to such mortgage, unless the agreement was only to give a mortgage of the depositors' interest. *S.C.*
- (3) For expenses of proceedings to establish or defend the mortgagee's title. *Godfrey v. Watson*, 3 Atk. 517; *Blackford v. Davis*, 4 Ch. 304.
- (4) For incidental legal proceedings [or expense with a view thereto], *e.g.*, action against surety (*Ellison v. Wright*, 3 Russell, 450); correspondence with a surety. *National, &c. Bank v. Games*, *ubi supra*.
- (5) For sums expended to protect the security from forfeiture or detriment, *e.g.*, premium on a life policy (*Bellamy v. Brickenden*, 2 J. & H. 137; *Gill v. Downing*, 17 Eq. 317); and for lasting repairs when in

- possession. *Shepard v. Jones*, 21 C. D. 470; *Henderson v. Aylward*, (1904) A. C. 163; *White v. Metcalf*, (1903) 2 Ch. 587.
- 6) For costs of abortive sale. *Farrer v. Lacy, Hartland & Co.*, 25 C. D. 636.
- 7) For his costs of an action of redemption or foreclosure. *Cotterell v. Stratton*, 8 Ch. 295; *National, &c. Bank v. James*, 31 C. D. 582.
- But where the mortgage is not by deed, there is no implied charge for moneys expended in insuring the mortgaged premises. *Dobson v. Land*, 8 Ha. 216; *Bellamy v. Brickenden*, 2 J. & H. 137. (As to a mortgage by deed, see now sect. 19 of the Conveyancing and Law of Property Act, 1881.)

Form 578.

It is therefore sometimes desirable to insert a special provision in the contract that the charge shall extend to additional matters besides those; and it is to be borne in mind that in the event of the Court at any time directing an account of what is due to the mortgagee, reasonable expenditure on the additional matters will, without further directions by the Court, be allowed to the mortgagee in the account as just allowances. *Blackford v. Davis*, 4 Ch. 304 (insurance and management); *Bompas v. King*, 33 C. D. 279.

In the case last mentioned, the mortgage contained power to "manage" the premises, which consisted of a large building let out in flats, and managed somewhat like a residential club. When the mortgagees took possession, it was found that many of the tenants held under agreements which entitled them to the supply of cooked food at a fixed tariff, and to the use of domestic servants employed by the landlord, and the existence of a power to manage was held to authorize the mortgagees to carry on the concern and to claim, out of the proceeds of sale, losses incurred in so carrying on the undertaking.

2. All moneys from time to time owing by the depositors to the bank are to carry interest (with half-yearly rests), at such rate as may from time to time be agreed on, or otherwise at the rate of one p.c.p.a. above the minimum rate of the Bank of England from time to time prevailing, but never less than — per cent.

Or, "At the rate of five per cent. per annum, or such higher rate as shall be the current rate of interest for the time being payable to bankers."

The depositors, on the request of the bank, are to execute a legal mortgage of the premises comprised in the deposited deeds or documents, such mortgage to be prepared by the bank's solicitors at the expense of the depositors, and to be in such form and to contain such provisions, including full powers of sale, as the said solicitors in the bank's interest may deem expedient.

the effect of such a clause in excluding the consolidation section (sect. 17) of the Conveyancing and Law of Property Act, 1881, see *Farmer v. Pitt*, (1902) 1 Ch. 954.

As to inserting in an equitable mortgage a declaration of trust with a power to appoint a new trustee, see *London and County Banking Co. v. Goddard* (1897) 1 Ch. 642.

4. Any notice by way of request, demand, or otherwise, may be served by the bank on the depositors in the manner specified in sect. 67 of the Conveyancing and Law of Property Act, 1881.

Form 578. 5. In the above clauses, words importing the plural include the singular, and *vice versa*, and words importing persons include corporations.

To the above-named bank.

Gentlemen,

I have deposited with you by way of security the documents specified in the schedule hto [or within], and upon the footing of the above general deposit clauses.

Yours, &c., —

THE SCHEDULE above referred to.

This will be divided into three columns, headed respectively—Date of Document, Parties to Document, Nature of Document.

The above is intended to take effect as an "equitable mortgage" within sect. 86 of the Stamp Act, 1891 (see *supra*, p. 1213), so as to fall within the 1s. per cent. duty. As to the seemingly unfounded objection of the Commissioners to the insertion of a power of sale, see *supra*, p. 1213.

For power of sale, if the objection is waived or considered untenable, see *infra*, p. 1219.

As to giving power of sale by separate power of attorney, see *infra*, p. 1223.

Form 579.

TO THE — BANK, LIMTD.

Memorandum
in shape of
letter.

Gentlemen,

I have this day deposited with you documents relating to —, in order that you may have a charge on the ppty comprised therein, or to which such documents relate, for securing the due satisfaction of my liabilities to you, whether incurred, &c., as in clause 1, Form 578.

[If desired, add, All moneys, &c., as in clause 2, Form 578.]

[If desired, add, And I undertake on your request, &c., as in clause 3, Form 578.]

Yours, &c., —

Sometimes a bank prefers to embody the conditions in the letter, as in the above form.

Form 580.

THE — BANK, LIMTD.

Agreement
for deposit
similar to
Form 578 (but
applicable to
registered
shares, stocks,
debentures,
&c.)

General Deposit Clauses.

1. Where any shares, stocks, bonds, debentures, or other securities (below referred to as "mortgaged premises") are, by a deposit of the documents of title thereto, or by transfer thereof to the bank or trees for the bank, or otherwise, made a security, they are (unless otherwise arranged) to stand as a continuing security, &c., as in clause 1 of Form 578.

2. All moneys from time to time owing by the depositors to the bank are to carry interest, &c., as in clause 2 of Form 578.

Form 580.

3. If at any time the value of the mortgaged premises, taken at the lowest market price of the day, as certified by a stockbroker employed by the bank, shall not exceed the amount of the depositor's liabilities to the bank by a margin of at least £—, the bank is to be at liberty to notify the fact to the depositors, and they are within — hours afterwards to give the bank additional securities approved by the bank to make up the required margin, or, in the alternative, are to pay to the bank so much cash as shall restore the required margin.

4. The bank is to have a power to sell the mortgaged premises in the terms of sub-sect. 1 of sect. 19 of the Conveyancing and Law of Property Act, 1881, and sects. 21 and 22 of the sd Act are to be applicable as if the power of sale were conferred by the sd Act, but such power is not to be exercised unless and until the depositors have made default for more than seven days in the payment of some money hereby secured, or in the performance of their obligations to the bank, and sect. 20 of the sd Act is not to be applicable.

Where the power of sale is made exercisable when the account is closed either party may close the account, and the customer can close it though in debit. *Berry v. Halifax Commercial Bank*, (1901) 1 Ch. 188.

5. Upon any sale under the power aforesaid, a statutory declaration made by a director, manager, or cashier of the bank that the depositors have made default as aforesaid, and that the power of sale is exercisable, shall be conclusive evidence in favour of any purchaser or other person deriving title to the premises under such sale.

6. The depositors are to execute and sign from time to time all transfers, powers of attorney, and other documents which the bank may require for perfecting the bank's title to the mortgaged premises, or vesting the same, or any of them, in any purchaser.

7. As regards transfers in blank handed to the bank of any of the mortgaged premises, which are not transferable by deed exclusively, the bank is at liberty to fill up the blanks in favour of itself or its nominee.

8. Any notice by way of request, demand, &c., as in clause 4 of Form 578.

9. In the above clauses words importing the plural number include the singular, and *vice versa*.

To the above-named bank.

Gentlemen,—

I have deposited with you by way of security the documents specified in the schedule hereto [or within], and upon the footing of the above general deposit clauses.

Yours, &c.,

Form 580.

THE SCHEDULE above referred to.

List of Securities.

NOTE.—It is easy to embody the conditions in the letter if preferred, as in Form 579.

Notice in Lieu of Distringas.

Under Order 46, r. 4, of the Supreme Court Rules, any person claiming to be interested in any stock, shares, or securities of any company, or dividends thereon, may obtain and serve a notice in lieu of *distringas* as follows:—

- (a) He should make an affidavit himself, or procure his solicitor to make an affidavit as below (Form A), with such variations as the circumstances may require.
- (b) He should file, or procure the filing thereof, in the Central Office of the Royal Courts of Justice, with a notice, as below (Form B), with such variations as the circumstances may require, and
- (c) He should obtain there an office copy of the affidavit, and a duplicate of the filed notice authenticated by the seal of the Central Office.
- (d) He should serve such office copy and duplicate notice on the company by leaving the same at the registered office of the company.

The effect of serving these documents is, that the company is bound to abstain from complying with a request to register a transfer of the shares [or to pay the dividends thereon when the notice extends thereto] until after due notice of the request has been given to the claimant; but the company may not, by virtue of such service, refuse to register or pay for more than eight days after the request (r. 10). Nevertheless, after the eight days, where the company sees that there is a *bona fide* dispute, it may rest neutral, and leave the parties to fight the matter out in Court. Immediately on receiving any such request, the company, acting by its secretary or otherwise, should give notice in writing to the claimant, or his solicitors, stating that a request has been made for registration of a transfer or for payment of the dividends, and that unless an injunction is obtained and served on or before a specified day, usually within the eight days above mentioned, the *distringas* notice will no longer be regarded. Upon receipt of such notice the claimant must, if he wants to prevent the transfer or payment, bring an action, and obtain in that action an injunction to restrain the transfer or payment, and if he does not do so, the notice at the end of the eight days will fall to the ground. A restraining notice may be withdrawn by the person by whom or on whose behalf it was given (see Form D), and the Court can vacate it by order on motion, on notice, or petition, or by summons at the instance of any other person claiming to be interested (r. 9).

The address given in the restraining notice may be altered. (See Form C below, and r. 7.)

Where the mortgage, settlement, or other instrument, comprises shares or securities of different companies, there must be a separate affidavit and notice for each company, and a 10s. stamp will be required on each notice. The duplicate notice must be signed in the same way as the original notice. It will be sealed by the Filing Department without fee. When the claimant is a married woman, the affidavit should state that she is beneficially interested in the shares "as her separate estate," or otherwise "by A. B., her next friend."

Form A.

AFFIDAVIT FOR DISTINGUAS.

(See Order 46, rr. 4-11 of Supreme Court Rules.)

In the High Court of Justice.
(Chancery Division.)

In the matter [*here state nature of the document comprising the shares, and add the date and other particulars so far as known to the deponent sufficient to identify the documents, e.g.*].

In the matter of an Indenture of Mortgage dated the — day of —, and made, &c., comprising, *inter alia*, — shares of £ — each in the — Co., Limited [numbered — to — inclusive], standing in the name of A. B.,

and

In the matter of the Act of Parliament 5 Vict. chap. 5.

I, A. B., of —, in the county of — (description), make oath and say that according to the best of my knowledge, information and belief, I am [*or if the affidavit is made by the solicitor, say, "A. B., of, &c., is"*] beneficially interested in the shares comprised in the indenture of mortgage above mentioned, which shares, according to the best of my knowledge and belief, now consist of [*or comprise amongst others*] the shares specified in the notice hereto annexed.

Sworn by the deponent A. B. [*state where and before whom, e.g.*] at my office, No. —, New Square, Lincoln's Inn, in the County of Middlesex, before me

R. D.,

A Commissioner to administer Oaths in the Supreme Court of Judicature in England.

NOTE.—This affidavit is filed on behalf of A. B., whose address is [*here state address for service*].

N.B.—The above note must be indorsed on the affidavit. See Order 38, r. 10.

Form B.

DISTINGUAS NOTICE TO BE ANNEXED TO AFFIDAVIT.

(Title as in preceding Form.)

To the — Co., Limited.

Take notice that the shares comprised in and now subject to the indenture of mortgage referred to in the affidavit to which this notice is annexed consist of the following particulars, that is to say, — shares of £ — each in the capital of the — Co., Limited [numbered — to — inclusive], standing in the name of —.

This notice is intended to stop the transfer of the said shares only, and not the receipt of dividends [*or the receipt of dividends on the shares as well as the transfer of the shares*].

(Signed)

N.B.—This notice must be signed by the deponent to the affidavit to which it is annexed.

Form 581.Affidavit for
distinguas.**Form 582.**Distinguas
notice
annexed to
affidavit.

Form 583.Notice as to
address.**Form C.**

NOTICE AS TO ADDRESS.

(Title as in Form A.)

To the — Co., Limited.

I beg to give you notice that my address, or the address of A. B., is now at —, instead of at —, as mentioned in the affidavit and notice filed by me [or on my behalf, or by or on behalf of the said A. B.] on the — day of

(Signed)

[Here state the name and address of the person giving the notice, or of his solicitor.]

Order 46, r. 7, allows alteration of address.

Form 583a.Withdrawal
notice.**Form D.**

WITHDRAWAL NOTICE.

(Title as in Form A.)

To the — Co., Limited.

I beg to give you notice that I hereby withdraw the notice given by me, or on my behalf, on or about the — day of —, which notice restrained the transfer of — shares of £— each standing in the name of — [Here add the names of the persons in whose names the shares are standing, and if the notice applied to the dividends also, and the dividends due and to accrue due thereon.]

Dated this — day of —.

(Signed) A. B., of —

Witness to the signature of A. B.

Form 584.Proposal for
deposit in
order to
obtain over-
draft.

TO THE — BANK, LIMTD.

[Conditions as in Form 578, or Form 580, as suitable.]

Gentlemen,

We, the — Coy, Limtd, beg to make to you the proposal following, that is to say:—

1. That we shall deposit with you, by way of security, on the footing of the above general deposit conditions, the documents specified in the schedule hto.

2. That you shall thereupon allow us an overdraft, not exceeding at any one time £—.

3. That we shall forthwith, after your acceptance of this proposal, execute such powers of attorney as you may require for enabling you to transfer the mortgaged ppty to any purchaser or purchasers.

4. That we shall also furnish you with an approved guarantee for £—.

Be so good as to notify to us your acceptance of this proposal.

For the — Coy, Limtd.

—, Secretary

Sometimes a transaction is impeded by the expense of stamping the securities. it may be that the loan is one only for a short time, and that to expend 2s. 6d. per cent. on stamp duty, or even 1s. per cent., is more than it is possible to afford. Moreover, it may not be practicable to bring the securities within the 1s. per cent. duty, *e.g.*, where it is desired that there should be a power of sale. In such cases it is not uncommon to deal with the matter by way of written proposal, as above, to be accepted orally by the bank. The proposal in such case requires no stamp, for the agreement is an oral one. See *supra*, p. 338. Nevertheless, the proposal constitutes an efficient memorandum of the arrangement when orally accepted, and in effect invests the bank with the desired securities and powers. *Supra*, p. 1184.

Form 584.

Where a security by way of deposit is given by deed, the following clause can be inserted in the letter:—

"And we hereby irrevocably appoint you to be our attorney to convey the legal estate in the mortgaged premises or any pt thof, to any purchaser or purchasers thof, upon any sale under the statutory power, and to execute and do all deeds, instruments, and things requisite for that purpose; and sect. 20 of the Conveyancing Act, 1881, is not to apply."

Form 595.

Power of attorney to execute mortgage.

THE — COY, LIMTD.

General Deposit Clauses.

BEARER SECURITIES.

Form 586.

Agreement for deposit of securities to bearer.

1. Where any securities to bearer are deposited with the bank by way of security, they are (unless otherwise arranged) to stand as a continuing security, &c. [Clause 1 of Form 578.]
2. All moneys, &c. [Clause 2 of Form 578.]
3. If at any time the value, &c. [Clause 3 of Form 580.]
4. The bank is to have a power to sell, &c. [Clause 4 of Form 580.]
5. Any notice, &c. [Clause 4 of Form 578.]
6. In the above clauses words importing the plural include the singular, and *vice versa*, and the expression "securities" includes any shares or stock warrants to bearer, debentures to bearer, and any bonds, certificates, and other instruments passing title by delivery, whether negotiable or not.

[Add form of letter as in Form 580, with schedule of securities.]

As to deposit by way of security of bearer securities, see *supra*, p. 1186.

THE — BANK, LIMTD.

Form 587.

All stock and shares, and all securities, marketable or otherwise, as well as bills of exchange, promissory notes, scrip, bills of lading, dock warrants, delivery orders, and cash, which, or the certificates or docu- General deposit security.

Form 587. ments relating to which, are now, or may at any time hereafter be lodged with or held by you on [my] account, or which have been or may be transferred to you or your nominees, or registered in your or their name or names by or for —, whether lodged, held, treated, or registered for safe custody, collection, security, or other specific purpose, or generally, shall be and remain a continuing security for the due payment and satisfaction of all [my] liabilities to you whatsoever for the time being and from time to time, whether matured or not, and whether incurred by [me] alone or jointly with others, and whether as principal or surety, including liabilities in respect of advances, whether on account current or otherwise, and in respect of bills, notes, and other negotiable or non-negotiable instruments drawn, accepted, indorsed, signed, or guaranteed by —, which you may have discounted, taken up, made advances on, or become interested in, together with interest, commission, banking charges, law and other costs, charges, and expenses, and all moneys from time to time owing to you, to carry interest, with half-yearly rests, at the rate of 5 p.c.p.a., unless any special rate be agreed on.

And if — make default in payment to you of any moneys secured hby for — days after payment in writing, you shall have power to sell the premises hby charged in the terms of paragraph 1 of sect. 19 of the Conveyancing and Law of Property Act, 1881, and sects. 21 and 22 of the sd Act shall apply as if the power of sale hby conferred were conferred by the sd Act, and a certificate by any one of your managers that such power of sale has arisen shall be conclusive in favour of any purchaser.

— undertake from time to time to execute and sign all transfers, powers of attorney, and other documents which you may require for perfecting your title, and for vesting or enabling you to vest the ppty in any purchaser or nominee.

In the event of the premises being considered by you at any time an insufficient security, — undertake on your request to furnish such further securities as you may require.

Any notice by way of request or otherwise may be served by you on me in the manner provided in sect. 67 of the sd Act.

The above form is sometimes used, but the Revenue authorities (see p. 1213) object to the power of sale. The form can readily be converted into a proposal. See Form 584.

Form 588.

Agreement
for deposit
of goods
warrants.

THE BANK, LIMTD.

General Deposit Clauses.

GOODS WARRANTS

1. Where warrants for goods are deposited with the bank by way of security the same are (unless otherwise arranged) to stand, &c [Clause 1 of Form 578.]

Form 588.

2. All moneys, &c. [Clause 2 of Form 580.]
3. If at any time the value, &c. [Clause 3 of Form 580.]
4. The bank is to have power to sell the goods in the terms, &c. [Clause 4 of Form 580.]
5. The bank is to be at liberty to sample all or any of the goods, and to insure the goods against fire, loss and damage, and to debit the depositors with the premiums, or to repay the same out of the proceeds of the goods.
6. Notice. [Clause 4 of Form 578.]
7. Interpretation. [Clause 5 of Form 578.]

To the above-named bank.

Gentlemen,

I have deposited with you, by way of security, the warrant-specified in the schedule hto [or within], and upon the footing of the above general deposit clauses. The present market value of the goods is as stated below.

Yours, &c.,

SCHEDULE

To THE --- COY, LIMTD.

Form 589.

In conson of the sum of £ --- this day lent by you to us, The --- Corporation, Limtd, we have deposited with you the securities specified in the schedule hto.

Agreement for deposit of securities to secure loan of specified sum.

The following are the terms on which the loan and deposit are made:

1. We are forthwith to pay to you a commission of £ --- as a premium for the loan.
2. The loan is to be repaid by us on the --- day of ---
3. The loan is to carry interest at the rate of 7 p.c.p.a., but if the loan is repaid on the above date, with interest at the rate of 5 p.c.p.a., you are to accept the lower rate of interest in lieu of the first-mentioned rate.
4. If the loan is not repaid on the sd --- day of ---, it shall thenceforth carry interest at the rate of 10 p.c.p.a., payable quarterly on the usual quarter days.

Such a provision for raising the rate of interest after the time passed for repayment of the loan is valid. It is not a penalty against which equity will grant relief. *Herbert v. Salisbury, &c. Co.*, 2 Eq. 221.

As to the meaning of "punctually" with reference to payments under mortgages, see *Leeds and Hanley Theatre c. Varieties v. Broadbent*, (1898) 1 Ch. 343; reversing *Kekowich, J.* It means "at the time specified."

5. The deposited securities are to be held by you as a security for the repayment of the loan and the interest thereon.

Form 586.

6. If at any time the value of the securities for the time being deposited with you on the footing of this memorandum, taken at the lowest market price of the day as certified by a stockbroker employed by you, shall not exceed the amount due to you on the security then by a margin of at least — p.c., you are to be at liberty to notify to us the fact, and we will, within twenty-four hours afterwards, deposit with you additional securities to your satisfaction to make up the required margin, and in default you may, by a further notice to us, call in the loan, and the same shall thereupon immediately become payable.

7. On our failing to repay the loan with interest on its becoming repayable, you are to have power to sell the deposited securities in the terms of sub-s. 1 of sect. 19 of the Conveyancing and Law of Property Act, 1881, and sects. 21 and 22 of the said Act are to be applicable as if the power of sale were conferred by the said Act, but such power is not to be exercised unless and until depositors have made default in the payment of money hereby secured or in the performance of their obligations to the bank.

Where shares, stock, or debentures are mortgaged to secure payment of a sum on a specified day, and the mortgage contains no power of sale, and is not under seal, the mortgagee has an implied power to sell after the mortgagor has made default, and a reasonable notice has been given by the mortgagee calling for payment, and informing the mortgagor that in default the mortgagee will be in a position to enforce his rights. *Deverges v. Sandeman, Clark & Co.*, (1902) 1 Ch. 579

As to tender by mortgagor after expiry of notice, see *Edmondson v. Copeland*, (1911) 2 Ch. 301.

8. Upon any sale, &c. [Clause 5 of Form 580.]

IN WITNESS whereof we have caused this memorandum to be signed by our managing director on our behalf this — day of —.

Form 590.

Another.

AN AGREEMENT, &c.—The — Coy, Limtd (hereafter called "the coy"), of the one part, and — Bank, Limtd (hereafter called "the bank"), of the other part.

WHEREAS the coy is the owner, free from incumbrances, of the several stocks, shares, and securities, the short particulars of which are set forth in the schedule hereto, and which stocks, shares, and securities are hereafter referred to as "the scheduled investments."

AND WHEREAS the coy has applied to the bank to make an advance to the coy of the sum of 12,000*l.*, which the bank has consented to do upon the terms hereafter set forth.

NOW THEREFORE IT IS AGREED as follows:—

1. The bank shall, on the signature hereof, advance to the coy the sum of 12,000*l.*

FORMS.

2. The coy shall, on the — day of —, repay to the bank the sd **Form 590.**
sum of 12,000*l*.

3. The sd sum of 12,000*l*, or so much thof as shall for the time being remain due, shall carry interest at the rate of 4 p.c.p.a., or at the Bank of England rate if more than 4 p.c., up to the sd — day of — from the date hof. and such interest is to be pd on the sd — of —.

4. The coy is to be at liberty to pay off the whole or any pt of the sd sum of 12,000*l*. at any time or times before the sd — day of —, without being required to give any previous notice of its intention so to do, and as and whenever any such payment is made the bank shall, subject as huftr provided, re-transfer to the coy a proportionate pt of each of the scheduled investments.

5. If the coy shall, on the sd — day of —, make default in payment of the sd sum of 12,000*l*. or so much thof as shall then be due, the coy shall pay interest on such sum, or so much thof as shall then be due, at the rate of 4 p.c.p.a. from that day, or at the Bank of England rate if more than 4 p.c., until full payment of the sd sum of 12,000*l*. has been made.

6. The coy shall forthwith transfer to the bank the scheduled investments, and shall, save as regards those (if any) transferable by delivery, forthwith procure the bank to be registered as the holders thof, and the bank shall hold the scheduled investments as security for the payment of all moneys payable to the bank hereunder, and if the coy do not duly comply with this clause the bank may at any time call in the sd sum of 12,000*l*. and the same shall thereupon become payable.

7. If the sd sum of 12,000*l*. is not fully pd off on or before the day of —, the statutory power of sale huftr mentd shall immediately become exerciseable by the bank as regards the scheduled investments, or such pt thof as shall not previously have been transferred under clause 4 hof.

8. All moneys received by the bank in respect of any sale or enforcement or otherwise under this security, whether the same shall have been received before or after the sd — day of —, shall be applied: first, in payment of all costs and expenses of and incident to any such sale or enforcement, or getting in of such moneys; and, secondly, in or towards satisfaction of the principal moneys and interest owing hereunder, and the surplus (if any) shall be pd to the coy.

9. If, before the sd sum of 12,000*l*. is fully pd, the debentures of The — Coy, Limtd, referred to in the schedule hto, shall become enforceable by reason of any default or otherwise on the pt of such coy, the coy shall forthwith, at the request of the bank, take such steps in regard to the enforcement thof for the benefit of the bank as the bank may think expedient and require.

Form 590. 10. All dividends and interest from time to time received by the bank in respect of the scheduled investments shall be dealt with in accordance with clause 8 *h*of.

11. The statutory power of sale conferred by the Conveyancing and Law of Property Act, 1881, is to be applicable *h*to, but sect. 20 of the *sd* Act is not to apply *h*to.

As to implied power of sale, see *supra*, p. 1226, note to clause 7.

12. When and so soon as all principal and other moneys and interest owing on the security *h*of shall have been satisfied, the bank shall re-transfer to the *coy*, or as it may direct, the scheduled investments, or such part *th*of as shall not previously have been sold or re-transferred.

As witness, &c.

THE SCHEDULE above referred to.

Form 591.

Advances on
debentures
payable on
demand.

AN AGREEMENT made, &c., between The — — Coy, Limtd (*h*ntfr called "the *coy*") of the one *pt*, and The — — Bank, Limtd (*h*ntfr called "the bank") of the other *pt*.

WHEREBY IT IS AGREED as follows:—

1. The bank is forthwith to make to the *coy* a loan of 10,000*l.* and as security for the payment *th*of, with interest, the *coy* is to issue to the bank ten debentures of the *coy* each for the sum of 1,000*l.*, framed in accordance with the form which has already been approved by the parties *h*to.

[See *Form in note below*.]

2. If the *coy* duly pays the interest on the *sd* debentures on the days thereby fixed for the payment of the same, or within fourteen days after each of the *sd* days *resp*ly, and duly pays the principal moneys secured by such of the *sd* debentures as shall for the time being be payable, or within fourteen days after the same shall become payable, then the bank shall not demand payment of the *sd* debentures otherwise than as follows, that is to say:—

One of the *sd* debentures may be called in at any time after the day of — .

Two of the *sd* debentures may be called in at any time after the day of —, &c., &c.

3. The provisions of the last preceding clause shall cease to operate if an order shall be made, or an effective resolution shall be passed, for the winding-up of the *coy*.

4. As and when each debenture is *pd* off the bank shall, on the request of the *coy*, deliver up the same to the *coy* to be cancelled.

As witness, &c.

Form 591.

The debenture referred to will be in the terms following:

THE — — COY. LIMITED

Issue of ten debentures of 1,000*l.* each, all ranking *pari passu*

No. — — — — — Debenture. 1,000

1. The — — Coy, Limitd (huftr called "the coy"), will on demand pay to the Bank, Limitd (huftr called "the bank"), the sum of 1,000*l.*

As to meaning of words "on demand," see *English Bank of Roper Plate*, 69 L. T. 14.

2. The coy will in the meantime, until such payment, pay to the bank interest on the said sum of 1,000*l.* at the rate of — p.c.p.a. by equal half-yearly payments on every — day of — and — day of — in each such year, the first of such half-yearly payments to be made on the — day of — next.

3. The coy hby charges with such payments its undertaking and all its ppty whatsoever and wheresoever, both present and future, including its uncalled capital for the time being.

4. This debenture is one of a series of ten debentures each for securing the principal sum of 1,000*l.* The debentures of the sd series are all to rank *pari passu* in point of charge on the ppty hby charged without any preference or priority one over another, and such charge as regards the coy's land, goodwill, and uncalled capital is to be a specific charge, and as regards the coy's other assets is to be a floating security, but so that the coy is not to be at liberty to create any mortgage or charge in priority to the sd debentures.

5. The coy may at any time give notice in writing to the bank of its intention to pay off this debenture, and upon the expiration of one calendar month from such notice being given the principal moneys hby secured shall become payable.

6. None of the now uncalled capital of the coy shall, whilst this debenture is outstanding, be called up or received in advance of calls without the consent in writing of the bank, and if the same is called up with or without such consent, the amount shall be made payable to the bank and to no other person or persons, and shall be applicable in or towards payment of the moneys owing from the coy to the bank.

7. The ppal moneys hby secured shall immediately become payable if an order is made, or an effective resolution is passed for the winding-up of the coy.

8. At any time after the ppal moneys hby secured become payable the bank may, by instrument in writing, appoint any person or persons, whether an officer of the bank or not, to be a receiver or receivers of the premises hby charged, and a receiver so appointed shall have power, &c. [*As in Form at p. 1253.*]

9. The debentures of this series are issued to the bank pursuant to an agreemt dated the — day of —, and made between the coy and the bank, and subject to the provisions thof.

GIVEN, &c.

MEMDUM of AGREEMENT, made the — day of —, between
The — Coy, Limitd (huftr called "the coy"), of the one part,
and the — Bank, Limitd (huftr called "the bank"), of the other
part.

WHEREAS the coy has a current account with the bank, and from time to time the bank allows the coy to overdraw such account,

Form 592

Memorandum
as to deposit
of debentures
to secure cur-
rent account

R initials

Form 592. and as it may allow further overdrafts, the coy has, with the privity of the bank [or with A. and B. as trees for the bank], issued to and deposited with it a debenture for £—, charging the undertaking of the coy. Now, THEREFORE, IT IS AGREED AND DECLARED as follows:—

Debenture
to be security
for account.

1. The sd debenture is to stand as a security to the bank for the payment of the final balance on the sd current account, including therein all usual and accustomed bankers' charges, and commission, together with interest on such final balance until payment at the rate of 5 p.c.p.a.

What is
final balance.

2. For the purposes hof the final balance asfd means such sums as, upon the closing at any time of the current account of the coy by either party, shall be found due thereon to the bank; and accordingly payments to the credit of the account, so long as the same shall be current, shall not be deemed to be made in or towards discharge of the sd debenture.

Sect. 104 (2) of the Companies (Consolidation) Act, 1908, now provides that: "Where a company has either before or after the passing of this Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debt whilst the debentures remained so deposited."

No prior
mortgage.

3. The coy hby declares that there is no mortgage or charge on its ppty or assets having priority to or ranking *pari passu* with the sd debenture, and that the coy will not at any time during the continuance of this security create any mortgage or charge ranking, or which can by any means be made to rank, in priority to or *pari passu* with such debenture.

As witness, &c.

Form 593.

Another.
where debentures
put into
names of
trustees.

AN AGREEMENT made the — day of —, between the — Coy. Limtd (hnfr called "the coy") of the first part, the — Banking Coy. Limtd (hnfr called "the bank") of the second part, and of —, and — of — (hnfr called "the present trees") of the third part.

WHEREBY IT IS AGREED as follows:—

1. The coy shall forthwith create and issue — [second debentures of the coy for 100l. each, which are to be charged on the coy's undertaking *pari passu* and are to rank as a first charge on the coy's undertaking immediately after and in subordination to the existing first debentures of the coy for £—, and are to be further secured by a trust deed in a form approved by the bank creating a specific charge on the freehold and leasehold property of the coy specified in the schedule hereto, subject only as to such

of the said freehold and leasehold property as is thereby specifically charged to the specific charge created by an indenture dated, &c. and made, &c., and creating a floating charge upon all the other assets of the coy for the time being, present and future, including its uncalled capital, and containing covenants on the part of the coy, &c. The said second debentures are to be framed in accordance with the form to be scheduled to the trust deed and are to be issued exclusively to the bank or its nominees as hereinafter provided, and are not to be issued to any other person or persons or coy. **Form 593.**

2. The coy shall not, during the continuance of this agreement, without the previous consent in writing of the bank and the present trustees or other the trustees or tree for the time being hereof (hereinafter called the trustees), create any mortgage or charge ranking in priority to or pari passu with the charge hereby agreed to be created, nor exercise the power reserved to it by the said indenture of the June, —, —, in issuing further debentures entitled *pari passu* to the benefit of such indenture.

3. The coy is forthwith to issue the whole of the said [second] debentures to the present trustees as nominees of the bank, and the same are to be deposited with the bank, and thereupon the bank is by way of advance to place the sum of [20,000*l.*] to the credit of the coy's current account, and is to debit the amount to the coy's loan account (now to be opened) [and further, the bank is from time to time as and when the coy shall request to make to the coy further advances up to a further 40,000*l.* beyond the said sum of 20,000*l.* by crediting the coy's current account and debiting the coy's loan account with the amount of such further advance: PROVIDED ALWAYS that the obligation of the bank to make any further advance to the coy beyond the said 20,000*l.* shall cease in the event of any failure on the part of the coy to observe and perform all or any of the obligations imposed upon it hereby or by the said intended trust deed or second debentures].

4. The said loan account is also from time to time to be debited [with all further advances from time to time made by the bank to the coy on the footing that they are to be debited to such account, and also] quarterly with interest on the balance from time to time owing on such account, and with all charges and expenses of and incident to the advance aforesaid, and is to be credited from time to time with all payments made by the coy into such account, and the coy shall from time to time at the request of the bank pay into such account the amount of such interest, charges and expenses, and the bank shall be at liberty from time to time to transfer to the credit of the said loan account from the coy's current account the amount of any interest on the said loan account which is for the time being overdue and any sum debited for charges or expenses which remains unpaid.

Form 593.

5. The interest so to be debited is to be at the rate of 5 percent per annum, but the interest on any of the said [second] debentures is not to be payable or to be deemed (as between the coy and the bank) to run until—(a) the bank has become entitled as huftr provided to call in the moneys for the time being owing on the said loan account; or (b) the expiration of the term of _____ years from the date hereof; or (c) the said second debentures resply shall be sold by the bank—whichever event shall first happen.

6. The said [second] debentures so issued and deposited as afcd are to stand as a security for the payment of the moneys for the time being and from time to time owing from the coy to the bank on the balance of the said loan account.

7. The said security is to be a continuing security, and accordingly is not to be affected by any settlement of account or fluctuation in the amount for the time being due or by the existence of a credit balance at any time, but the coy shall be at liberty at any time and from time to time within the said period of _____ years from giving one day's notice in writing to the bank to repay the whole or any part of the moneys owing on the said loan account.

8. Subject as afcd and to the next succeeding clause, the moneys for the time being owing on the security of the said loan account may be called in by the bank in any one or more of the events huftr mentioned, that is to say:

- (a) If the coy shall at any time make default for more than fourteen days in paying any interest due hereunder, whether the same shall have been lawfully demanded or not; or
- (b) If a petition shall be presented for the winding-up of the coy; or
- (c) If a notice convening a general meeting of the coy for the voluntary winding-up thereof shall be issued; or
- (d) If the coy shall stop payment; or
- (e) If a receiver shall be appointed of the coy's undertaking or any part thereof; or
- (f) If a distress or execution shall be levied on the ppty of the coy; or
- (g) If the coy fails to observe and perform any stipulation of this agreement, or any stipulation contained in the said intended trust deed or second debentures; or
- (h) If any event occurs on which the security constituted by the said intended trust deed becomes enforceable.

But save as afcd the bank shall not call in the amount for the time being owing on the said loan account, or sell such second debentures for the term of _____ years from the date hereof.

9. Before calling in the said moneys under paragraph (a) of the said preceding clause hereof, the bank is to give to the coy at least seven days' notice in writing of its intention to call in the same, but

in every other case twenty-four hours' notice in writing of such **Form 593.**
intention shall be sufficient.

10. The statutory power of sale conferred by the Conveyancing and Law of Property Act, 1881, is to be applicable, and in case of a sale by the bank of the said second debentures, or any of them, the trees or tree are, or is, to execute such transfers of such second debentures as the bank shall from time to time direct [and sect. 20 of the sd Act shall not apply].

11. In case at any time the security created hereby or by the said intended second debentures and trust deed is in the opinion of the bank in jeopardy, or in case the said security becomes enforceable, the trees or tree shall be at liberty to, and if required by the bank shall, enforce the said second debentures, and in case they or he shall thereby realize any sum in excess of the amount for the time being due to the bank, shall hold such surplus moneys in trust for the coy.

12. The statutory power of appointing new trees hereof is vested in the bank, and it is to be no objection that a tree appointed under such power or that a tree of the said intended trust deed is a director, officer, or employé of the bank.

AS WITNESS, &c

AN AGREEMENT made the — day of —, 19 —, between the — Coy, Limtd (hinftr called "the coy"), of the one pt, and the — Corporation, Limtd (hinftr called "the bank"), of the other pt. **Form 594.**

WHEREAS the coy was incorporated in 1890 with a nominal capital of 100,000*l.*, divided into 10,000 shares of 10*l.* each.

AND WHEREAS 9,990 only of the sd shares have been issued, and the sum of 4*l.* per share has been pd up thereon, and the sd shares are numbered — to — inclusive, and are still outstanding.

AND WHEREAS the coy has applied to the bank for an advance of 25,000*l.*, which the bank have agreed to make on the terms hinftr expressed.

NOW THESE PRESENTS WITNESS AND DECLARE as follows:

1. The bank shall, immediately after the execution hof, advance to the coy the sum of 25,000*l.*

2. The coy shall repay the sd sum of 25,000*l.* to the bank on the day of —

3. The coy shall forthwith pay to the bank the sum of £ —, being interest on the sd sum of 25,000*l.* at the rate of 6 p.c.p.a., as from the date hof up to the sd — day of —, and also a commission at the rate of 2 p.c. on the sd sum of 25,000*l.*, making together the sum of £ —.

4. If the sd sum of 25,000*l.* is not pd on or before the — day of —, such sum, or so much thof as shall for the time being remain unpaid shall carry interest at the rate of — p.c.p.a. until the actual payment thof.

P.

4

Mortgage of
uncalled
capital to
secure a sum
advanced
by bank.

Form 594.

5. The coy hby charges with the payment of the sd principal moneys and interest the whole of the capital, namely 6*l.* per share, now uncalled upon the sd 9,000 shares in the coy's capital which have been issued.

6. The sd capital shall not, during the continuance of this security, be called up or received in advance of calls without the consent in writing of the bank first had and obtained.

7. If during the continuance of this security the sd capital hby charged, or any pt thof, shall with the consent of the bank or otherwise be called up or in any way got in, the amount shall be pd over to the bank as security for the advance, with full power to the bank to apply a competent pt thof in or towards satisfaction of the advance and the interest thereon (if any) unpaid.

8. The coy shall not at any time during the continuance of this security create any charge on the sd capital hby charged without first giving notice to the person or persons in whose favour such charge is created of the existence of this security.

9. During the continuance of this security the coy shall forthwith, after the presentation of any transfer of ordinary shares in the capital of the coy, give the bank notice containing full particulars thof and no person shall be registered until forty-eight hours after such notice shall have been given, and no transfer shall be registered otherwise than in favour of a solvent transferee.

10. General charge on undertaking of coy. See Form 58.

11. In each of the events following, namely:

- (1) If a petition shall be presented, or an effective resolution shall be passed, or an order be made for the winding-up of the coy; or
- (2) If judgment shall be obtained against the coy for upwards of £—, and shall remain unsatisfied for — days; or
- (3) If a distress or execution shall be levied or enforced against any of the ppty of the coy; or
- (4) If the coy shall make default in the payment of any moneys due and owing hereunder by it at the time hbefore provided for payment thof; or
- (5) If the coy shall commit any breach of any of the provisions herein contained, and that whether the bank shall or shall not have waived any prior breach:

the bank may, by notice in writing to the coy, call in the principal moneys secured, and such principal moneys shall become payable immediately on the service of such notice.

12. If the principal moneys hby secured shall not be duly pd as and when the same shall be payable, the coy shall, upon the request of the bank, procure the sd capital hby charged to be called up by such instalments and payable at such times as the bank shall in writing request.

XVI.

principal
share,
whichsecurity,
sent inal hby
e other-
pd over
e bank
advanceof this
out first
chargethwith.
capital
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herwise

8.

solution
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ays; or
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quest of
l up by
shall in

13. The bank may, at any time after the principal moneys hby secured shall have become payable, appoint a receiver of the capital hby charged, and of all calls made in respect thereof, and also of the undertaking and ppty of the coy hby charged, and sects. 19 and 20 of the Conveyancing and Law of Property Act, 1881, shall be modified accordingly. **Form 594.**

14. The coy hby covenants with the bank that the sd capital hby charged has not been called up or incumbered in any way, and that the contracts under which the sd shares were allotted are not in any way void or voidable.

14a. The coy shall forthwith give notice in writing to each of its shareholders of this charge on uncalled capital.

15. The coy shall procure each of its directors for the time being to covenant with the bank that whilst he is a director of the coy he will not be party to anything in breach of the obligations hby imposed on the coy, and that he will give to the bank immediate notice of any such breach, and also of any threat to commit any such breach, which shall come to his knowledge, and such covenant shall be executed, as regards the present directors, immediately after the execution hereof, and as regards each future director, immediately after his appointment.

16. The principal moneys and interest hby secured will be pd, and shall be assignable free from any right of set-off or equities between the coy and the bank.

IN WITNESS, &c.

Where a bank takes a separate mortgage to secure a loan it is sometimes considered expedient to make provision as in clause 16. In the absence of such a clause a transferee of the mortgage would take subject to the mortgagor's right if sued to set off against the amount secured by the mortgage the credit balance on his current account with the bank at the time when notice of the transfer is given to him. (*Cavendish v. Greaves*, 21 Beav. 163.) But of course the mortgagor can by agreement waive or exclude the application of the right of set-off. Perhaps, however, he may not be willing at the critical moment to do so hence the utility of the clause.

AN AGREEMENT made the _____ of _____, between the _____ Coy of _____ the one pt, and The _____ Bank, Limtd, of the other pt. **Recitals of incorporation and issued capital and uncalled capital.** **Form 595.** AND WHEREAS the coy is indebted to the bank in the ppal sum of £ _____ and upwards, and has applied to the bank for a further advance of £ _____ which the bank has agreed to make on receiving the security hby constituted. Now THESE PRESENTS, &c.

1. The coy hby charges the whole of the capital, namely, £- _____ per preference share, and £- _____ per ordinary share, now uncalled upon the sd _____ preference shares and _____ ordinary shares in the _____ Charge.

Form 595. coy's capital, with the payment to the bank of the sum of 5,000/ and interest as from the date hof at the rate of — p.c.p.a.

Continuing
security.

2. The sd charge limtd in amount as afsd shall stand as a continuing security to the bank for the due satisfaction of the coys liabilities to the bank, whether incurred before or after, &c., as in Form 578.

Commission.

3. The coy shall pay to the bank upon the execution hof a commission of — p.c. on the sd sum of £ — as a premium for the advance.

Payment
after demand.

4. The coy shall pay to the bank all moneys for the time being owing on the security hof within thirty days after a demand in writing shall have been served by the bank on the coy.

5-13. Set out 6, 7, 8, 9, 11 to 14 and 15 of Form 594.

Cesser.

14. Lastly, if the coy shall at any time pay to the bank all ppal moneys and interest for the time being owing on the security hof, the bank shall at any time thereafter at the request and expense of the coy, whilst no ppal moneys or interest shall be owing on the security hof, release the sd capital from the sd charge and otherwise from this security.

As witness, &c.

Form 596.

Security for
loan on de-
bentures and
charge on
undertaking.

AN AGREEMENT made between L. & A., Limtd (hnftr called "the coy"), of the one pt, and The — Banking Coy, Limtd (hnftr called "the bank"), of the other pt.

WHEREAS the coy has issued, or are about to issue, debentures to the total nominal amount of 100,000/ in 1,000 debentures of 100/ each, secured by a trust deed, dated, &c., and made between, &c.: AND WHEREAS the sd debentures are all to be framed in accordance with the form, a print whereof is annexed hto: AND WHEREAS the coy has requested the bank to advance to it the sum of 20,000/ upon the security of 200 debentures of 100/ each, numbered — to — inclusive, pt of the sd issue of 100,000 debentures, which 200 debentures are hnftr referred to as "the security debentures": AND WHEREAS the bank has agreed to make such advance on the terms hnftr appearing.

NOW THESE PRESENTS WITNESS, AND IT IS HEREBY AGREED as follows:—

1. In conson of the sum of 20,000/ now advanced and pd by the bank to the coy, the receipt of which is hby acknowledged, the coy shall pay to the bank on the — day of —, or on such earlier day as the same may become payable in accordance with the provisions hnftr contained, the ppal sum of 20,000/., and in the meantime, until payment of such ppal moneys, shall pay to the bank interest upon the sd sum of 20,000/., or such pt thof as shall for the time being remain

unpd, at the rate of 6l. p.e.p.a. as from the --- day of ---, by Form 596.
half-yearly payments on, &c. in each year.

2. The coy shall on the execution hof pay to the bank the sum of £ --- by way of bonus or commission for the sd advance.

3. If the coy shall on the execution hof pay the sum mentd in the last preceding clause, and shall also pay interest upon the sd ppal sum of 20,000l., or upon so much thof as shall for the time being remain unpd, at the rate of £ --- p.e.p.a. upon or before, or within ten days after, each of the half-yearly days afsd, up to and including the sd --- day of ---, in accordance with clause 1 hof, and shall duly observe all the other provisions of this agreemt, then the bank will accept interest at that rate in lieu of interest at the rate of £ --- p.e.p.a. for each half-year in respect of which the same shall be so pd; but no claim for reduction of interest under this provision shall be made in respect of any half-yearly payment not made within the time afsd, and no claim for reduction of interest payable after the sd --- day of --- shall in any case be made.

4. The coy shall forthwith issue to and into the name of the bank the security debentures, and the same shall constitute a collateral security for the ppal moneys and interest hby secured, and shall stand charged accordingly.

5. So long as the coy shall duly pay interest on the sd sum of 20,000l., or so much thof as shall for the time being remain unpd, at the rate of and payable in accordance with the provisions hof, the bank will accept each half-year's interest so pt in satisfaction of the corresponding half-year's interest on the security debentures.

6. The coy may at any time before the --- day of --- give notice in writing to the bank of its intention to repay the whole or any pt of the sd sum of 20,000l., such pt not being less at any one time than 500l., and being a multiple of 100l., and at the expiration of one calendar month from such notice being given, the ppal moneys therein specified shall be payable, and the coy shall forthwith pay the same accordingly, and upon payment thof being made in accordance with this clause the bank shall allow or pay to the coy a rebate calculated at the rate of 1 p.e.p.a. on the amount then repaid for the time remaining unexpired, between the date of such redemption and the sd --- day of ---.

7. Upon any repayment being made by the coy to the bank with interest in pursuance of the last preceding clause hof, the bank shall transfer or give up to the coy security debentures equal in face or nominal value to 80 p.c. (or as near thereto as the debentures will permit) of the amount of the principal moneys repaid.

8. If the coy shall commit any breach of any of the obligations imposed on it by these presents or by the sd trust deed or the debentures secured thereby, or if the sd debentures or any of them shall become payable, or if the security constituted by the sd trust deed shall become enforceable, or if the coy shall stop payment or cease to

Form 596. carry on business, or if any of the events specified in clause - - of the sd trust deed shall happen, then, and in any and every such case, the bank may, by not less than twenty-four hours' notice in writing to the coy, call in the principal moneys hby secured, and thereupon the whole of the principal moneys hby secured and then remaining unpaid shall immediately become payable without any right to rebat on the part of the coy, and the coy shall forthwith pay the same accordingly.

9. Sections 17 and 20 of the Conveyancing and Law of Property Act, 1881, shall not apply hto.

10. If the coy shall at any time within fourteen days from the date hof by deed give to the bank the option in accordance with the conditions following of purchasing from the coy the security debentures and every pt thof at the price of 97 $\frac{1}{2}$ for every debenture in respect of which the option is exercised, the bank shall accept such option in satisfaction of the principal sum of 5,000 $\frac{1}{2}$ pt of the sum of 25,000 $\frac{1}{2}$ made payable to the bank under clause 1 hof, but the deed afsd to be operative in this respect must comply with these conditions that is to say

- (a) It must provide that the option afsd may be exercised from time to time by notice in writing to the coy specifying the amount to be purchased, and served during the continuance of this security.
- (b) It must provide that if the bank shall determine to offer for public subscription the debentures purchased, or otherwise to sell or dispose of the same, the coy shall furnish the bank with such reports of experts and other information as the bank shall reasonably require for the purpose of a prospectus offering the debentures for public subscription, and that the bank shall be at liberty to use and publish such reports and information in any such prospectus.
- (c) It must provide that the bank shall be at liberty to apply the purchase-money payable for the debentures so far as necessary in satisfaction of the moneys for the time being owing to the bank under or by virtue of this security.
- (d) It must provide that the coy shall, when required by the bank, apply to the committee of the London Stock Exchange for a quotation of the debentures, and shall do, and concur in doing, all acts and things which the sd committee shall require before and for the purpose of granting a quotation of the debentures.
- (e) It must be delivered to the bank within fourteen days from the date hof.

IN WITNESS, &c.

Sometimes, where there is a mortgage of shares, debentures or debenture stock, for a specified sum, it is desired to give the mortgagee power to buy such

FORMS.

Shares, debentures, or debenture stock. This, however, cannot be done by the original mortgage, for the power operates as a clog on the equity of redemption and the well-established rules of equity prohibit such a clog. *Jerrah Timber and Wood Paving Corp.*, (1904) A. C. 323; *Noakes v. Rice*, (1902) A. C. 24; *Green v. Curlett*, (1903) A. C. 253; and see *Reeves v. Lisle*, (1902) A. C. 161; *Salt v. Northampton*, (1892) A. C. 1.

But the desired end can in some cases be achieved thus: Let the mortgage as above be made redeemable on payment of a larger sum than the advance, i.e., with a bonus of, say, 25 per cent. This is allowable. *Whester v. Cook*, 2 Ch. 542; *Potter v. Edwards*, 20 L. J. Ch. 468; *Mannland v. Upjohn*, 41 C. D. 126. Insert a clause as above under which the liability for the bonus is to be cancelled if the mortgagor within a specified time by deed gives the desired option. The mortgagor, of course, at once gives the notice, although he is not in any way bound to give it, and thus the power is conferred by a transaction subsequent to the mortgage, and is therefore unobjectionable. See *Jerrah Timber and Wood Paving Corp.*, *supra*.

Form 596.

THIS INDENTURE, made, &c., between The Coy., Limited (herein called "the coy."), of the one pt, and The Bank, Limited (herein called "the bank"), of the other pt

Form 597.

Security of bank on bills and by deposit of debentures in blank

WHEREAS the coy is indebted to the bank in the sum of £

AND WHEREAS it has been arranged that the sd sum of £ shall be repaid by instalments at various dates, and that such instalments shall be secured by bills of exchange to be drawn by the bank upon, and accepted by, the coy, and the particulars of such bills are set forth in the schedule hto.

AND WHEREAS it is one of the terms of the sd arrangement that such bill shall be secured as hntf provided.

NOW THESE PRESENTS WITNESS and it is hby agreed and declared, as follows:

1. The coy shall forthwith accept the sd bills and hand them over to the bank.

2. The payment of the sd bills to the holders for the time being thereof shall be secured by the issue to the bank as free of £ debentures of the coy, part of the series of debentures secured or to be secured by an indenture, dated, &c., and made, &c.

3. With a view to such issue, £ debentures of the coy, framed in accordance with the form set forth in the schedule to the sd indenture, with blanks left nevertheless in the first paragraph of each of the sd debentures for the name and address of the payee, shall forthwith be sealed by the common seal of the coy, and handed over, duly stamped, to the bank upon the footing that the bank is to be at liberty at any time to fill up the sd blanks as hntf provided, and that in the meantime the bank is to stand in the same position in regard to security as if the name of the bank were inserted in each and every of the sd debentures as the name of the payee thereof.

Form 597.

4. The coy hby empowers the bank, as and when the bank shall think fit, to fill in the name of the bank as the payee of the sd debentures, and to deliver the debentures so from time to time completed as the deed of the coy, and the coy hby irrevocably appoints the bank to be the attorney of the coy for the purposes afd.

5. The sd debentures when issued, and the bank's title in the meantime to stand in the position afd as regards security, shall be held in trust to secure the payment to the holders for the time being, and from time to time, of the bills of exchange afd of the principal moneys and interest payable in respect of such bills.

Queensland, &c. Co., (1894) 3 Ch. 181; Pegge v. Neath, &c. Co., (1897) 1 Ch. 183; Simultaneous Colour Printing Syndicate v. Foweraker, (1901) 1 K. B. 771.

6. The coy shall not, whilst any of the sd bills are outstanding, issue, or attempt to issue, any debentures enttd to the benefit of the sd trust deed other than the debentures for £- — afd.

7. In each and every of the events following the security hby constituted shall immediately become enforceable; that is to say:

- (1) If the coy makes default in payment of any such bill as afd at maturity.
- (2) If an order shall be made, or an effectual resolution shall be passed, for the winding-up of the coy.
- (3) If any of the sd bills shall be dishonoured
- (4) If the bank shall be of opinion that the coy is in financial difficulties.
- (5) If the coy shall commit any breach of any of the provisions of this agreemt.
- (6) If the coy shall not procure every director of the coy to deliver to the bank a covenant with the bank that he will not, whilst he is a director, be a party to anything in breach of clause 6 hof, such covenant to be delivered, as regards each of the present directors of the coy, immediately after the execution hof, and as regards each future director, immediately after his appointment to be a director.

8. If and when the security hby constituted becomes enforceable, the bank may sell the sd debentures, or any of them, or the bank may bring any action or take any proceedings to enforce the same or any of the rights hby given to the bank, and generally may take such steps with a view to enforcing and realising the security as the bank shall think expedient, and with a view thereto the bank may fill up the blanks in the sd debentures as afd.

9. All moneys arising under the last preceding clause shall be applicable by the bank, first, in paying all expenses incurred by the bank as tree hof, and, secondly, in paying off the sd bills of exchange

pari passu, and so that, if any of the sd bills shall not then have **Form 597.**
matured, a sufficient portion of such surplus proceeds shall be set
apart to meet such bills.

10. The coy may at any time pay off any of the sd bills at or before
or after the time fixed for payment thereof, and upon production thereof to
the bank duly cancelled, the bank shall give up to the coy a due
proportion of the debentures aforesaid.

11. The issue of the sd debentures is not in any way to operate as
a merger of the debt owing by the coy on the sd bills of exchange
resply.

IN WITNESS, &c.

THE SCHEDULE above referred to

[Particulars of Bills.]

AN AGREEMENT made the day of , between the Coy, **Form 598.**
Limited (hereinafter called "the coy"), of the one pt. and the Bank, **Mortgage of**
Limited (hereinafter called "the bank"), of the other pt. whereby it is agreed **securities for**
as follows: **present and**
future
advances.

1. The bank is forthwith to advance to the coy on the footing of **Present**
this agreement the sum of 100,000*l*. **advance.**
2. The bank is to make further advances from time to time on the **Further**
request of the coy on the footing of this agreement, but so that the total **advances.**
amount of the ppal moneys to be hereby secured shall not exceed at any
one time 150,000*l*.
3. The advances aforesaid are to carry interest as follows, namely **Interest.**

As to the sd 100,000*l*. at the rate of $3\frac{1}{2}$ p.c.p.a., up to the
day of - next, or at such higher rate as shall for the time
being and from time to time be the minimum rate of the Bank
of England, and as to the balance at the minimum rate for the
time being and from time to time of the Bank of England, but
not less than 3 p.c.p.a.

1. The advances aforesaid are to be repaid by the coy to the bank on **Repayment.**
the 30th June, 19 , unless on or before the 31st March, 19 , an
arrangement at the request of the coy is made for extending the time
for payment.

5. As from the time when the sd advances become repayable until **Interest**
the actual payment thereof, the same shall carry interest at the rate of **after date for**
10 p.c.p.a., unless a lower rate shall be agreed on. **payment.**

6. As security for the repayment of the sd advances and interest **Security.**
thereon, the coy is forthwith to execute in favour of the bank a
mortgage of the freehold ground ents specified in the s le hto,

Form 598. such mortgage to be in the terms of the draft already approved by the parties hto.

Further securities.

7. As further security for the repayment of the sd advances and interest, the coy will from time to time vest in the bank further securities of a value not less than 30 p.c. beyond the advances in excess of 100,000*l.* from time to time owing on the security hof.

Approval.

8. The further securities afsd shall in every case be subject to the approval of the bank, and shall not be regarded as further securities for the purposes of this agreement until the same have been so approved, and the value of such further securities must be made out to the satisfaction of the bank, and shall not be deemed to have been so made out until the bank shall have certified that it is so satisfied, and such further securities shall be vested in the bank in such manner as the bank shall direct, and whether by deposit of deeds or by legal mortgage, or by equitable mortgage or otherwise, and in every case the short particulars of the further securities shall be entered in the annexed schedule.

Legal mortgage.

9. When any such further security is vested in the bank by deposit of deeds, the coy shall at any time or times on the request of the bank execute an effectual mortgage of the premises comprised in the deposit deeds, such mortgage to be declared by the bank's solors at the expense of the coy, and to be in such form and to contain such provisions, including full power of sale, as the said solors in the bank's interest may deem expedient.

Value to be kept up.

10. If at any time the value of the mortgaged premises according to a valuation to be made by some expert approved by the bank shall not exceed the amount of the coy's liabilities in respect of the advances made on the footing thof by a margin of at least 30 p.c., the bank is to be at liberty to notify the fact to the coy, and the coy is within days afterwards to vest in the bank further securities approved by the bank to make up the required margin, or in the alternative is to pay to the bank so much cash as shall restore the required margin.

Sale.

11. The bank is to have a power to sell the mortgaged premises in the terms of sub-sect. 1 of sect. 19 of the Conveyancing and Law of Property Act, 1881, and sects. 21 and 22 of the sd Act are to be applicable as if the power of sale were conferred by the sd Act; but such power is not to be exercised unless and until the coy shall have made default for more than seven days in the payment of some money hby secured or in the performance of some obligation hby imposed on the coy. Sect. 20 of the sd Act is not to apply.

See new sects. 4, 9 of Conveyancing Act, 1911.

Declaration evidence of default, &c.

12. Upon any sale under the power afsd, a statutory declaration made by a director, manager, or cashier of the bank that the coy

FORMS.

has made default as aforesaid, and that the power of sale is exercisable, shall be conclusive evidence in favour of any purchaser or other person deriving title to the premises under such sale. **Form 598.**

13. The coy is from time to time to execute and sign all transfers, powers of attorney, and other documents which the bank may require for perfecting the bank's title to the mortgaged premises, or vesting the same or any covenant with any purchaser. Transfers, &c. to be executed.

14. With the consent of the bank the coy is to be at liberty from time to time to withdraw any of the further securities aforesaid vested in the bank pursuant to this agreement by the vesting in the bank other securities in accordance with the foregoing provisions. Withdrawal

AS WITNESS, &c.

Securities on Debentures and Debenture Stock.

Where a bank is willing to take debentures as security, they can of course be specially framed so as to meet the circumstances. Thus, they can be made payable on demand, or on demand in certain events. See Form 591.

But cases very commonly occur in which this is not practicable or expedient, *e.g.*, where the company has already issued part of a series of debentures or debenture stock, and the best security it can offer to the bank is the balance of the same issue. In such cases the security may be effected

- (1) In the case of debentures, by issuing the debentures to trustees for the bank, and giving the bank a charge thereon with a power of sale under which it can, if necessity arise, sell the debentures and transfer them to the purchasers; or
- (2) In the case of debentures, by sealing the debentures in blank as to dates and names of payees, and depositing them with the bank as security, with power at any time to fill up the blanks and deliver the instruments as the deeds of the company (see Form 597), and with power for the company on paying to the bank a specified sum per debenture to withdraw any of the debentures, *e.g.*, which it finds means to place with outsiders.
- 3) In case of debentures to bearer, by simply depositing the debentures with the bank and giving the requisite power of sale, &c., for debentures being negotiable instruments, the legal title passes to the depositor. *Bechuanaland Exploration Co. v. London Trading Bank*, (1898) 2 Q. B. 658; *Edelstein v. Schuler*, (1902) 2 K. B. 144.
- (4) In the case of debenture stock, by issuing the stock to the bank or its nominees with definitive certificates, or by giving a charge without issue of any certificates, or by giving a charge and issuing a provisional scrip certificate, or by issuing definitive certificates of various amounts, with power to fill up.

The law and practice as to debentures and debenture stock will be found set forth in considerable detail in Part III. of this work, 10th ed., 1907. The following is an alphabetical list of the principal matters there dealt with:

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Nevertheless, it may be convenient here to give the ordinary form of registered debenture, with a few references to leading cases:—

Form 599. See Form 58. *supra*, p. 400.

Debentures to
registered
holder.

Form 599a. See Part III. of this work. p. 261.

Debentures
to bearer.

Form 600.

Joint and
several guar-
antee (general
clauses).

Guarantees.

THE — — BANK, LIMTD.

General Clauses (Joint and Several Guarantee)

1. Unless otherwise expressed, the guarantee is to be considered joint and several.

Form 600.

See note on guarantees, *supra*, p. 1196.

Prima facie, a guarantee by several is to be regarded as a joint contract, but it is a question of intention; and even where the word "severally" is not used, it may appear that a joint and several liability was intended. See *Fell v. Goslin*, 7 Ex. 185, where the words were "we undertake and guarantee . . . in the proportion of 200*l.* each," which words were held to mean that the guarantors were not jointly liable for the whole amount. When the guarantee is expressed to be joint and several, A., who signs on the understanding that B. is also to sign, will not be bound if B. does not in fact sign (*Underhill v. Hopwood*, 10 Ves. 226; *Bonsor v. Cox*, 4 Beav. 379), or if B. qualifies his signature. *Ellesmere Brewery Co. v. Cooper*, (1896) 1 Q. B. 75. The release of one guarantor *prima facie* operates as the release of all, even though the guarantee is expressed to be joint and several. *Mercantile Bank of Sydney v. Tyser*, (1893) A. C. 317; and see *Re E. W. A.*, (1901) 2 K. B. 612.

Sometimes it is provided that "It is not to be incumbent on the bank to call upon the principals to pay before requiring the guarantors to pay the amount guaranteed." But it is unnecessary, for it only expresses what the law implies. *Ranelagh v. Hayes*, 1 Ves. 189; *Wright v. Simpson*, 6 Ves. 714, 733; *Smith's Merc. Law*, 11th ed. 625.

Some guarantees also provide that "The amount guaranteed is (unless otherwise provided) to be due and payable at the expiration of fourteen days after notice requiring payment shall have been served on the guarantors." This is a concession to the guarantor, for *prima facie* the creditor can sue the surety without any previous notice or demand. *Hitchcock v. Humphrey*, 5 M. & G. 559; *Cutler v. Southern*, 1 Wms. Saund. 115.

Sometimes it is provided that—"As from the time when the bank requires payment of any moneys from the guarantors, such moneys are, until payment, to carry interest at the rate of 5 per cent. per annum."

Where two or more sureties for a common principal bind themselves in different amounts, in the event of the principal being in default they are liable to contribute to the satisfaction of the creditor's claim in proportion to the limits of their respective liabilities, and not in equal amounts. *Ellesmere Brewery Co. v. Cooper*, (1896) 1 Q. B. 75; *Re Ennis*, (1893) 3 Ch. 242; and *Stirling v. Burdett*, (1911) 2 Ch. 418. See further, De Colyar on Guarantees, 2nd ed.

As to the signature to a guarantee being obtained by fraud, see *Re Carlisle Printing Co.*, *Law Times News*, 1911, p. 121.

2. Unless otherwise provided the guarantee is to be considered a continuing guarantee for the purpose of securing (subject to any limit specified therein) the general balance due, or that may be due, from time to time, and at any time, from the ppals to the bank, notwithstanding any payments from time to time made to the bank, or any settlement of account, or any other thing whatsoever. And the guarantor's liability to pay is to arise first when notice in writing is given to him requiring him to pay.

If A. guarantees the payment to B. of all sums to become owing to him by C. up to a specified sum, the question arises whether the guarantee attaches merely on the debts incurred up to the specified sum, so that when they are cleared off the guarantee will be at an end, or whether it is a continuing guarantee as above expressed. To avoid doubt the matter should be dealt with

Form 600. in clear terms. *Laurie v. Scholefield*, L. R. 4 C. P. 622; *Hoffield v. Meadows*, *ibid.* 595; *Kirby v. Duke of Marlborough*, 2 M. & S. 18; *Parr's Banking Co. v. Yates*, (1898) 2 Q. B. 460; *Balfour v. Grace*, (1902) 1 Ch. 733; *Smith's Merc. Law*, 11th ed. 626, 627.

It may be desirable to state when first the liability to pay is to arise, so that the statute may not run till then. *Denton v. Puddison*, 68 L. T. R. 409; *Parr's Banking Co. v. Yates*, (1898) 2 Q. B. 460.

3. The guarantee (unless otherwise arranged) is to remain in force as to each of the guarantors until the expiration of fourteen days after a notice in writing to discontinue the same shall be given to the bank by such guarantor or his legal personal representative, and notwithstanding the discontinuance as to one or more of the guarantors, the guarantee is to remain a continuing security as to the other or others.

The death of a surety will determine his guarantee if he could by notice have determined the same in his life (*Coulthart v. Clementson*, 5 Q. B. D. 42; *Harris v. Fawcett*, 8 Ch. 866; *Sherry*, 25 C. D. 692, 705; *Re White*, (1897) 1 Ir. R. 575); but in the case of a joint and several continuing guarantee the death of one does not, *ipso facto*, determine the continuing operation of the guarantee as to the survivors (*Beckett v. Adlyman* (1882), 9 Q. B. D. 783); and if the contracting parties desire that on the death of a guarantor a special notice shall be necessary to determine the guarantee, they can so provide, and the provision binds the estate of the guarantor. *Coulthart v. Clementson*, 5 Q. B. 42, 48; *Silvester*, (1895) 1 Ch. 573. See, however, *Re Silvester*, (1895) 1 Ch. 573; and *Re Grace*, (1902) 1 Ch. 733, 739.

Where the consideration for a guarantee is given once for all, the guarantee cannot be determined in the absence of express provisions (*Lloyd's v. Harper*, 16 C. Div. 290; *Calvert v. Gordon*, 3 Mann. & Ry. 124); but where the consideration is to consist of separate advances and credits, to be from time to time made and given, it is considered that a surety may determine his liability by notice as regards future advances. It is therefore wise to make the matter clear by express provision. Sometimes a much longer period than fourteen days is fixed, e.g., one month, three months, or six months.

4. The bank, without exonerating the guarantors, may grant time or other indulgence to the ppals, or any other person or persons liable to the bank on or in respect of any bills, notes, guarantees, or undertakings, and give up, or modify or abstain from perfecting or taking advantage of any securities or contracts, and discharge any party or parties, and accept or make any composition or arrangement, and realise any securities when and in such manner as the bank may think expedient.

Prima facie the surety has an interest "in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him." Per Lord Loughborough, in *Rees v. Berrington*, 2 Ves. jun. 540; and see *Bolton v. Bull*, (1891) 2 Ch. 48.

Giving time and forbearance. If the creditor agrees with the principal debtor to give him time, the surety, unless the contract otherwise provides, is

Form 600.

discharged. *Combe v. Woulfe*, 1 M. & S. 241; 8 Bing. 156; *Oriental Financial Corporation v. Overend*, 7 Ch. 142, 150; affd. L. R. 7 H. L. 348; *Bolton v. Buckingham*, (1891) 1 Q. B. 278. But to have this effect the agreement for time must be of a binding character, and made for valuable consideration (*Bliss v. White*, 1 Y. & C. (Exch.) 620); the giving of time without any binding agreement does not discharge the surety; nor will the surety be discharged if the agreement is not with the debtor, but with some third party. *Frazier v. Jordan*, 26 L. J. Q. B. 289; 8 El. & Bl. 303; *Clarke v. Barley*, 11 Ch. D. 422.

As to the effect, on an action for contribution, of one surety giving time to the principal debtor, see *Greenwood v. Francis*, (1899) 1 Q. B. 312.

A release of the principal operates *pro tanto* as a discharge of the surety. *Ex parte Harvey*, 4 D. M. & G. 801; *Crugue v. Jones*, L. R. 8 Ex. 81; *Hilson v. Lloyd*, 16 Eq. 50 (composition). Not so if the guarantee contains provisions to the contrary. *Manchester Union Bank v. Beuch*, 34 L. J. Ex. 133; *Cooper v. Smith*, 4 M. & W. 519. And a release by the creditor of one of the sureties operates *primâ facie* as a release of all. *Mercantile Bank v. Taylor*, (1893) A. C. 317. Not so where the release of the debtor is by operation of law. *Ex parte Jacobs*, 10 Ch. 211; *M. Gath v. Gray*, L. R. 9 C. P. 216. A release of the principal by novation extinguishes the remedy against the surety. *Commercial Bank of Tasmania v. Jones*, (1893) A. C. 313.

The surety is not released where the release of the principal only amounts to a covenant not to sue, with a reservation of the rights and remedies against the surety (*Green v. Wigan*, 4 Ch. 204); but where the principal is really released, there can be no such reservation. *Commercial Bank of Tasmania v. Jones*, (1893) A. C. 313. As to when a release is not implied, see *Perry v. National Provincial Bank of England*, (1910) 1 Ch. 164.

As to securities. A surety is *primâ facie* entitled to the benefit of all securities—whether known to the surety or not—which the creditor holds, as against the principal debtor (*Dunster, Fox & Co. v. North and South Wales Bank*, 6 App. Cas. 1); even though obtained after the contract of suretyship. *Forbes v. Jackson*, 19 C. D. 615, 621; and see Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 5; and *The Englishmen and The Austrians*, (1895) 1 A. 12. Hence, in the absence of express provision, a surety is released by the creditor taking a new, or different, security in lieu of the original security. *Clarke v. Bentley*, 3 Y. & C. (Ex.) 187; *Bowles v. Mayes*, 19 C. B. N. S. 76.

As to the right of retainer by a surety who takes out administration to the deceased principal debtor, see *Re Allen, Adcock v. Evans*, (1895) 2 Ch. 345.

Where through the fault of the creditor any security for the debt is lost, the surety is *primâ facie* discharged *pro tanto*. *Wulff v. Jay*, L. R. 7 Q. B. 756 (bill of sale not registered); *Pledge v. Buss, Johns*, 663; *Coates v. Coates*, 33 Beav. 249; *Strange v. Fooks*, 4 Giff. 408 (not giving notice of assignment of chose in action); *Capel v. Butler*, 2 S. & S. 457 (omission to register transfer of books); *Mutual Loan Society v. Sad'ar*, 5 C. B. N. S. 419 (neglecting to restore collateral security); *Latham v. Chartered Bank*, 17 Eq. 205 (not presenting bill at maturity). But the surety is not released by the creditor realising the security in exercise of the power conferred on him. *Taylor v. Bank of New South Wales*, 11 App. Cas. 586; and see *Carter v. Wille*, 25 C. D. 670, and *Belfast Banking Co.*, 1 Ir. C. L. R. 693, as to negligence not discharging surety.

Accordingly it is sometimes provided that the guarantors are not to make any claim against the bank, on the ground that, by negligence or otherwise, the bank has lost the benefit of any security or guarantee which, if enforced, or preserved, would or might have afforded funds in relief of the guarantors.

5. All dividends, compositions, and payments received from any

Form 600. such person or persons are to be treated as payments in gross, and the guarantors are not to have any right to participate except to the extent of the surplus remaining after satisfaction of the ultimate balance due to the bank.

Primâ facie, where the guarantee is a limited one, and the debt exceeds the sum guaranteed, and the creditor receives a dividend from the estate of the bankrupt or deceased debtor, the surety is entitled to treat a proportionate part of the dividend as paid in reduction of the guarantee, and to insist that the whole shall not be applied in reduction of the unguaranteed portion of the debt. *Thornton v. McKewan*, 1 H. & M. 525; *Hobson v. Bass*, 6 Ch. 792; *Seton*, p. 1783. But the rights of the surety may be waived or modified as above. *Ex parte National Provincial Bank, Re Rees*, 17 C. D. 98; *Midland Banking Co v. Chambers*, 4 Ch. 398; *Ex parte Miles*, 1 De G. 623; *Re Blakeley*, 9 Morr B. R. 173. Where, however, the whole debt is guaranteed with a proviso limiting the guarantor's liability, the above stipulation is unnecessary. See *Ex parte National Provincial Bank, Re Sass*, (1896) 2 Q. B. 12.

5a. Where the principals are a corporation or society the bank is not to be concerned to see or inquire into the powers of the principals or their directors or other agents acting, or purporting to act, on their behalf, and moneys in fact borrowed from the bank in professed exercise of such powers shall be deemed to form part of the moneys guaranteed, even though the borrowing or obtaining of such moneys be in excess of the powers of the principals, or of the directors or other agents afd. or shall be in any way irregular or defective or informal.

Primâ facie the surety is not liable, unless there is a principal debtor liable, for the essence of the contract of suretyship is that the surety is only secondarily liable. *Mountstephen v. Lakeman*, L. R. 5 Q. B. 613; 7 H. L. 17. Where, however, directors of a company guaranteed the repayment of a loan borrowed *ultra vires* of the company, they were held liable on their guarantee. *Yorkshire Railway Waggon Co. v. Maclure*, 19 C. D. 478. But on appeal (21 C. D. 309) it was held that the transaction in question was not *ultra vires*, and accordingly the decision below cannot be relied on, and it is desirable expressly to deal with the matter. See also *Becket v. Tower Bridge Assessment Commrs* (1891) 1 Q. B. 638.

Some banks, to preclude question, use a clause as above.

5b. Any accounts settled or stated by or between the bank and the principals, or admitted by them or on their behalf, may be admitted by the bank, and shall in that case be accepted by the guarantors, and each of them and their respcive representatives, as conclusive evidence that the balance or amount thereby appearing is due from the principals to the bank.

Such a clause is sometimes used. In the absence of some such provision, the principal debtor's admission as to the amount owing is not available as against the surety. *Evans v. Beattie*, 5 Esp. 26. Even a judgment against the principal debtor is not evidence against the surety in an action in which he is sued by the creditor (*Ex parte Young*, 17 C. D. 668) (following the American case

Douglas v. Howland, 24 Wendell, 35); unless, indeed, the surety was made a party to the former action, or was served with a third party notice. **Form 600**

5c. A certificate in writing under the common seal of the bank stating the amount at any particular time due and payable to it under the guarantee shall be conclusive evidence as against the guarantors, and each of them, and their respcive legal personal representatives.]

Such a provision is occasionally used.

6. As to each of the guarantors any notice may be served on him, or his legal personal representatives, either personally or by sending the same through the post in an envelope addressed to the last known place of address of the person to be served, and a notice so sent shall be deemed to be served on the day following that on which it is posted

7. In the above clauses the singular includes the plural, and *vice versa*.

Where several covenant as principal debtors, and it is subsequently arranged between them that one shall be liable as a surety only, and the creditor has notice, he may do nothing to prejudice the surety without in effect releasing him *Rouse v. Bradford Banking Co.*, (1894) A. C. 586

TO THE BANK, LIMTD.

Form 601

Gentlemen,

Letter on
footing of
above
conditions.

In conson of your making advances or otherwise giving credit or accommodation to the Coy, Limtd (hinftr called "the principals"), we, the undersigned, on the footing of the above general clauses, guarantee the due payment and discharge of all the principals' liabilities to you, whether incurred before or after the due hof, and whether incurred by the principals alone or jointly with others, and whether as principals or sureties, and whether such liabilities are matured or not, and whether absolute or contingent, including liabilities in respect of advances and in respect of cheques, bills, notes, and other negotiable or non-negotiable instruments drawn, accepted, indorsed, or guaranteed by the principals; and in respect of interest with half-yearly rests, commission, and other usual banking charges and in respect of all costs, charges, and expenses which you may incur in paying any rent, rates, taxes, calls, instalments, or other outgoings in respect of the mortgaged ppty, or in insuring, repairing, maintaining, managing, or realising any of the mortgaged ppty, or in investigating the title thereto :

If so, say :

And this guarantee is to extend to the person or persons for the

Form 601. time being and from time to time carrying on the business now carried on by the principals.]

[If so, add:

We are not to be called on under this guarantee to pay more than £——.]

Dated this —— day of —

If one of two joint guarantors is sued on the guaranty itself, and judgment is recovered, the other one cannot be sued; but it is otherwise when the first one is sued on his cheque. See *Wegg-Prosser v. Evans*, (1895) 1 Q. B. 108, 112, 113; overruling *Cambeford v. Chapman*, 19 Q. B. D. 229.

As to liability of surety for interest when creditor has proved in the bankruptcy of the principal debtor, *In re FitzGeorge*, (1905) 1 K. B. 462; *In re Moss*, (1905) 2 K. B. 307.

Form 602. 1. Where documents of title are deposited with the bank by way of guarantee for the due discharge of the liabilities of a third person (in these conditions referred to as the party guaranteed to the bank), they are, unless otherwise arranged, to stand as a continuing security for the due satisfaction of the liabilities of the party guaranteed to the bank, whether incurred before, &c. [as in clause 1 of Form 578].

Charge by
surety.

2. All moneys, &c. [as in clause 2 of Form 578].

3. The depositors, &c. [as in clause 3 of Form 578].

4. The bank, without exonerating, &c. [as in clause 4 of Form 600].

5. All dividends, &c. [as in clause 5 of Form 600].

6. Any notice, &c. [as in clause 4 of Form 578].

7. In the above clauses, words importing, &c. [as in clause 5 of Form 578].

Form 603.

TO THE —— BANK, LIMTD.

Letter on
above
conditions.

Gentlemen,

I have deposited with you the below-mentioned documents, by way of guarantee for the due discharge of the liabilities of A. B. of ——, to you, and upon the footing of the above general clauses, but so that the security is not to be available for more than £——.

Yours, &c. ——.

[Particulars of Documents.]

THIS INDENTURE, made, &c. between The — Coy, Limitd (hnfr called "the coy"), of the one pt, and A. B., of, &c., C. D., of, &c., E. F., of, &c., and G. H., of, &c. (hnfr called "the guarantors"), of the other pt.

Form 604.

Deed of indemnity from company to directors and another for becoming sureties for company to bank.

WHEREAS the coy recently obtained from The — Bank, Limitd (hnfr called "the bank"), an advance of 6,000*l*.

AND WHEREAS the sd advance was made on the security of an indenture, dated, &c., and made between the coy of the first pt, the guarantors of the second pt, and the bank of the third pt, and by that indenture the coy and the guarantors, jointly and severally, covenanted with the bank to pay to the bank on the — day of — the sum of 6,000*l*., with interest thereon at the rate of 5 p.c.p.a., computed from the date thof, and also so long after that day as any moneys remained due on the security thof, to pay to the bank interest thereon after the same rate, by equal half-yearly payments on the — day of — and the — day of — in each year; and by the sd indenture the coy assigned to the bank certain patents and patent rights specified or set out in the second and third schedules to a certain agreement of the — day of —, which agreement was framed in accordance with the draft thof set forth in the first schedule to the coy's arts of assen, and is hnfr referred to as "the scheduled agreement," to hold the same unto the bank, subject to the proviso therein contained for the redemption of the same premises on payment on the sd — day of — by the coy to the bank of the sd sum of 6,000*l*., with interest thereon in the meantime at the rate afd, and the sd indenture contained a proviso to the effect that, although, as between the coy and the guarantors resply, the guarantors were only sureties for the coy as between the guarantors and the bank, they, the guarantors, were to be considered as joint and several principal debtors for all the principal moneys and interest intended to be secured by the indenture now in recital, so that the guarantors, their heirs, executors, or administrators, should not be released or exonerated by time being given to the coy, or by any other dealing between the bank and the coy, or by any act or omission of the bank, or by any other matter or thing whatsoever, whereby the guarantors, their heirs, executors, or administrators, or any of them, as a surety or as sureties only for the coy, would be released or exonerated.

AND WHEREAS the guarantors, other than the sd G. H., are directors of the coy.

AND WHEREAS the directors of the coy are empowered by the arts of assen of the coy, amongst other things, to execute in the name and on behalf of the coy, in favour of any director or other person who may incur, or be about to incur, any personal liability for the benefit of the coy, such mortgages of the coy's ppty, present and future, as

Form 604. they think fit, and any such mortgage may contain a power of sale, and such other powers, covenants, and provisions as shall be agreed on: and by clause -- of the sd arts of assen it is provided, amongst other things, that no director shall be disqualified by his office from contracting with the coy or from voting in regard to any contract by or on behalf of the coy, to give to any director any security by way of indemnity.

AND WHEREAS it was one of the terms on which the guarantors agreed to execute the sd indenture that the coy should forthwith execute in their favour a security in the terms hof.

NOW THESE PRESENTS WITNESS AND DECLARE as follows:

1. The coy shall indemnify the guarantors, and each of them, and their and each of their heirs, executors, and administrators, against all actions, proceedings, claims, and demands in respect of the sd indenture of the --- day of ---

2. The coy shall, upon the request in writing of the guarantors, or of any one of the guarantors, or of the legal personal representatives of any one of the guarantors, pay off the principal moneys and interest secured by the sd indenture, and procure the release of the guarantors, and their respective heirs, executors, and administrators, from all claims under or in respect of the sd indenture.

3. The coy hby charges in favour of the trees or tree the undertaking and ppty of the coy whatsoever and wheresoever, both present and future, with the payment of all moneys which shall from time to time become payable under clause 1 hof, and as a security for the due performance by the coy of all the obligations imposed on the coy by that clause.

4. The sd charge shall operate as a fixed charge, so far as concerns the sd patents and patent rights, and as regards the residue of the premises hby charged shall operate as a floating security. Nevertheless, each of the guarantors, or his legal personal representative for the time being, shall be at liberty at any time, by notice in writing to the coy, to determine the floating character of the charge as regards any parlar asset specified in such notice, and thereupon the charge, as regards such asset, shall become and operate as a fixed charge, and shall cease to be a floating charge.

And see sects. 4, 9, Conveyancing Act, 1911.

5. The statutory power of sale conferred on mortgagees by sect. 19 of the Conveyancing and Law of Property Act, 1881, shall be exercisable without further notice by the trees or tree at any time after the coy shall have committed any breach of any of the obligations hby imposed on it, and sects. 19 and 20 of the sd Act shall be regarded as modified accordingly.

6. The coy irrevocably appoints the trees or tree to be the attorneys or attorney of the coy, in the name and on behalf of the coy or otherwise to execute and do any such assignments, conveyances, assurances, and things as the trees or tree may find it necessary to execute and do for the purpose of carrying any such sale as aforesaid into effect.

Form 604.

7. The trees or tree may, at any time after the power of sale aforesaid has become exerciseable, appoint any person or persons to be a receiver or receivers of the ppty hby charged, and a receiver or receivers so appointed shall have power to take possession of the sd ppty charged, to carry on, or concur in carrying on, the business of the coy, and to sell, or concur in selling, any of such ppty; and all moneys received by such receiver or receivers shall, after providing for the matters specified in the first three paragraphs of clause 8 of sect. 24 of the sd Act, be applied in paying off all moneys which the guarantors shall then be liable to under the sd indenture of the day of —, and in making good to them all moneys they may previously have pd. and generally in effectuating the complete indemnity of the guarantors and their respive heirs, executors, and administrators, in accordance with clause 1 hof, and any surplus shall be pd to the coy.

8. The coy hby covenants with the guarantors, and as a separate covenant with each of them, that the coy will duly observe and perform all the obligations hby imposed on it.

9. In these presents the expression "the trees or tree" means the guarantors or the survivors or survivor of them, or other the trees or tree for the time being hof.

10. The statutory power of appointing a new tree or new trees, conferred by sect. 10 of the Trustee Act, 1893, shall be applicable hereto.

IN WITNESS, &c

That the proposed deed of indemnity submitted to the meeting be approved, and that the common seal be affixed thereto

Form 605.

Resolution

PETITIONS.

CHAPTER XVII.

REDUCTION OF CAPITAL.

The Companies Act, 1862, made no provision for the reduction of the capital of a company limited by shares. The capital was by the Act made one of the conditions which had to be specified in the memorandum of association, and although sect. 12 of the Act allowed modification of some of the conditions specified in the memorandum as, e.g., to increase the capital, consolidate the shares, (said-up shares into stock), it prohibited all other alterations. This omission was, however, rectified by the Companies Act, 1880, sect. 90, which was explained (to meet the decision of *Jessel v. R.*, in *the Vale Co.* (1877), 4 Ch. D. 827) and extended by the Companies Act, 1877. Both these Acts are now repealed, and the provisions re-enacted in sects. 46 to 56 of the Companies (Consolidation) Act, 1908. See *infra* as follows:—

Reduction of Share Capital.

46. (1) Subject to confirmation by the Court, a company limited by shares, if so authorized by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

- (a) Extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or
- (b) Either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or
- (c) Either with or without extinguishing or reducing liability on any shares, pay off any paid-up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act called a resolution for reducing share capital.

This section is supplemented by sects. 47 to 56 of the Act, which deal with the machinery for obtaining the sanction of the Court, and will be found in the Appendix, *infra*.

Effect of the sections.

Sections 46 to 56 of the Act take the place of the corresponding sections of the Companies Acts, 1867 and 1877. Sections 9 to 20 inclusive of the Act of 1867 gave power to a company limited by shares to reduce its capital by special resolution confirmed by the Court, and sect. 3 of the Act of 1877 declared that the word "capital," as used in the Act of 1867, should include paid-up capital, and the power to reduce capital conferred by that Act should include a power to cancel any lost capital or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company. And it was held in *British and American Corporation v. Couper*, (1894) A. C. 399, that under the Acts of 1862 and 1867, any kind of reduction might be confirmed by the Court. "There is," said Lord Herschell, L. C., "not a word in the Act of 1877 from beginning to end to narrow the scope of the Act of 1867. The generality of the power conferred by that Act is left wholly untouched." And the jurisdiction of the Court to sanction reductions of capital of the most varied kinds were frequently recognised. However, in *Anglo-French Corporation*, (1902) 2 Ch. 845, Buckley, J., considered that the construction placed on the Act in the past was unsound, and that inasmuch as the Act of 1877 gave a specific power to cancel capital lost or unrepresented by available assets, it impliedly denied jurisdiction to sanction the cancellation of paid-up capital not lost or unrepresented by available assets, e.g., to sanction a cancellation of paid-up shares which the holder was willing to have cancelled for the company's benefit. This, as pointed out in former editions of this work, was inconsistent alike with the principle laid down by the House of Lords in *British and American Corporation v. Couper*, *supra*, and with a series of cases in which the Court had exercised from time to time the power thus supposed to be denied to it. Then came the decision of the House of Lords in *Poole v. National Bank of China*, (1907) A. C. 229, where that House dissented from the views expressed by Buckley, J., and re-affirmed the principles laid down in *British and American Corporation v. Couper*, *supra*. "The decision," said Lord Macnaghten, "of Buckley, J., in *Anglo-French, &c. Co.*, goes even further. His language if correctly reported, seems to imply that because the Act of 1877 specifies certain cases and declares that the power conferred by the Act of 1867 includes those specified, it is to be inferred that in all other cases the jurisdiction of the Court is excluded. If that is the meaning of what the learned judge said, with all respect I am unable to agree with his view. The condition that gives jurisdiction is not proof of loss of capital, or proof that capital is unrepresented by available assets, or that capital is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect. Lastly came the Companies (Consolidation) Act, 1908, which alters the wording of the enactments as to reduction of capital by saying

that, subject to the confirmation of the Court, a company limited by shares, if so authorized by its articles, may by special resolution reduce its capital *in any way*, and in particular (without prejudice to the generality of the foregoing power), may reduce its capital ' [in the manner specified in paragraphs (a), (b) and (c) of sect. 46]. Thus the jurisdiction of the Court to sanction *any kind* of reduction is made clear beyond all cavil.

The jurisdiction to confirm a reduction of capital arises—

When
jurisdiction
arises.

- (1) Where the company is a company within the definition contained in sect. 285 of the Act, that is to say, "a company formed and registered under this Act, or an existing company," that is, a company formed and registered under the Joint Stock Companies Act, under the Companies Act, 1862, or is a company (see sect. 246) registered but not formed under the Joint Stock Companies Act or the Companies Act, 1862, or is a company registered but not formed under Part VII. of the Act of 1908; and
- (2) The company has passed a special resolution for the reduction of its capital; and
- (3) The Court applied to has jurisdiction to wind up the company.

The following are some of the modes of reduction commonly adopted:—

Modes of
reduction

- (a) Reducing the liability of shareholders in respect of uncalled or unpaid capital, *e.g.*, where the shares are 10*l.* each with 5*l.* paid up, reducing them to 5*l.* fully paid-up shares, and thus relieving the shareholders from liability of the uncalled amount.
- (b) Paying off or returning paid-up capital not wanted for the purposes of the company, *e.g.*, where the shares are 10*l.* fully paid up, reducing them to 5*l.*, and paying back 5*l.* per share. Sect. 46 of the Act expressly provides that this kind of reduction is to be allowable. *Lees Brook Spinning Co., In re*, (1906) 2 Ch. 394; *Artizans' Land and Mortgage Corp., In re*, (1904) 1 Ch. 796; *Piercy, In re*, (1907) 1 Ch. 289.
- (c) Paying off paid-up capital by issuing debentures or debenture stock in satisfaction. *Nixon Navigation Co.*, (1897) 1 Ch. 872; *De La Rue & Co.*, (1911) 2 Ch. 361.
- (d) Paying off paid-up capital on the footing that it may be called up again. Thus, if the shares are 10*l.* fully paid up, paying off 2*l.* per share on the footing that when desired the company may call it up again. *Fore Street, &c. Co.*, 59 L. T. 214.
- (e) Cancelling by special resolution shares that have not been taken or agreed to be taken. See sect. 41 (1) (e) of the Act.

- (f) Cancelling shares surrendered, or the holders of which consent to cancellation. *Llynri Co.*, 26 W. R. 55; *Virian & Co.*, 54 L. T. 384; *Poole v. National Bank of China*, (1907) A. C. 228.
- (g) Paying off and cancelling preference shares, in pursuance of a contract in the memorandum and articles binding on both preference and ordinary shareholders, by applying for the purpose a portion of the profits of the company. See *In re Dicko Pier Co.*, (1891) 2 Ch. 354.
- (h) Paying off capital out of accumulated profits and increasing *pro tanto* the uncalled capital. See sect. 40 of the Act; and *Neale v. Birmingham Tramways Co.*, (1910) 2 Ch. 464.
- (i) Lost capital. Cancelling capital which has been lost or is unrepresented by available assets. This is one of the commonest modes of reduction. A company, whose capital amounts to 100,000*l.* in 10*l.* shares, has lost, say, 50,000*l.* by some business disaster. It may be a submarine telegraph company, and one of its cables has been destroyed, or a shipping company, and part of its fleet has been sunk; in such a case where a company has lost a portion of its capital, nothing, as Sir George Jessel said, can be more beneficial to the company than to admit the loss, and to write it off (*In re Ebbw Vale Co.*, (1877), 4 C. D. 31), e.g., to reduce its 10*l.* shares to 5*l.*, and thus place itself in a position to resume payment of dividends.

The provisions empowering a company to cancel "any lost capital, or any capital unrepresented by available assets," are alternative provisions, and the latter is not explanatory of the former. *Hoare & Co., Ltd., In re*, (1904) 2 Ch. 208.

In all cases a special resolution is required, and in all cases (except (e) and (h)) the confirmation of the Court is also required.

All round Reduction or otherwise.

All round reduction.

Prima facie a reduction of capital should be an all round reduction; that is to say, where capital is to be paid off or to be cancelled as lost or unrepresented by available assets, or where the liability for uncalled capital is to be reduced, the same percentage should be paid off or cancelled or reduced in respect of each share; and, on the same principle of fairness, this *pari passu* mode of reduction is the proper mode where there are several classes of shares, e.g., ordinary and preference shares (*Bannatyne v. Direct Spanish Telegraph Co.*, 24 C. D. 287; *Direct Spanish Cable Co.*, 34 C. D. 307; *Barrow Hematite Steel Co.*, 39 C. D. 382; *Credit Assurance and Guarantee Corporation*, (1902) 2 Ch. 601), unless such preference shares have

priority as regards capital in winding-up (*Re American Pastoral Co.*, 62 L. T. 625), in which case the loss should be thrown first on the ordinary shares. And see *Floating Dock of St. Thomas*, (1891) 1 Ch. 691; *London and New York Co.*, (1895) 2 Ch. 860. But it is open to a company to pass a special resolution reducing the capital otherwise than in accordance with the legal rights of the shareholders, *e.g.*, by paying off wholly or in part some of the shareholders, although all are entitled to rank *pari passu*; or by cancelling part of the capital paid up on one class, although both classes rank evenly as regards capital. And it is now settled that the Court has jurisdiction to confirm any kind of reduction, notwithstanding that it involves a departure from the legal rights of the classes. *British and American Corporation v. Couper*, (1894) A. C. 399; *Credit Assurance and Guarantee Corporation*, (1902) 2 Ch. 601; *Allsopp and Sons*, 51 W. R. 644; *Welsbach Incandescent Gas Light Co.*, (1904) 1 Ch. 87; *National Dwellings Society, In re*, 78 L. T. 144.

A scheme for reduction of capital by paying off paid-up capital may be sanctioned, even though it involves the raising by other means of the very money which is required for effecting the reduction. *De La Rue & Co.*, (1911) 2 Ch. 361.

But the Court will not sanction the cancellation of a class of shares on the footing that in lieu thereof the company is to issue to the holders a much larger amount of paid-up shares of another class. *Development Co. of Central Africa*, (1902) 1 Ch. 54.

If the company reducing its capital has a reserve fund, there is no obligation to apply in the first instance the whole of such reserve fund to replace the capital account; and if the reserve fund has been employed in the business and is therefore mixed up with the general assets, the loss falls on the reserve and on the paid-up capital rateably. *Hoare & Co.*, (1904) 2 Ch. 208; *Pooler v. National Bank of China*, 1907 A. C. 229, unless the company chooses to throw on reserve a larger proportion than its rateable proportion.

In the case last mentioned, Lord Macnaghten said: "The Court of Appeal was not quite satisfied about the propriety of retaining in hand any part of the reserve fund, but the proposal was allowed to pass on the company giving an undertaking which is embodied in the order that no part of the sum retained out of the profit reserve fund should be applied otherwise than for capital purposes. As the company offered this undertaking I do not propose to your Lordships that it should be omitted, but I do not quite understand what the undertaking means or how long it is intended to last. But I must say, speaking for myself, that I do not think that this addition to the order ought to be treated as a precedent in any other case."

A scheme for reduction of capital is not necessarily unfair or inequitable because it involves the alteration of rights of voting and priority as between the different classes of stockholders. *Welsbach Incandescent Gas Co.*, (1904) 1 Ch. 87; *Allsopp & Sons, Ltd., In re*,

54 W. R. 644, C. A. The Court will not, under guise of a reduction of capital, sanction a resolution which effects a "conversion" and "re-allocation" as distinguished from a reduction of capital. *Walker Steam Trawl Fishing Co.* (1908), S. C. 123, 41. of Sess.

It is no objection to a resolution for reduction that in effect it contravenes a bargain contained in the memorandum and articles of association, and it is no part of the business of the Court to determine the wisdom of the course adopted by the company in the management of its own affairs. Per Lord Loreburn, *L. C.*, *Poole v. National Bank of China, Limited*, (1907) A. C. 229, 336.

The Court's Discretion.

Court's
discretion.

Wide as is the jurisdiction to confirm a reduction of capital, the Court is invested with a discretion—a judicial discretion—and it is the duty of the Court before sanctioning a reduction to see that there is nothing unfair or objectionable in the scheme, especially if it does not provide for the treatment of the shareholders in accordance with their rights *inter se*.

The creditors," said Lord Macnaghten in *British and American Ind. Corporation v. Couper*, (1894) A. C. 339, and in *Poole v. National Bank of China, Ltd.*, *supra*, "are protected by express provisions. Their consent must be procured or their claims must be satisfied. The public shareholders and every class of shareholders, individually and collectively, are protected by the necessary publicity of the proceedings, and by the discretion which is entrusted to the Court. Until confirmed by the Court, the proposed reduction is not to take effect, although all the creditors have been satisfied. When it is confirmed the memorandum is to be altered in the prescribed manner, and the company, as it were, makes a new departure. With these safeguards, which certainly are not inconsiderable, the Act apparently leaves the company to determine the extent, the mode, and the incidence of reduction, and the application of any capital moneys which the proposed reduction may set free . . . The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect."

"I entirely agree," said Vaughan Williams, L. J., in *Welsbach & Co.* (1904) 1 Ch. 87, "that whether a scheme does or does not accord exactly with the legal rights of the shareholders, the Court may always consider whether it is a fair or an unfair scheme. In my judgment, this is a fair scheme. I cannot help saying—although this is in no way conclusive upon the question of fairness—that the Court always does take into consideration the wishes of the shareholders who are affected by the scheme, and in this case the majorities which have been obtained to my mind go far to show, at all events, that the shareholders, and in particular the preference shareholders, regarded this as a fair scheme." And, in the same case, Stirling, L. J., said

"I entirely agree . . . that in these cases the Court is not under an obligation to confirm any scheme for reduction by whatever majorities it may be sanctioned, but has a discretion which it is bound to exercise in every case. But, at the same time, in exercising that discretion, when we find that the determination of such matters as variations in the rights attached to different classes of shareholders has by the constitution of the company been left to the decision of the shareholders themselves, the Court ought to be very careful how it interferes with the *bonâ fide* judgment of business men on a matter of business in which they themselves are largely interested." See also *Hoare & Co.*, (1904) 2 Ch. 208; *Samuel Allsopp & Sons, Ltd.*, 51 W. R. 644; 19 T. L. R. 637. The shareholders cannot be heard to say that they took their shares in ignorance of the provisions for reduction of capital contained in the Companies Act, 1908, ss. 46-56 (re-enacting the Companies Acts, 1867 and 1877), or of provisions in the articles of association enabling class meetings to approve of modification of rights (see *Bannatyne v. Direct Spanish Telegraph Co.*, 34 C. D. 287, and *Welsbach Co.*, (1904) 1 Ch. 87); and accordingly the Court can make an order notwithstanding that it may create some sense of disappointment or hardship. *Direct Spanish Telegraph Co.*, 34 C. D. 307, and the cases above referred to.

Confirmation of Reduction, not of Resolution.

It is to be observed that the Court, in dealing with the reduction of capital, has not to confirm the special resolution but to confirm "the reduction," for sect. 50 of the Act, replacing sect. 11 of the Act of 1867, provides that "the Court may make an order confirming" the reduction "on such terms and conditions as it thinks fit." If, therefore, the resolution deals with matters beyond reduction, the Court as a general rule should abstain from passing any opinion on it, and not purport in any way to confirm it; but the minute proposed to be adopted may render it necessary to look at the other circumstances, and in such case the Court must of course consider the validity or invalidity of the other parts of the resolution. See *Hyderabad Decan Co.*, 75 L. T. 21, *Stirling*, J.

What the Court confirms.

As to cancelling paid-up capital which is not capital lost or unrepresented by available assets, the Court has frequently acted on the footing that it has jurisdiction to sanction the cancellation of shares fully or partly paid up, notwithstanding the absence of evidence that the capital paid up thereon has been lost or is unrepresented by available assets. The following are instances: *Islington Electric Co.*, W. N. 1892) 81 (there the memorandum was subscribed for certain founders' shares, and it being desired to get rid of them, the holders paid them up in full and the company passed a resolution cancelling them, and Chitty, J., confirmed the reduction); *West-*

minster Electric Supply Co., 1897 (Stirling, J., founders' shares cancelled, the holders consenting thereto, and being allowed to subscribe for a number of other shares at less than the market price); *House to House Electric Co.*, in 1899 (Romer, J., of a similar character); *St. James and Pall Mall Electric Co.*, in 1899 (Stirling, J., a similar scheme sanctioned).

The *dicta* to the contrary have been overruled (see *supra*, p. 1256 in *Anglo-French Co.*, (1902) 2 Ch. 845.

As to necessity of proving loss of capital.

According to the decision in *Louisiana and Southern States Co.* (1909) 2 Ch. 552, it is not necessary, regard being had to the terms of sect. 46 of the Act, where a company seeks confirmation by the Court of a resolution to cancel capital lost or unrepresented by available assets, to prove the loss or non-representation, and what was said by Lord Macnaghten in *Poole v. National Bank of China Ltd.*, (1907) A. C. 229, 336, was relied on in support of this view, but it seems doubtful whether the wording of the section really justifies that conclusion. Jurisdiction is one thing, and proof of the facts alleged is another thing, and where a petition for reduction alleges that some part of its paid-up capital proposed to be cancelled has been lost or is unrepresented by available assets, the Court as of course requires evidence of the facts alleged so that the order of the Court may be *secundum allegata et probata*.

Evidence of loss.

It has been held that in order to obtain the sanction of the Court to a cancellation of capital alleged to be lost or unrepresented by available assets, the allegation must be proved clearly, and goodwill (if any) must be brought into account. *Barrow Hematite Co.* (2 (1900) 2 Ch. 846.

It is sufficient to prove *either* that capital has been lost or that it is unrepresented by available assets; it is unnecessary to prove both these facts. *Hoare & Co.*, (1904) 2 Ch. 208, C. A.

In cases of cancellation, care should be taken to ascertain that the capital proposed to be cancelled has been effectually paid up. In one case it was proposed to cancel some paid-up capital, and in preparing the evidence on the petition it was discovered that the agreement under which the shares were issued as paid-up had not been filed. The petition accordingly stood over, pending a motion to rectify the register and file a contract; and this having been done, the petition was amended, and the order for reduction was made. See *Nottingham, &c. Co.*, 4 T. L. R. 429; *Eastern, &c. Co.*, 68 L. T. 312; see also *Nixon Navigation Co.*, (1897) 1 Ch. 872.

In some cases, where no sufficient contract has been filed, application may be made under the Companies Act, 1898, as to which see Chap. XX., *infra*.

Reserve.

Where the company reducing its capital has a reserve fund of accumulated profits, there is no absolute necessity to bring the reserve fund into account for the purpose of ascertaining whether the capital proposed to be cancelled has been lost. A loss of capital

falls on the general assets—not on the reserve fund of undivided profits where the reserve fund is separately invested; but if the reserve fund is invested in the business so as not to be distinguishable from the general assets, a loss should be treated as falling on the general assets and the reserve fund rateably in proportion to the amounts thereof (*Re Hoare & Co.*, (1904) 2 Ch. 208), unless the company chooses to throw a larger proportion on the reserve. This decision is one of great practical importance, and removes the doubts raised by the decision of Cozens-Hardy, J., in *Barrow Hematite Steel Co.*, (1900) 2 Ch. 846, 854.

Cases sometimes arise in which, as part of the scheme of reduction, arrears of preference dividends are to be cancelled, or are to be satisfied by the issue of deferred warrants carrying interest payable out of profits or out of surplus profits, but it is not for the Court to sanction such an alteration of rights—they have to be dealt with by virtue of provisions in the memorandum or articles of association, as in the *Welsbach Co.*, (1904) 1 Ch. 87, C. A.; *Hoare & Co.*, (1904) 2 Ch. 208; *General Credit Assurance Co.*, (1902) 2 Ch. 601. In the *Welsbach Co.* the special resolution passed for reduction of capital also provided, with the requisite sanction of class meetings, for the cancellation of the arrears of preference dividend. In *Samuel Allsopp & Sons, Limited*, W. N. (1903) 132, deferred warrants were issued in respect of the arrears.

Arrears of preference dividend.

In *Hoare & Co.*, (1910) W. N. 87, *infra*, Form 508, arrears of preferential dividends were extinguished and participation certificates were to be issued instead to the preference shareholders binding the co to pay a percentage of surplus profits to the certificate holders.

If there is no efficient provision in the articles for class meetings in such cases, it may be necessary to proceed under sect. 120 of the Act. See *infra*, Form 808.

Scheme of management

Sometimes, where it is desired to cancel founders' shares, provision is made for paying them off and for paying them a considerable bonus out of the undivided profits of the company. The Court has sanctioned such a reduction in more than one case. See Form 617a, *infra*.

Bonus to founders' shares

But the Court will not sanction a cancellation of a class of shares on the footing that in lieu thereof the company shall issue to the holders a much larger amount of paid-up shares of another class. *Development Co. of Central Africa*, (1902) 1 Ch. 54.

Sometimes it is desired in cancelling lost capital not to reduce the amount of the individual shares; for example, where there has been a loss of 50 per cent. of the paid-up capital, *prima facie* the mode of carrying out a corresponding reduction would, where the capital is divided into 1*l.* shares, be to reduce every share from 1*l.* to 10*s.* But in some cases it is preferred to cancel one-half of each holding, so as to leave the shares at the same figure. This can be done, but occasionally it is necessary to make provision for fractions.

Preserving nominal amount of shares.

Buying out
some share-
holders.

Occasionally, again, it is desired by the holder of a number of shares to have the other holders paid off, so that, in effect, he and his nominees may become the sole shareholders and the practical owners of the concern. Such a scheme can be worked out under the Act. See Form 647b, *infra*.

Reduction in
winding-up.

In several cases orders have been made sanctioning reduction of capital where the company was being wound up, and the reduction was part of a scheme of arrangement with a view to the resumption of business. In such cases the proceedings must comply not only with sect. 120, but sects. 46-56 of the Act (replacing respectively the Joint Stock Companies Arrangement Act, 1870, and the Companies Acts, 1867 and 1877), and the petition must be intitled accordingly. So held by Vaughan Williams, J., in *South Staffordshire Blue Brick Co.*, 8th March, 1898, and by Byrne, J., in *Cooper and Johnson* (1903), 51 W. R. 314. In *Wallasey Brick and Land Co.*, W. N. (1894) 20, Kekewich, J., refused to sanction a reduction of capital on the ground that the company was not a going concern, and did not contemplate resumption of business, but it may be doubted whether this decision can be supported.

Occasionally, too, a reduction of capital takes place along with a reorganization of capital under sect. 45 of the Act or otherwise. *Australian Estates and Mortgage Co.*, (1910) 1 Ch. 414; and *infra*, p. 1520.

Special Resolutions for Reduction.

Whether the sanction of the Court is or is not required, special resolutions have to be passed for the reduction of capital.

A special resolution for reduction can only be passed if at the time of passing the same the *articles* of association of the company contain a clause giving the company power to reduce its capital, for sect. 46 of the Act only empowers the company to reduce by special resolution "if so authorized by its articles." Accordingly, power in the memorandum of association is ineffective. *Dexine Patent Packing and Rubber Co.*, W. N. (1903) 82.

For the clause in articles of association authorizing a reduction of capital, see Form 251, clause 48, p. 684.

Hence, where the articles omit to give express power to reduce the capital, a special resolution must first be passed altering them by introducing a clause that "the company may from time to time reduce its capital"; and subsequently a second special resolution must be passed to effect the reduction. These special resolutions cannot be passed concurrently. See sect. 46 of the Act, and *West India Co.*, 9 Ch. 11, n.; *Patent Invert Sugar Co.*, 31 C. Div. 166; *Oregon Mortgage Co.* (1910), S. C. 964. Ct. of Sess.

See form of resolution, p. 1117.

As to special resolutions generally, see sect. 69, and *supra*, p. 1093 *et seq.*

For notices of meetings to pass such resolutions, see Forms 436 and 437, and notes thereto.

For forms of resolution for many kinds of reduction, see *supra*, p. 1117 *et seq.*

The Court.

The expression "the Court" in sect. 46 of the Act means (see sect. 285) the Court having jurisdiction to wind up the company. See sect. 131.

What Court—
have juris-
diction.

As to these Courts, see sect. 131, and the Rules in the Appendix, after "Acts." The Court's jurisdiction is exercisable by the judges of the Chancery Division, including those to whom the winding-up business is assigned.

Under the Act of 1900 this was doubtful, but in *Islington and General Electric Supply*, W. N. (1892) 81, it was held by Chitty, J., after consulting with the other judges of the Chancery Division, that the jurisdiction was not confined to the winding-up judges, and his Lordship stated that similar reasoning might be applied to applications under the Companies (Memorandum of Association) Act, 1890, now represented by sects. 9 and 264 of the Act of 1908. Accordingly, many orders in reductions of capital were subsequently made by the learned judges above mentioned.

When
petition
presented

It was also held by Vaughan Williams, J., and it appears to be clear, that the jurisdiction under the Acts of 1867 and 1877 was also exercisable by the judge to whom, under sect. 2 of the Companies (Winding Up) Act, 1890 (Companies Act, 1908, s. 132), the general jurisdiction to wind up companies was assigned. *Mining Shares Investment Co.*, (1893) 2 Ch. 660 (Extension of Objects); *Ocean Queen Steamship Co.*, *ib.* 666 (Reduction of Capital); and Vaughan Williams, J., when acting as winding-up judge, afterwards made many orders in similar cases. Other such orders were made by Romer and Byrne, J.J., when acting for the winding-up judge, and by Wright, J., and every subsequent winding-up judge. Irrespective of these decisions, the jurisdiction is also exercisable by the other Courts having, under the Companies Act, 1908, s. 131 (Companies (Winding Up) Act, 1890), jurisdiction in England and Wales to wind up companies, namely, the Chancery Courts of the Counties Palatine of Lancaster and Durham, and certain of the County Courts, subject to the conditions imposed by sect. 131 of the Act. Hence the first inquiry to be made in ascertaining what Court is to be petitioned is, "What Court, having regard to the situation of the registered office and the amount of capital paid up, or credited as paid up, would have jurisdiction to wind up the company?"

Orders confirming reductions of capital have also been made by the

Chancery Courts of the Counties Palatine of Lancaster and Durham, and in a few cases, where the paid-up capital did not exceed 10,000*l*. (see sect. 2 (3) of the Companies (Winding Up) Act, 1890; Companies Act, 1908, s. 132), orders have been made by County Court judges. A petition for reduction or extension, to be heard before winding-up judge, need not be specially intitled. It can be intitled "In the matter of the Companies (Consolidation) Act, 1908. *Aluminium Co., W. N.* (1894) 6. See Rule 5, *infra*.

In a case within the County Court's jurisdiction (asking for confirmation of an alteration of objects) presented to the High Court Wright, J., made the order, but directed the proceedings to be transferred to the County Court. *Rugeley Gas Co., W. N.* (1899) 127.

In a case in August, 1905, Warrington, J., confirmed a resolution for reduction, although the company's paid-up capital was under 10,000*l*. This seems correct, for by sub-sect. 5 of sect. 2 of the Act of 1890 (Companies (Consolidation) Act, 1908, s. 131 (7)), which section gives winding-up jurisdiction to the Courts above mentioned, "nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court." But whether there is any power to transfer a petition for reduction or extension of objects from the High Court to a County Court, or *vice versa*, is doubtful. See s. 133 of the Companies Act, 1908, replacing sect. 3 of the Act of 1890, only gives power to transfer "the winding-up of a company or any proceedings therein."

Procedure (see Rules of May, 1909, in Appendix)

The short process.

Where the reduction does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital:

1. See that the regulations—*i.e.*, the articles—give the requisite power to reduce capital (*supra*, p. 684), and if they do not, insert by special resolution power to reduce capital.
2. Then pass a special resolution (see Companies (Consolidation) Act, 1908, s. 69 (2)) for the reduction in the desired form, taking care to specify the character of the reduction and how it is to be effected (*supra*, Form 487 *et seq.*).
3. File with the Registrar of Companies printed copy of this resolution, pursuant to sect. 70 of the Act of 1908 (see Appendix).
4. Present petition (*infra*, Form 606) to the Court praying for confirmation of the reduction, the company to be the petitioner. File affidavits in support of the petition. See Form 615, *infra*.
5. As from the presentation of the petition until the Court otherwise directs, use the words "and reduced" as part of the

- name of the company. See sect. 48 of the Companies Act, 1908, unless a dispensation order is obtained, *infra*, p. 1271.
6. Take out summons in chambers immediately after the presentation of the petition for directions as to advertising, &c. (see Form 609), and obtain order thereon. See Form 610.
 7. Advertise petition as directed. See Form 611.
 8. Bring on the petition for hearing, and obtain an order of the Court confirming the reduction and approving of the minute. See Form 622.
 9. File with the Registrar an office copy of order and the minute as required by sect. 51 of the Act, and obtain the Registrar's certificate, sect. 51 (4).

As to the procedure where the reduction DOES involve the diminution of liability in respect of unpaid capital, or the payment off of paid-up capital, see *infra*, p. 1287 *et seq* The long process

Appeals.

Appeals from the decisions of the High Court of Justice on petitions for reduction of capital will, on application, be treated as interlocutory, and dealt with speedily. See *Samuel Allsopp & Sons, Ltd.*, W. N. (1903) 132.

PRECEDENTS

(UNDER ACT OF 1908).

Form 606. In the High Court of Justice,
Chancery Division

Petition for
company
cancellation
of capital lost
or unrepresented.

Mr. Justice

In the matter of the ——— Coy, Limtd and Reduced
And in the matter of the Cos (Consolidation) Act,
1908

The above heading is right even where the petition is filed at the office of the Registrar in Companies Winding-up, Bankruptcy Buildings, *Aluminium Co., W. N.* (1894) 6.

To His Majesty's High Ct of Justice

The humble peton of the ——— Coy, Limtd and Reduced

Showeth as follows:

1. Your petr, the above-named coy (here called "the coy"), was incorporated in the year ——— under the Cos Acts, 1862 to 1900, as a coy limtd by shares.

2. The registered office of the coy is situate at ———

3. The objects for which the coy was established are [the working of gold mines], and other objects set forth in the memorandum of association.

4. The capital of the coy is £ ——— divided into ——— shares of £ ——— each.

5. Shortly after its incorporation the coy commenced and it has since carried on business.

6. The coy has issued ——— of its shares and no more, and the sum of £ ——— per share has been paid up thereon.

7. By clause ——— of the arts of asson of the coy it is provided that the coy may from time to time by special resolution reduce its capital in any manner permitted by law.

See *supra*, p. 684. and *infra*, p. 1471.

8. By special resolution of the coy, duly passed and confirmed in accordance with sect. 69 of the Cos (Consolidation) Act, 1908, at

extraordinary general meetings (thof. held (resp. on the --- day of Form 608
and the --- day of ---, it was resolved:

That the capital of the coy, which now consists of 10,000*l.*, divided into 1,000 shares of 10*l.* each fully pd-up, be reduced to 5,000*l.*, divided into 1,000 shares of 5*l.* each, and that such reduction be effected by cancelling pd-up capital which has been lost or is unrepresented by available assets to the extent of 5*l.* per share."

For other forms of resolution, see *supra*, p. 1117

9. Previously to the passing of such special resolution, pd-up capital of the coy to the extent of 5,000*l.* and upwards had been lost or was unrepresented by available assets

10. The reduction of capital aforesaid does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any pd-up capital

1. The form of the minute proposed to be registered is as follows:
Here set out minute. See Forms, *infra*, p. 1287

Your petr the coy therefore humbly prays:

- (1) That the reduction, &c. *as below*, p. 1289;
- (2) That the addition of the words "and reduced" to the coy's name may be dispensed with altogether
- (3) Or that [*as in Form 625*].

And your petr will ever pray, &c.

NOTE. It is not intended to serve this peton on any person.

As to the Court having jurisdiction, see *supra*, p. 1265.

As to the forms of resolution, see *supra*, pp. 1117 *et seq.*

As to the alleging and proving the capital proposed to be cancelled as lost or unrepresented by available assets, see *supra*, p. 1262.

As to the minute to be approved by the Court, see *infra*, pp. 1282, 1284 *et seq.*

As to the general procedure in such cases, see *infra*, pp. 1287, 1288.

As to the use of the words "and reduced," sect. 48 of the Act of 1908 provides for the addition to the company's name of the words "and reduced" as from the confirmation of the resolution for reduction until a date to be fixed by the Court.

The effect of sect. 48 of the Act of 1908 is shortly as follows:

If the case involves a diminution of liability or repayment to any shareholder of any capital, the words "and reduced" must be added to the company's name "on and from" the confirmation by the company of the resolution for reducing the share capital.

If the reduction does not involve either the diminution of any liability in respect of share capital or the payment to any shareholder of any paid-up share capital, then the words "and reduced" need only be added on and from the presentation of the petition.

In either case the words must be continued until such date as the Court may fix.

If the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may dispense altogether with the words "and reduced."

Form 606.

The section also provides in effect that where the reduction of the capital of the company does not involve either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital, it shall not be necessary before the presentation of the petition for confirming the reduction to add, "and the Court may, if it thinks it expedient so to do, dispense altogether with the addition of the words 'and reduced.'"

Hence, after the presentation of the petition, the words "and reduced" must, unless and until otherwise ordered, be used as part of the company's name; but, as appears above, the Court has a discretionary power to dispense altogether with the use of the words, and, this being so, the practice established soon after the passing of the Act of 1877 was to make an order immediately after the presentation of the petition dispensing with the words "and reduced" until the hearing. Thus the following order was made in the first case under the Act which came before the Courts.

Form 607.
Dispensation
order.

UPON MOTION this day made, &c., by counsel [Mr., now Lord Macnaghten] for the coy, petrs named in the peton on 6th August 1877, preferred unto this Ct, and upon reading an affidavit of J. J. S. filed 8th August, 1877, this Ct doth order that the addition of the words "and reduced" to the title of the coy be dispensed with until the hearing of the sd peton. And it is ordered that the petrs be at liberty to amend the sd peton by omitting therefrom the words "and reduced" from the title of the coy. And it is ordered that the peton be in the paper for hearing without the Chief Clerk's certificate of the settlement of the list of creditors referred to by the Cos Act, 1867, and the general order and rule of 21st March, 1868. *Llynri Tandu, & Co., Malins, V.-C., 8th August, 1877.*

The following are a few of the many cases in which such interim dispensation orders were made:—

New Civil Service Co., Hall, V.-C., 5 November, 1879.

Fron Co., Hall, V.-C., January, 1880.

British Land and Mortgage Co. of America, W. N. (1885), p. 205.

London and City Land and Building Co., ibid. p. 137.

African Bank, Chitty, J., 5 May, 1886.

Union Finance Co., W. N. (1887) 253, North, J.

Orion Diamond Mining Co., Stirling, J., 10 June, 1887.

New Quebrada Railway Co., North, J., W. N. (1888) 233.

The ground of application in most cases was that, as the Act gives the Court discretionary power to dispense altogether with the use of the words "and reduced," it was desirable to dispense with the words between the presentation and the hearing, usually a period of only ten days, in order that the Court might at the hearing, with the full evidence before it, be able to exercise its discretion.

But for some years past it has been extremely difficult to obtain such interim dispensation orders, and according to the present practice they are only made in very special and extraordinary circumstances. The application for such an order is usually made by summons at chambers, Chitty, J., having expressed the opinion that such applications should be so made. *Solway Steamship*, 61 L. T. 659. See Form 609. The application must be supported by affidavit showing the special circumstances. *Maxim Weston Co., W. N. (1888) 212.* The fact

that the company is a bank has induced the Court in more than one case to make the order. *Anglo-Argentine Bank, Ltd.*, Wright, J., 1901. **Form 607**

In *Lindler and Co.*, W. N. (1911) 66, Joyce, J., refused an interim dispensation order, although the company carried on business abroad. It seems a strange thing that the Court should countenance a practice of refusing off-hand to make a dispensation order, when in the result it practically prejudges the question whether at the hearing, with all the evidence before it, such an order should or should not be made.

The application used not only to be made along with the application (see Form 611) as to advertisement, &c.

As to advertising the presentation and day fixed for hearing of the petition. Prior to *Tambracherry Co.* (1885), 29 C. D. 683, it was the general practice to apply for and obtain, shortly after the presentation of the petition, an order dispensing with any notice of the presentation and any notice of the day fixed for hearing.

Upon motion, &c., let the peton be placed in the paper for hearing **Form 608**
on Saturday, the 3rd March, 1888, without advertisement or notice, **Notice dispensed with**
and without any certificate of creditors. *West Cumberland &c Co.*,
Kav. J., 21st February, 1888.

In *Tambracherry Co.*, 29 C. D. 683, Bacon, V.-C., refused to hear a petition for cancelling lost capital without previous advertisement, and the decision was affirmed by the Court of Appeal on the ground that the judge had a discretion with which the Court of Appeal would not interfere. Cotton, L. J., in that case, after considering the Acts and Rules, said: "According to my view the rule requiring an advertisement applies, but subject to be dispensed with in a case where the Court thinks that it is impossible that creditors can be interfered with or prejudiced, and therefore does not think that they ought to object; but certainly there was a discretion with the judge, and as he said he would not hear the petition without its being advertised, in my opinion the Court of Appeal ought not to interfere with that discretion, although in my opinion, petitions taking advantage of the Act of 1867, with the provisions introduced by the Act of 1877, are *prima facie* to be advertised for the purpose of enabling the parties to go before the Court and object that this may interfere with the due recognition of their claims;" and Bowen and Fry, L. J.J., concurred.

Within a few years after this decision the rule was adopted by all the judges that the Court would only in very special cases dispense with advertisements of the presentation and day fixed for hearing. See *Consolidated Telephone Co.*, 14 W. R. 408, Chitty, J., and *Union Finance Co.*, W. N. (1887) 253, North, J., and this is the present practice. Indeed, according to the present practice, an order to dispense is scarcely ever made. But possibly, regard being had to the views expressed in *Pooler v. National Bank of China*, (1907) A. C. 229, and in *Louisiana and Southern States, &c. Co.*, W. N. (1900) 170, *supra*, p. 1262, and *ibid.* p. 1277, the old practice may now be revived.

The advertisement of a company's petition for reduction of capital must, *prima facie*, exercise a prejudicial influence on the company's credit, and if there is no real ground for such prejudice, and if creditors' rights are noways affected by the reduction, there seems no reason why the Court, having a dispensing power, should not use it to relieve the company from being placed at a disadvantage. A form of application for such an order where desired could run as follows:—

Form 609.

[Title as in the Petition.]

Summons for
dispensation
order.

Let all parties concerned attend the Judge in chambers on the day of — at — o'clock in the — noon on the hearing of an applicon on the part of the above-named coy for an order fixing a day for the hearing of the peton in this matter, presented on the — day of —, and dispensing with the publication of notice of the presentation of the sd peton and with any advertisement of the day appointed for hearing of the sd peton, and with a settlement of any list of creditors and with the addition to the coy's name of the words "and reduced" until the hearing of the sd peton.

Dated this — day of —

This summons is taken out by — of —, in the county of —, solicitor for the applicant.

The order may be framed in accordance with the following:

Form 610.Order
dispensing
with "and
reduced."

Upon motion this day made unto this Ct by counsel for the Orion Diamond Mining Coy, Limtd, the petra named in a peton preferred in the above matters on the 10th day of June, 1887, and upon reading the sd peton:

This Ct doth order that the sd peton be placed in the paper for hearing on the 18th day of June, 1887.

And the Ct dispenses with the publication of notice of the presentation of the peton, with any advertisement of the day appointed for the hearing of the sd peton, the settlement of a list of persons who are creditors of the sd coy, and, until the hearing of the sd peton, the words "and reduced" in the title of the sd coy. *Orion Diamond Mining Co.* Stirling, J., 10th June, 1887.

But the usual practice now is to apply by summons as follows:

Form 611

[Title as in petition]

Summons to
fix a day for
hearing, &c.

Let, &c.

On the pt of the above-named coy, that a day may be fixed for the hearing of the peton for the reduction of the coy's capital proposed on the — day of —, and that directions may be given as to advertisements which are to be published, and that the certificate of creditors may be dispensed with.

There should be an affidavit in support. *Western Hosiery Co., W. N.* 211.

Upon the application of the City of London, &c. Coy, Limited and Form 612
 Reduced, the petition presented in the above matters, Order on
 by summons dated the 18th day of July, 1890, and upon hearing the special
 order for the applicants, and upon reading the sd petition presented on summons—
 the 18th day of July, 1890, and the affidavits of Sir H— E—
 K— and E— C— S—, both filed the 22nd day of July, 1890,
 and the several exhibits therein referred to, and the Judge being of
 opinion that the proposed reduction of the capital of the sd coy does
 not involve either the diminution of any liability in respect of unpaid
 capital or the payment to any shareholder of any paid-up capital. It
 is ORDERED that the list of creditors of the sd coy, and the office copy
 affidavit verifying such list menud or referred to in the general order
 of this Ct. of the 21st day of March, 1868, and thereby directed to be
 left in the chambers of the Judge, be dispensed with

AND IT IS ORDERED that the sd petition be set down to be heard before
 his Lordship, Mr. Justice Chitty, on Saturday, the 2nd day of August,
 1890, when any creditor or shareholder who desires to object may
 attend and be heard.

AND IT IS ORDERED that notice of the presentation of the sd petition
 and of the sd day fixed for the hearing thereof be inserted at the
 following times in the following newspapers, that is to say, in the
London Gazette of the 25th day of July, 1890; in the *Times* news-
 paper of the 24th and 29th days of July, 1890; in the *Standard*
 newspaper of the 24th and 29th days of July, 1890; and in the
Daily News of the 24th and 29th days of July, 1890. *City of London*
Fire Insur. Co., 23rd of July, 1900. The like, *New Automatic*
&c Co., Chitty, J., 7th March, 1892; the like, *Queensland, &c. Co*
Vaughan Williams, J., 7th January, 1895; the like, *St. Petersburg*
&c Co., Chitty, J., 11th April, 1895; the like, *Espeula Land and*
Cattle Co., Byrne, J., 16th May, 1900 (the petition in that case was
 presented 8th May, 1900); *Anglo-Argentine Bank*, Kekewich, J.,
 8th July, 1902

See also pp. 1117 *et seq.*, for resolutions for reduction, and the following

That the capital of the company be reduced to 640,000/ divided
 into 14,000 B. preference shares of 10/ each and 50,000 ordinary
 shares of 10/ each, and that such reduction be effected by paying
 off the whole of the capital paid up on the 30,000 A. preference
 shares in the company's capital of 10/ each and applying the assets
 representing the reserve fund towards payment off of the amount
 and any deficiency to be provided by obtaining an advance from
 A. B. by way of loan without security on the footing that the same
 shall carry interest at the rate of 4½ per cent. per annum, and by
 cancelling such shares, and by paying off or satisfying 24,000
 of the B. preference shares in the capital of the company of 10/

Form 613.

Resolution
 for reduction
 by paying off
 preference
 shares

Form 613. each, being the whole of the B. preference shares except the 14,000 held by the said A. B. and by issuing to the holders thereof perpetual debenture stock of the company carrying interest at the rate of 4½ per cent. per annum secured by a trust deed constituting a first mortgage upon the freehold and leasehold property of the company situate in — Row in the County of London, and a floating charge on the undertaking of the company exclusive of the assets to be applied in payment of the said A. preference shares and framed in accordance with the draft which has already been prepared by the solicitors of the company, and by cancelling the said 20,000 B. preference shares.

See Thomas De la Rue & Co., Ltd. and Reduced, (1911) 2 Ch. 361

Form 614.

Form of advertisement

In the High Ct of Justice (Chancery Division). Mr. Justice —
In the matter of the — Cos. (Limited and Reduced), and in the matter of the Cos. Act, 1867, and of the Cos. Act, 1877. Notice is hereby given that a petition presented to the High Ct of Justice, Chancery Division, on the — day of —, for confirming a special resolution reducing the capital of the above-mentioned cos from £ — to £ — is directed to be heard before his Lordship on the — day of —, —. Any creditor or shareholder of the cos desiring to oppose the making of an order for the reduction of the capital of the said cos under the above Acts should appear at the time of hearing by himself or his counsel for that purpose, and a copy of the petition will be furnished to any creditor or shareholder of the cos requiring the same by the undersigned on payment of the reasonable charges for the same.

Dated this — day of — A. and B., solicitors to the above-named cos

(Chief Clerk)

Solicitors for the cos

This is the form of advertisement generally adopted

Sometimes the words "by cancelling capital which has been lost or represented by available assets" are inserted.

A petition for reorganizing share capital under sect. 45 of the Companies (Consolidation) Act, 1908, does not need advertising. *Isabanti Paper Co. Ltd.*, 27 T. L. R. 498

Evidence.

However the petition is brought on, it must, at the hearing, be supported by proper evidence of the facts stated, and Forms 615 to 621 are inserted to show the line of evidence required in cases within sects. 48 and 49 of the Companies (Consolidation) Act, 1908, replacing sect. 4 of the Act of 1877.

The affidavit should be filed soon after presentation of the petition

In the High Ct of Justice,
Chancery Division.

Mr. Justice — .

In the matter of the S. Coy. Limitd and Reduced,
and

In the matter of the Cos (Consolidation) Act, 1908

Form 615

Affidavit in
support of
petition for
reduction by
cancelling
lost capital.

I, A. B., of, &c., make oath and say as follows:

1. I am, and have for upwards of eleven years past been, a director, and for upwards of three years past the chairman of the above-named coy, hithr called the coy, and am intimately acquainted with the affairs of the coy.

2. I have read the petition in this matter now exhibited to me and marked A. B. 1, and I believe that all the statements contained in that petition are true, and that belief is grounded on the knowledge I have obtained as such director and chairman of the coy as aforesd.

The document now exhibited to me marked A. B. 2 is the certificate of incorporation of the coy. The registered office of the is now situated at, &c

The document now exhibited to me marked A. B. 3 is a printed copy of the memorandum and arts of asson of the coy, and also contains copies of all special resolutions which have been passed and confirmed except the special resolution referred to in the sd petition.

If no special resolutions have been passed except the one for reduction, write
No alterations have been made in such memorandum or articles save so far as the same are affected by the special resolution referred to in the said petition.

The document now exhibited to me marked A. B. 4 is a duplicate of the agreement mentd in paragraph 4 of the sd petition. That agreement was duly filed with the Registrar of Companies before any of the shares therein mentd were issued. Except those shares, all the capital credited as pd up on the outstanding shares of the coy has been pd up in cash.

6. The statements contained in paragraphs 5 and 6 of the petition are correct.

7. The general meetings mentd in paragraph 8 of the petition were resply convened by notices in the terms of the two documents now exhibited to me, and resply marked A. B. 5 and A. B. 6. These notices were duly sent out to the shareholders in accordance with the arts of asson of the coy. I was present at the meetings at which the special resolution referred to in such paragraph was passed, and I say that the same was duly passed and confirmed in accordance with sect. 69 of the Cos (Consolidation) Act, 1908.

Clitty, J., repeatedly held that in cases of reduction the fact that the meetings for passing the special resolution were duly convened and held should be

Form 616. proved by affidavit [see Form 621], and not merely by production of the minute book which, under sect. 67 of the Act of 1862 (Companies (Consolidation) Act, 1908, s. 71), is *prima facie* evidence. And Vaughan Williams, J., adopted this rule both in reduction and extension cases. *Omnium Invention Co.*, (1895) 2 Ch. 127, which also see as to exhibiting the memorandum and articles. Presumably the ground for requiring something more than *prima facie* evidence is, that the creditors, present and future, and the public, are interested, and though existing creditors are invited to attend they rarely do in fact attend and in the result the application to the Court is heard *ex parte*, and the Court therefore acts, and, it is submitted, should act, with greater strictness than in a contested case, where the evidence adduced by one party is likely to be tested by the other party. It must also be borne in mind that fraud in such cases is possible, and this danger is minimised if the *prima facie* evidence has been confirmed by affidavit.

Acting on the same principle, the Court did not treat the entry on the register that certain shares are paid up as sufficient where the shares had been issued for a consideration other than cash. In some cases the Court required evidence of the fulfilment of the requisite contract, pursuant to the "cash payment" section, sect. 25 of the Companies Act, 1867.

8. The book now exhibited to me marked A. B. 7 is the minute book of the coy, containing minutes of the proceedings had at the general meetings of the coy.

9. At the time when the said special resolution was passed, capital of the coy to the extent of at least £ — had been lost or was unrepresented by available assets. This fact is made out as follows—

The assets of the coy as on the — day of — consisted of the following particulars, and are of the value set opposite the same respectively, that is to say:

Set out short particulars of the assets, and set opposite the same the value thereof, and add up the amounts—say 150,000/.

The liabilities of the coy are as follows—

Set out the general values of the liabilities, and opposite each the amount thereof, and add up—say 100,000/.

According to *Lindsay and Southern Station, &c. Co.*, *supra*, p. 1262, it is no longer necessary to prove the loss, but it seems doubtful whether that view is sound. See *infra*, p. 1277.

10. Deducting the amount of the liabilities aforesaid, namely £ — from the amount of the assets aforesaid, it appears that the surplus amounts to £ —, or this, but the paid-up capital of the coy is £ — and accordingly paid-up capital to the extent of £ — and upwards has been lost or is unrepresented by available assets.

11. The loss aforesaid is attributable to the following circumstance [State the circumstances, and use Form 616 or 617 if applicable]

12. It was for some time hoped that the value of the property of the coy might be regarded as only temporarily affected, but the directors and shareholders are now fully satisfied that the assets of the coy —

its liabilities, cannot in any sense be regarded as equivalent to the amount of its paid-up capital, and that the deficiency, namely, £ - - - - - upwards, must be regarded as a permanent deficiency, and ought to be written off and cancelled

Sworn, &c

This affidavit is merely given as an example of the kind of evidence which the Court has hitherto looked for in such cases. Usually the statement of the loss or depreciation is further fortified by the affidavit of some expert.

According to *Ladbroke and Southern States Co., W. N. (1909) 170*, s. 1262, evidence of loss is not necessary. As, however, the Court has a judicial discretion to exercise, and has to decide whether the reduction involves or does involve diminution of liability or payment off of capital (see sects. 18, 19) it is submitted that the facts have to be duly proved.

The following forms will show how losses have in some cases been explained in affidavits:

The loss aforesaid is attributable to the following circumstances, that is to say:

Under an indenture, dated, &c., and made between, &c., the coys. as lessor and lessee of extensive collieries situated at, &c., for a term of twenty-one years, commencing on, &c., with power for the coys. to determine the sublease at the end of the seventh or fourteenth years of the term, on giving one year and one week's notice. The coys. acquired these collieries when the coal trade was in a very flourishing condition, and when consequently colliery concerns were regarded as of very great value, and the coys. therefore agreed to pay the lessor very large rents and royalties. The coys. also expended very large sums of money in developing and improving the collieries. Subsequently, however, the demand for coal went down and prices fell and it then became impossible for the coys. to work the collieries at a profit. The coys. therefore gave notice of its intention to determine the lease at the end of the fourteenth year of the term, and its occupation of the collieries accordingly determined on the - day of - 18-. The net result of the working of the collieries by the coys. has been ascertained to be a loss to the coys. of upwards of

Moreover, the coys. has from time to time expended large sums, amounting altogether to £ - - - or thbts., on machinery and plant at its iron and steel works. The works, being originally laid out as to part thereof, for the manufacture of iron, became old-fashioned and obsolete, and had to be remodelled for the manufacture of steel. The result from this outlay has been a loss to the coys. of £ - - - and upwards.

Other examples are given below, but the circumstances differ so widely that forms can only be useful as indicating very generally what is required.

The words "any lost capital or any capital unrepresented by available assets or alternative provisions." The latter is not explanatory of the former. *Hogg, Ltd., (1904) 2 Ch. 208*

Form 615

Form 616.

Causes of loss of capital.

Form 617. The loss of capital above mentd has been occasioned as follows—that is to say:—
Another.

- (1) From various causes, including of late years the extraordinary depression of the sugar trade, the business of the coy has been carried on at a loss, and no dividends have ever been pd by the coy. The balance of profit or loss each year has been carried to the profit and loss account, and on the day of —, —, the accumulated balance to the debit of that account was £—.
- (2) The coy in — erected and constructed extensive works, machinery, and buildings liable to depreciation and diminution in value from wear and tear and otherwise, at a cost of £— and upwards, and although such works, machinery and buildings have become depreciated, and have steadily diminished in value, no part of such depreciation or diminution in value has ever been written off by the coy, inasmuch as it was not considered material to alter the figures when the coy was not paying dividends.

Form 618.

Loss by fire
 insurance
 company.

At the time when the sd special resolution was passed, capital of the coy to the extent of at least 100,000*l.* had been lost or was unrepresented by available assets. This fact is made out as follows—that is to say:

The assets of the coy as at 31st March, 1909, were as follows:

Investments	£197,580	6	—
Cash	6,772	1	8
Bills receivable	2,071	5	10
Branch and agents' balances	78,939	6	1
Interest accrued	2,172	2	1
Furniture and fittings at head offices and branches	1,052	—	—

£289,488 5 1

The liabilities of the coy as at 31st March, 1909, were as follows:

Estimated liability on outstanding policies, at least	£127,976	5	—
Outstanding fire losses	53,411	19	—
Sundry creditors	2,260	1	—
Temporary loans	5,500	—	—
Bills payable	200	—	—
Unclaimed dividends	139	1	10

£189,488 5 1

Deducting the amount of the liabilities aforesaid, namely, **Form 618**
 189,488/ 5s. 4d., from the amount of the assets aforesaid, it appears that
 the surplus amounts to 100,000/ or thereabouts, but the paid-up capital
 of the coy is 200,000/., and accordingly paid-up capital to the extent
 of 100,000/ and upwards had, up to the 31st March, 1909, been lost
 or was unrepresented by available assets, and there has not since
 been any material alteration in the coy's position. The document
 now exhibited to me, and marked "H. E. K. 8," is a copy of the
 directors' report and balance sheet which was submitted to and
 adopted by the ordinary general meeting of the coy held on the
 day of . 18

The loss aforesaid is attributable to the following circumstances

- 1.) The occurrence of exceptional fires and conflagrations, by
 which the coy had to pay during the last two years losses
 much in excess of the average.
- 2.) The payment during the last year of losses upon classes of
 risks which the coy has ceased to insure owing to their
 unprofitable character.
- 3.) The coy's inability to reserve from premiums received in
 respect of policies issued prior to the 31st March, 1890
 a proportion to meet the losses which will accrue on such
 policies

In the circumstances aforesaid, I say that the reduction of capital pro-
 posed to be effected does not involve either the diminution of any
 liability in respect of unpaid capital or the payment to any shareholder
 of any paid-up capital

The following is a specimen of an affidavit by an actuary in support
 of the reduction referred to in the foregoing form: -- **Form 619**

I, the general manager of the Fire Insurance Coy. I
 have held that office for upwards of years, and similar engage-
 ments with other cos for years previously, and I have con-
 sequently great experience relative to the business of fire insurance

Actuary's
 affidavit
 to be sworn
 to.

I have read the petition in the above matters now exhibited to me
 and marked "A," and also a copy of the afft of , the chairman of
 The A. B. Insurance Coy. Limited (hereafter called "the coy"), filed in
 support of the sd petition

3. I have lately, at the request of the coy, examined the books-
 documents, accounts and papers of the sd coy, for the purpose of
 ascertaining what loss of paid-up capital the sd coy has incurred, and
 say that, as the result of such examination, I believe the statements
 in the sd petition and afft as to the sd coy's financial position to be
 correct.

4. Having regard to the total amount of the coy's liabilities in
 respect of outstanding policies granted by it, the coy ought, at the

Form 610. very least, in my opinion, to have a reserve fund to answer such liabilities of 127,976*l.* 5*s.* 5*d.*, whereas the coy only has a reserve fund to answer such liabilities of 27,976*l.* 5*s.* 5*d.* This opinion is based on the following estimate, which is founded on the established practice of fire insurance cos. and which experience has substantiated. I arrive at this estimate in the following manner:

The premiums received during the twelve months ending 31st day of March, 1890, were 298,095*l.*

The annual rate of fire loss incurred by the coy since its commencement is 70.75 p.c. It is found, by actual analysis, that one-half of the risks comprised in an ordinary year's income are, at its close still unexpired. This, upon an annual income of 298,095*l.*, would represent 149,047*l.*, and the expected losses thereupon, at the rate of 70.75 p.c., would require £105,451 0 0

To this sum I add the special provision for losses which will occur under policies included in the year for various terms exceeding one year. From an examination of the coy's business and my knowledge of its transactions, I estimate this to be not less than

£22,525 0 0

£127,976 0 0

Form 620.

Accountant's
affidavit in
support

1. In my opinion the pd-up capital is at the present time unrepresented by available assets to the extent of at least 70,000*l.*, being the equivalent to 7*l.* per share.

2. I have arrived at the above conclusion from the following considerations:

By the concession granted by the municipality of, &c., the municipality had an option, which they have exercised, of taking over the undertaking in conson of an annuity of roubles p.a., which is payable half-yearly up to the 31st May, 19... The value of this annuity on the 12th January, 19..., calculated upon a 5 p.c. basis with half-yearly payments, is the sum of roubles, which reckoning the exchange at roubles to the pound, amounts to £... I regard --- roubles to the pound as a fair rate to take for the purpose of the above calculation, regard being had to the average rate of exchange during the last three years. In addition to the value of the annuity the coy has assets, consisting of, &c., to the value of £... or thbts, so that the total assets do not exceed a calculated value of 232,500*l.* After deducting the debentures, debenture stock, and other liabilities, either actual or contingent (the whole of which indebtedness together amounts to between 103,000*l.* and

104,000*l.*), there remain available for the shareholders' assets which cannot be calculated at more than 130,000*l.*, being the equivalent of 13*l.* per share on the 10,000 shares constituting the share capital: in other words, there is, as stated above, a sum of at least 7*l.* per share unrepresented by available assets.

Form 620

1. The register now produced and shown to me marked A. B. (1), did, on the — day of —, and also on the — day of —, contain the name and last-known address of every person who on each of the sd days was a member of the above-named coy

Form 621

Affidavit of secretary proving due calling of meetings

2. I did, on the sd — day of —, serve a true copy of the notice now produced and shown to me, marked A. B. (2), upon every member of the sd coy whose name appeared in the sd register as a member of the coy on that day.

3. I did, on the sd — day of —, serve a true copy of the notice now produced and shown to me marked A. B. (3) upon, &c.

4. I served the sd respec copies of the sd notices by putting such copies respec into envelopes duly addressed to such persons respec according to their respec names and addresses appearing in the sd register, and with proper postage stamps affixed thereto as prepaid letters, and by posting the same at the Post Office receiving house, No. —, — Street, in the City of London, between the hours of — and — of the clock in the afternoon, as to the sd first mentioned notice of the — day of —, and as to the sd secondly mentioned notice of the — of —

Upon the petition of the City of — Coy, Limtd and Reduced, on the — day of —, preferred unto this Ct, and upon hearing counsel for the petitioners, and upon reading the sd petition, an order dated the — day of —, dispensing with a list of creditors, the *London Gazette* of the — day of —, the — newspaper, of the — and — days of —, the — newspaper, of the —, and the — newspaper, of the —, each containing a notice that the sd

Form 622

Order confirming reduction by cancelling lost capital

petition was appointed to be heard on the — of —, pursuant to the sd order, an affidavit of —, filed the —, an affidavit of —, filed the —, and the exhibits therein referred to, and an affidavit of —, filed the — of —: This Court doth order that the reduction of capital proposed to be effected by the special resolution passed at an extraordinary general meeting of the petitioners, the

Coy, Limtd and Reduced, held on the — day of —, and confirmed at an extraordinary general meeting of the sd coy held on the — day of —, and which resolution was in the words and figures following, that is to say: [*set it out, e.g., "That the capital*



Form 622. of the coy be reduced from 200,000*l.*, divided into 10,000 shares of 20*l.* each, to 130,000*l.*, divided into 10,000 shares of 13*l.* each, and that such reduction be effected by cancelling capital which has been lost or is unrepresented by available assets to the extent of 7*l.* per share upon each of the 10,000 shares which have been issued and are now outstanding, and by reducing the nominal amount of all the shares in the coy's capital from 20*l.* to 13*l.* per share"] be, and the same is hby, confirmed. And this Court doth approve of the minute set forth in the schedule hto. And it is ordered that this order be produced to the Registrar of Joint Stock Cor., and it is ordered that an office copy of this order be delivered to him, together with a minute in the words or to the effect set forth in the schedule hto. And it is ordered that notice of the registration of this order and of the sd minute be published as follows, that is to say, once in the *London Gazette*, twice in the —, and once in the — and — newspapers. And it is ordered that the sd coy be at liberty forthwith or after the — day of —] to discontinue the addition to its name of the words "and Reduced."

MINUTE APPROVED BY THE COURT.

"The capital of the City of — Coy. Limtd, is £ —, divided into — shares of £ — each [instead of the original capital of £ —, divided into — shares of £ — each]. At the time of the registration of this minute, the full sum of £ — per share has been and is to be deemed pd up on each of the sd — shares of £ — each."

Sometimes it is desired to get authority for the debenture trustees to consent to the reduction. Thus, in one case a supplemental trust deed was agreed to by which provision was made enabling the trustees of the deed to consent to the reduction of the company's uncalled capital which was charged with payment of the debentures. The clause ran as follows:—

"48a. The trustees or trustee may, and they or he are or is hereby instructed to, consent on behalf of the holders for the time being of the debentures of the company entitled to the benefit hereof and issued after the 1st day of December, 1899, to the reduction of the capital of the company by the extinction of all liability in respect of uncalled capital on the issued shares in the capital and of the nominal amount thereof accordingly, and on behalf of such holders by counsel or otherwise to appear in the proceedings for reduction and waive any right on the part of such holders as creditors of the company to notice under clause 9 of the General Order and Rules of the 21st day of March, 1868, in relation to such reduction. Provided that in the opinion of the trustees or trustee the nominal amount of the issued and paid-up capital, for the time being as reduced, and of the reserve of the company, will, immediately after such reduction is sanctioned, together be at least double the amount of the debentures entitled to the benefit hereof and outstanding at the time when such reduction becomes effective."

The order for reduction was obtained on 19th July, 1904. *Re New Zealand, &c. Co.*

Orders confirming Reduction.

The following points should be borne in mind:—

- (1) The order should confirm the reduction, and not the special resolution.
See sect. 47 of the Act.
- (2) The order should approve the requisite minute. See sects. 51, 52 of the Act.
- (3) The order should dispense with the use, or further use, of the words "and reduced." Sect. 48 of the Act.
- (4) The order should provide for advertisement. Sect. 51 of the Act.
There is no power to dispense with this. See note to Form 623.

As to dispensing with the words "and reduced" at the hearing, the Court formerly used very commonly at the hearing to dispense altogether with the further use of the words. *Llynvi Tondy Co.*, Malins, V.-C., 15th December, 1897; *Ebbw Vale Co.*, Jessel, M. R., 19th January, 1878; *Fron Co.*, Hall, V.-C., 26th November, 1880; *Virian Co.*, 54 L. T. 384; W. N. (1886) 32; *West Cumberland Iron and Steel Co.*, 58 L. T. 159; *Direct Spanish, &c. Co.*, 34 C. D. 313; *Newcastle Grain Co.*, 20th February, 1886; but such dispensation is now rarely granted.

In most cases the order directs that the words shall be used for a month, as in Forms 647 and 647a, *infra*. Sometimes the order is for fourteen days. *Michigan Rail. Co.*, Farwell, J., 23rd November, 1901. But occasionally the Court requires the use for a short time longer. *Pinckney and Sons Steamship Co.*, (1892) 3 Ch. 125. Occasionally an order to drop the words is made before the hearing, e.g., where the petition is ordered to stand over for some time. *Quebrada, &c. Co.*, 40 C. D. 348. Wright, J., used to dispense with the words altogether where the company's business was carried on entirely abroad, on the ground that the words "and reduced" would not be understood there. *Australian Estates, &c. Co.*, (1910) 1 Ch. 414, where there was evidence of possible prejudice. In the absence of such evidence, see *Lindler and Co.*, (1911) W. N. 66. And in the case of a publishing company, where penalties might be incurred by not adding the words, Kekewich, J., dispensed altogether with the use of the words on the company undertaking to inform their creditors of the reduction, and to use for one month the words "and reduced" on all documents on which, by sect. 41 of the Companies Act, 1862 (now sect. 63, Companies Act, 1908), the words were required to be used. *Lawrence & Bullen, Ltd.*, W. N. (1901) 158.

Occasionally, where it is proposed to cancel capital lost or unrepresented by available assets, it appears that some of the shareholders have not paid up their calls. In such cases the resolution should be framed so as to preserve the liability of the defaulters, and the order will be made without prejudice thereto. *Great Western Steamship Co.*, 35 W. R. 154; *American Pastoral Co.*, 62 L. T. 625. *International Conversion Trust*, W. N. (1892) 100. The resolution in such cases should contain words to the effect that such reduction is to be without prejudice to the company's right to sue for and recover all arrears of calls now outstanding and due in respect of the said shares.

In the matter of the — Coy, Limitd [and Reduced], and in the matter of the Cos Act, 1908, ss. 46—56. Notice is hereby given that the order of the High Ct of Justice (Chancery Division), dated, &c., confirming the reduction of the capital of the above-named coy from

Form 623.

Advertisement of order reducing capital.

Form 623. £—— to £——, and the minute (approved by the Ct) showing with respect to the capital of the coy as altered the several particulars required by the above statutes, were registered by the Registrar of Cos on the —— day of ——. And further take notice that the sd minute is in the words and figures following: "The capital, &c."

Dated the —— day of

—— of ——,

Solicitors for the Coy

Sect. 51 of the Act provides for the registration of the order and minute with the Registrar of Companies, and requires notice of such registration to be published in such manner as the Court may direct. The Court cannot dispense with this publication (per Chitty, J., *London Steamboat Co.*, 31 W. R. 781; W. N. (1883) 123): for Parliament has enacted that there *shall* be such publication.

The terms of sect. 51 should be borne in mind.

In some cases a copy of the order has been advertised in the notion that the section was thereby complied with; but that is not what the section requires.

Under sect. 55 of the Companies (Consolidation) Act, 1908, the Court may require the company to publish as the Court directs the reasons for reduction, or such other information in regard thereto as the Court may think expedient, with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction. Such a publication may properly be required where the depreciation of property necessitating the reduction has occurred suddenly and has not been growing year by year. *Truman, Hanbury, Burton and Co.*, [1910] 2 Ch. 498.

When this power is exercised (which it seldom is) the reasons are inserted just before the words "and further."

The following is another of the few available examples, as approved by Stirling, J., May, 1895. *Barton, &c. Co., Limited* (1894, B. 0136):—

Form 624.

—
Reasons for
reduction

"The reason for the reduction of the capital of the coy is on account of the loss of 31,691*l.* 3*s.* 4*d.* of the capital of the coy, arising from payments of pt of the debenture interest out of capital, the pulling down of certain malthouses, cottages, and timber stores, the depreciation in the value of the goodwill of the coy from the amount at which it was originally taken over, and a depreciation in value of five public-houses to the extent of 1,000*l.* in the whole, the loss of certain fixed plant, buildings and machinery upon the termination of a lease, and the deterioration in the casks, and also in the value of stock of ale at Burton and the agencies of the coy. And further take notice that the sd minute is in the words and figures following."

Minutes.

By sect. 51 of the Act (1) The registrar of companies, upon the production to him of an order of the Court confirming the reduction of the capital of a company, and the delivery to him of a copy of the order, and of a minute (approved by the Court) showing with respect to the share capital of the company, as altered by the order, the amount of the share capital, the number

of shares in which it is to be divided, and the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share, shall register the order and minute; (2) On the registration, and not before, the resolution for reducing share capital so confirmed by the order so registered shall take effect. Notice of the registration shall be published in such manner as the Court may direct; (3) The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of the Act with respect to the reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

The Court cannot dispense with notice of the registration of the order and minute, for sect. 51 of the Act requires the publication thereof; accordingly the Court must be asked to specify the newspaper or newspapers. When the presentation of the petition has been advertised, the Court usually specifies the same newspapers, otherwise it is desirable to have evidence ready showing what newspaper will come to the notice of creditors. Sometimes the Court has considered advertisement in the *Gazette* enough.

By sect. 52 the minute when registered is to be deemed to be substituted for the corresponding part of the memorandum of the company, and is to be valid and alterable as if it had been originally contained therein.

As the certificate is to be conclusive (*supra*, p. 24) it will operate even where the order confirms an invalid special resolution. *Ladies' Dress Association v. Fulbrook*, (1900) 2 Q. B. 376; *Walker v. Smith, Limited*, W. N. (1903) 62; 51 W. R. 491; *Yolland, Huason and Birkett, Limited*, 77 L. J. Ch. 43, C. A.

The following is the simplest form of minute, and the one which was formerly exclusively used:—

"The capital of the — company, limited [and reduced] is 70,000*l.*, divided into 10,000 shares of 7*l.* each. At the time of the registration of this minute the sum of 7*l.* has been and is to be deemed to be paid up on each of the said shares." Form of minutes.

But generally the minute states what the capital prior to the reduction was, thus:—

"The capital of the — company, limited [and reduced], henceforth is 70,000*l.*, divided into 10,000 shares of 7*l.* each, instead of the original capital of 100,000*l.* divided into 10,000 shares of 10*l.* each. At the time of the registration of this minute the sum of 7*l.* has been and is to be deemed paid up on each of the said shares."

This form of minute was first adopted by the direction of Kay, J., in *West Cumberland, &c. Co.*, W. N. (1888) 54; 58 L. T. 152; and, in *Britannia Milk Co.*, W. N. (1888) 103, North, J., approved of the form and stated that he should in future require its adoption, and acted accordingly. Chitty, J., did not require the adoption of this form (*Solvay Steamship Co.*, 61 L. T. 659), but had no objection to it.

A minute so framed is obviously not required by the Act, but it has the advantage of giving, at a glance, to a person attending at the office of the registrar of companies, information which would otherwise involve the perusal of other documents.

Sometimes the words "reduced from" are used in lieu of the words "instead of."

The minute is to state the amount to be deemed paid up on each share. Where all the shares have been issued and are paid up to the same extent, it is easy enough to say that so much is to be deemed to be paid up on each share, and this statement strictly complies with the requirement of this section. But cases frequently occur in which (a) only part of the shares are issued; or (b) the shares issued have different amounts paid up. In such cases the usual

practice has been to state in case (a) the aggregate number of the shares issued and the amount per share paid up; and in case (b) the aggregate number of each class, and the amount per share paid up on each class, but it has not always been usual to state the denoting number of the shares referred to, *e.g.*:

"The capital of the Madulseema Coffee and Cinchona Company, Limited, is 110,000*l.*, divided into 7,000 shares of 10*l.* each and 8,000 preference shares of 5*l.* each. At the time of the registration of this minute 7,000 of the said 10*l.* shares and 5,740 of the said 5*l.* preference shares have been issued, and have been and are to be deemed paid up as follows, that is to say:—6,018 of the said 10*l.* shares to the extent of 10*l.* per share, and of the remaining 982 of the said 10*l.* shares 250 to the extent of 7*l.* 16*s.* per share, and 532 of the said 10*l.* shares to the extent of 12*l.* 18*s.* 9*d.* per share, and the remaining 200 of the said 10*l.* shares to the extent of 7*l.* per share, and on each of the said 5,740 preference shares the sum of 1*l.* has been and is to be deemed paid up, and on the residue of the said preference shares nothing has been or is to be deemed paid up. The said 200 shares have been forfeited and have not been re-issued."

Hundreds of minutes have been so framed, but the minute ought to state the amount (if anything) which is to be deemed paid up on each share (see sect. 51), and a minute framed as above does not do this. See *Solway Steamship Co.*, 61 L. T. 659.

As to giving
numbers in
minute.

However, not uncommonly the minute points out the particular shares by numbers, *e.g.*, "The capital of the Livingstone Spinning Company, Limited, is 48,000*l.*, divided into 12,000 shares of 4*l.* each. At the time of the registration of this minute the sum of 1*l.* has been and is to be deemed to be paid on each of the 222 shares standing in the company's share register under the register numbers 356, 824, 867, 926, and 968; the sum of 1*l.* 10*s.* on each of the 38 shares standing in the said register under the register numbers 58 and 190; the sum of 1*l.* 12*s.* 6*d.* on each of the 425 shares standing in the said register under the register numbers 30, 154, 253, 301, 309, 317, 426, 440, 606, 621, 663, 684, 706, 1006, 1021, and 1026; the sum of 1*l.* 15*s.* on each of the 20 shares standing in the said register under the register number 566; and the sum of 1*l.* 17*s.* 6*d.* on the remaining 11,295 shares, and such order and minute have been duly registered by the said registrar of joint stock companies."

"The capital of the International Conversion Trust, Limited, is 40,500*l.*, divided into 20,000 ordinary shares of 2*l.* each and 100 founders' shares of 5*l.* each, reduced from 100,500*l.* divided into 20,000 ordinary shares of 5*l.* each and 100 founders' shares of 5*l.* each. At the time of the registration of this minute 2,407 of the said ordinary shares of 2*l.* each, numbered 101 to 2,507 inclusive, are issued and are fully paid up, except that upon the shares numbered 101 to 106 inclusive, 508 to 607 inclusive, and 1,208 to 1,307 inclusive there are the following arrears of calls:—

Denoting Numbers of Shares.	Amount of Call in arrear.
101 to 106 inclusive	2 <i>l.</i> per Share.
508 to 607 "	1 <i>l.</i> "
1,208 to 1,307 "	2 <i>l.</i> "

"And of the said founders' shares of 5*l.* each 74 shares numbered 1 to 74 inclusive are issued, of which 50 shares numbered 1 to 50 inclusive are fully paid up, and on the remaining 24 shares numbered 51 to 74 inclusive the sum of 2*l.* per share has been paid up. At the time of the registration of this minute the residue of the said ordinary shares, namely, —, —, and the residue of the said founders' shares, namely, 26, numbered 75 to 100 inclusive, are unissued."

Embodying Minute in Memorandum.

By sect. 52 of the Act, (1) the minute, when registered, must be embodied in every copy of the memorandum of the company issued after its registration; and (2) "if any company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding 1*l.* for each copy in respect of which default is made, and every director and manager of the company who knowingly and wilfully authorizes or permits such default shall be liable to the like penalty."

Copy of registered minute.

Procedure (See Rules of May, 1909, in Appendix, p. 1286, *supra*)

Where the proposed reduction does involve either the diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital: The long process

1. See that the *articles* give the requisite power to reduce capital (*supra*, p. 684); and, if they do not, insert the necessary power by special resolution. *Supra*, p. 684.
2. Then pass special resolution for the reduction, specifying the character thereof (*supra*, p. 1117, Form 488 *et seq.*); and file copy with Registrar. Sect. 70 of the Act.
3. Immediately after passing the resolution, add to the name of the company the words "and reduced," and continue to use them until after the reduction has been confirmed, and until liberty to drop them is given by the Court. Sect. 48 of the Act.
4. Then present petition to the Court praying for a confirmation of the reduction. *Infra*, p. 1288, Form 625.
5. Take out summons in chambers for directions as to the proceedings to be taken, &c., as required by Rule 6 of the Rules of 3rd of May, 1909 (see Form 626, *infra*, and p. 1290). and file evidence verifying the petition and proving due passing of the resolutions, &c.
6. Take an order for an inquiry in the terms of Form 627, *infra*, and obtain directions as to the newspapers, &c., in accordance with Rule 6 of the Rules of May, 1909, *infra*, Form 627a; and see Form 628 for the form of notice.
7. Advertise as in Form 628. See Rule 6 of May, 1909.
8. Pay off, as far as practicable, all creditors of the company; or, at any rate, those who would be likely to refuse consent.
9. In due course file list of creditors (if any) and amounts due, with affidavit verifying the same. See Rule 8 of May, 1909, *infra*, p. 1292, and Form 631 for terms of affidavit. Keep the list ready for inspection, as required by Rule 10.
10. Give notice to the creditors in accordance with Rule 11 and Form 632. Advertise notice of list of creditors as in Form 634, *infra* (see Rule 12); or, if there are no creditors, then as in Form 635.

11. In due course make and file affidavit as to particulars of debts and claims (see Form 636, *infra*, and Rule 13); or, that there are none. See Form 630.
12. As to disputed debts and claims, see Form 637, and Rules 13 and 14.
13. Obtain Master's certificate of settlement of list of creditors. Rule 16 and Form 639.

The Court has no power to dispense with settling the list of creditors even where there is evidence that the company has no debts. *Lamson Store Service Co.*, [1895] 2 Ch. 726.

14. Have petition placed in list, and file affidavit on lines of Form 615.
15. Advertise in papers day for hearing petition. See Form 642 and Rule 19.
16. Be prepared at the hearing to deal with opposing and non-assenting creditors. See *infra*, p. 1299.
17. Obtain order confirming the reduction and approving form of minute.
18. If the reduction involves payment off of capital be ready at the hearing with an affidavit that it is still in excess *Safety Oil Co.*, W. N. (1892) 133.
19. File office copy of order and the minute approved by the Court with the Registrar.

Form 625. In the High Court of Justice,
Chancery Division.
Mr. Justice . . .

Petition to
confirm
reduction of
capital under
Act of 1867
[where
creditors
affected].

In the matter of the — Coy, Limtd and Reduced.
And in the matter of the Companies Act, 1908.

The above heading is right even when the petition is filed at the office of the Registrar in Companies Winding-up, Bankruptcy Buildings. *Aluminium Co.*, W. N. (1894) 6.

To His Majesty's High Court of Justice:

The humble petition of the — Coy, Limtd and Reduced:

Showeth as follows:

1. Your petr, the above-named coy (huftr called "the coy"), was incorporated in the year —, under the Companies Acts, 1862 and 1867 [or 1862 to 1900, or as the case may be], as a coy limtd by shares.

2. The registered office of the coy is situated at —.

3. The objects for which the coy was established are [the working of coal mines] and other objects set forth in the memdum of assen thof.

4. The capital of the coy is 100,000*l.*, divided into 5,000 shares of 20*l.* each. **Form 625.**

5. Shortly after the incorporation of the coy it commenced and has since carried on business.

6. The coy has issued 4,200 of its shares, and no more, and the sum of 10*l.* per share has been pd up thereon.

7. By clause 37 of the arts of asson of the coy it is provided that the coy may from time to time by special resolution reduce its capital.

If requisite, say:-

"The articles of association of the company as originally framed did not contain power to reduce the capital, but by special resolution of the company duly passed, &c., it was resolved that the following words should be added to clause 37 of the articles of association, viz.: 'the company may at any time by special resolution reduce its capital in any manner permitted by law.'"

8. By a special resolution of the coy duly passed and confirmed, in accordance with sect. 69 of the Cos (Consolidation) Act, 1908, at extraordinary general meetings of the coy held resply on the — day of — and — day of —, it was resolved as follows, namely: "That the capital of the coy be reduced from 100,000*l.*, divided into 5,000 shares of 20*l.* each, to 75,000*l.*, divided into 5,000 shares of 15*l.* each, by reducing the liability on each share to the extent of 5*l.*, and by reducing the amount of the shares from 20*l.* to 15*l.*"

For other forms of resolution, see *supra*, p. 1117.

9. The form of minute proposed to be registered is as follows:—

Here set out the minute. See forms, infra, p. 1304.

It is convenient to state the proposed minute in the petition, especially where it is a long one. Counsel can thus, in indorsing his brief, refer to the minute in the petition, instead of setting it out, or referring to a separate document.

Your petitioner the coy therefore humbly prays:

- (1) That the reduction of capital to be effected by the special resolution mentd in paragraph 8 of the peton may be confirmed, and that the above-mentd minute may be approved by the Ct.

Un' = sect. 47 of the Act of 1908 the power of the Court is to confirm the *reduction*, not the *resolution*; and although the orders of older date used generally to confirm the resolution, the modern form is differently expressed. See Form 644, *infra*.

- (2) That to this end all inquiries and directions necessary and proper may be made and given, and that a day may be

Form 625.

fixed on and after which the coy shall be at liberty to discontinue the addition to its name of the words "and reduced."

(3) Or that such other order may be made in the premises as to the Ct shall seem meet.

And your petr will ever pray, &c.

NOTE.—It is not intended to serve this peton upon any person.

Form 626.

[Title as in Petition.]

Summons for directions.

Let all parties, &c., upon hearing of an applicon on the pt of the above-named coy, the petr named in the peton in this matter, for directions as to the proceedings to be taken for settling the list of creditors of the sd coy entitled to object to the proposed reduction, and as to advertisements.

Dated the — day of —.

— of —,
Solors to the applicant.

Under r. 6, *supra*, p. 1287, the taking out of a summons as above is the first step after presenting the petition.

The court cannot dispense with settling list of creditors, even where there is evidence that the company has no debts. *Lamson & Co.*, (1895) 2 Ch. 726.

The order will run as follows:

Form 627.

[Title as in Petition.]

Order for inquiry as to debts, &c.

Upon the applicon of the petr by summons, dated —, and upon hearing the solors for the petr, and on reading the peton on the — day of — preferred unto this Ct, it is ordered that an inquiry be made what are the debts, claims, and liabilities of or affecting the sd coy on the — day of —, 19—, and that notice of the presentation of the sd peton be inserted in [the newspapers] on the — day of — and [other times of insertion], and that a list of the persons who are creditors of the coy on the sd — day of —, and an office copy of the affidavit verifying the same be left at the chambers of the judge on or before the — day of —.

Form 627a.

Reduction of capital.

Order as to debts, notice of presentation, and list

Upon applicon of the petr by summons, dated 21 April, 1900, and upon hearing the solors for the petr and reading the peton on 25 April, 1900, preferred unto this Ct, and an afft of W. filed 28 June, 1900, it is ordered that an inquiry be made what are the debts, claims, and liabilities of or affecting the sd above-named coy on the first day of December, 1900, and that notice of the presentation

of the sd petou be inserted in one issue of the *London Gazette* and **Form 637a**
 the *Times*, and twice in the *Birmingham Post*, the *Glasgow Herald*,
 the — *Times*, and the *Coventry Times* newspapers, and that a list of creditors
 of the persons who are creditors of the sd coy on the sd first day of
 December, 1900, and an office copy of the afft verifying the same
 be left at the chambers of the judge on or before the 21st day of
 December, 1900. *Ryley, Ward and Bradford, Limited and Reduced.*
Cozens-Hardy, J., at chambers, 26 Oct. 1900, B. 3474.

The form of notice under r. 5 is as follows:

[Title as in Petition.]

Form 628.

Notice is hby given that a petition for confirming a resolution
 reducing the capital of the above coy from £— to £—, was on
 the — day of — presented to His Majesty's High Ct of Justice,
 and is now pending; and that the list of creditors of the coy is to
 be made out as for the — day of —, 19—.

Advertise-
 ment of
 petition

C. and D. of — [agents for A. and B., of —].

Solors to the coy.

See r. 7, *infra*, p. 1663, as to this advertisement.

Sometimes the advertisement states the mode in which the reduction is to be
 effected, as in the following:—

In the High Ct of Justice,
 Chancery Division,
 Manchester District Registry.
 Mr. Justice Farwell.

Form 629

Special
 notice.

1900, J., No. 3564.

In the matter of the Junction Spinning Coy,
 Limitd and Reduced, &c.

Notice is hby given that a petition presented to the High Ct of
 Justice, Chancery Division, Manchester District Registry, on the
 29th day of March, 1900, for confirming a special resolution of the
 above-named coy for reducing its pd-up capital from 50,000l. to
 40,000l., by repaying in respect of each share in the coy's capital
 upon which the sum of 50l. has been pd up the sum of 10l., upon
 the footing that the amount returned or any pt thof may be called
 up again, is directed to be heard before his Lordship as on 30th of
 March, 1900.

Any creditor, &c.

Form 630.

[Title as in Petition.]

Affidavit
of the secretary
of the company

I, —, of —, the secretary of the above-named coy, make oath and say as follows:—

1. On the — day of —, the date fixed by the order in this matter dated the — of —, I believe that there were no creditors or persons having claims upon or against the above-named coy, and that at the date aforesaid there was not any debt or claim which, if such date were the commencement of the winding-up of the said coy, would be admissible in proof against the said coy other than and except the current rates and taxes payable by the said coy, and which I estimate at £—.

2. My belief aforesaid is grounded on my knowledge as the secretary of the said coy, and upon information derived upon a careful investigation of the affairs, books, documents and papers of the coy.

Sworn, &c.

If practicable before the day fixed all the creditors are paid off, so that an affidavit as above may be made.

Form 631.

[Title, &c.]

Affidavit
verifying list
of creditors.

I, A. B., of, &c., make oath and say as follows:—

See Form 3 in schedule to Rules of May, 1909, *infra*, p. 1662.

Form 632.

[Title, &c.]

Notice to
creditors

To Mr. —.

You are requested, &c.

See Form 4 in schedule to Rules of May, 1909, *infra*, p. 1662.

See Rule 11, *infra*, p. 1663, as to notice to creditors.

Where the addresses of any creditors are not known, an order should be obtained for service on them by advertisement as in the cases below mentioned

Form 633.Summons for
order to serve
by advertise-
ment.

Let, &c., on the hearing of an application on the part of the above-named coy, for an order that the notice required by Rule 11 of the Rules of May, 1909, to be served on the creditors of the above-named coy may be served on the creditors named in the schedule hereto by advertisement, and for directions as to such advertisement.

Form 634.

[Title, &c.]

Advertisement
as to list
of creditors.

Notice is hereby given, that petition has been presented, &c.
See Form 5 in schedule to Rules of May, 1909, *infra*, p. 1667.

See Rule 12, *infra*, p. 1664, as to the above notice.

FORMS.

Where a special order for service has been made, the advertisement, Form 634, will have an additional paragraph, as in the following cases:—

And further take notice that, by an order dated 30th October, 1893, Mr. Justice — gave leave that the notice required by Rule 9 and the General Order of the Chancery Division of the High Ct of Justice to be served on the creditors of the above-named coy should be served on the creditors named in the first part of the schedule hto (whose addresses are not known to the coy), and on the creditors named in the second part of such schedule (who are believed to be dead) by the insertion of this advertisement

Dated this — day of —

& Co.,

Solrs to the sd coy.

Schedule above referred to.

First Part— Second Part.

The following is another instance where there were debentures to bearer:

And take notice that, by an order dated the 23rd day of July, 1887, his Lordship Mr. Justice Chitty gave leave that the notice required by Rule 9 and the General Order of the Chancery Division of the High Court of Justice to be served on the creditors of the above-named coy should be served on the holders of the debentures of the sd coy by the insertion of this advertisement.

Dated 29th July, 1887.

Assam Railways & Trading Co., Chitty, J.; and see General Bank.
17 W. R. 304.

Not uncommonly a company, immediately after the order, Form 627, is made pays off all its debts, and in the result has no creditors on the date fixed. In such case the notice will run as in the following form:—

[Title.]

Form 635

Notice is hereby given, that a petition has been presented to His Majesty's High Ct of Justice for confirming resolutions of the above coy for reducing its capital from £— to £—. By an affidavit of A. B., the secretary of the above-named coy in the sd matter, on the — day of —, it appears that to the best of his knowledge, information, and belief there was not on the — day of —, the day fixed by the order in this matter dated the — day of —, any debt or claim which, if such date were the commencement of the winding-up of the sd coy, would be admissible to proof against the sd coy. Any person who claims to have been on the sd last-mentioned day and still to be a creditor of the sd coy must, on or before the day of —, send his name and also the particulars of his claim and the

Notice where
no creditors

Form 635. name and address of his solor (if any) to the undersigned, at the address mentd below, or in default thof he will be precluded from objecting to the proposed reduction of capital.

— & Co.

[Address.]

Solors for the sd coy.

This was the form approved in the *Cardigan Mercantile, Limtd. and Reduced*, *London Gazette*, 18th July, 1890, p. 3996, and in the *Safety Oil Co.* in 1892, and in other cases.

Form 636.

[Title, &c.]

Affidavit
of result.

We, C. D., of &c. [the secretary of the sd coy], E. F., of &c. [the solor of the sd coy], and A. B., of &c. [the managing director of the sd coy], severally make oath and say as follows. (See Form 6 in schedule to Rules of May, 1909, *infra*, p. 1668.)

Form 637.

[Title, &c.]

Notice to
prove.

To Mr. —.

You are hby required to come in and prove, &c. See Form 7 in schedule to Rules of May, 1909, *infra*, p. 1670.

See Rule 14, *infra*, p. 1664, as to such notice, and Rule 13 as to costs.
See also sect. 49 of the Act of 1908, *infra*, p. 1538.

Form 638.

[Title as in Petition.]

Affidavit
proving debt.

I, —, of —, make oath and say as follows:—

1. That the above-named coy was on the — day of —, and still is justly and truly indebted to me in the sum of £— [Here state consideration, e.g., for goods sold and delivered by me to the coy between the — day of — and the — day of —, as shown by the account exhibited to me marked —] for which sum, or any pt thof, I say that I have not, nor has any person by my order, to my knowledge or belief for my use, had or received any manner of satisfaction or security whatsoever, save and except the following: [Here state securities.]

Sworn, &c.

[Title as in the Petition.]

Form 639.

Master's
certificate.

In pursuance of the directions given to me by Mr. Justice —, I hereby certify that the result of the proceedings which have been taken in pursuance of the order made in this matter, dated the — day of —, and the general order of Ct in that behalf, is as follows:

The petitioner, the sd coy, has attended by its solicitor.

1. Notice of the presentation of the petition in this matter, and that the list of persons admitted to have been creditors of the coy on the — day of — might be inspected at the office of the coy, &c., was, in accordance with the directions of the judge in chambers, inserted in the *London Gazette* of the — of —, the *Times* newspaper of the — of —, and so on in accordance with the facts.

2. A list of the persons who were creditors of, or had claims against, the said coy on the — day of — has been settled, and is set forth in the first schedule hto.

3. The coy has since pd off and discharged such of the sd debts and claims as are set forth in the first pt of the sd schedule.

Not uncommonly it is certified that "all the said creditors have since been paid."

4. The sd coy is willing to set aside and appropriate the full amount of the debts and claims set forth in the second pt of the sd schedule. Such debts and claims amount together to £

5. The amounts of the debts or claims set forth in the second pt of the sd schedule have been fixed by inquiry and adjudication in manner provided by the 49th section of the Cos (Consolidation) Act, 1908.

6. Such of the creditors of the sd coy as have consented in writing to the proposed reduction of the capital thof are named in the third pt of the sd schedule, and the sum of £— is the total amount of the debts due from the sd coy to the creditors so consenting.

7. The sum of £— is the total amount of the debts and claims of the sd coy, the payment of which has been secured in manner provided by the sd 49th section of the Cos (Consolidation) Act, 1908, and the names of the persons to whom the same are due or by whom the same are claimed are set forth in the fifth pt of the sd schedule.

8. The debts and claims set forth in the second schedule hto have been made against the sd coy, but have been wholly disallowed.

The evidence produced on this proceeding consists of the afft of —, filed the — of —, an afft of, &c., filed, &c., the *London Gazette* of the — of —, and of —, 19—, the *Times* newspaper of, &c.

Dated this — day of —, 19—.

—, Master

[or —, Registrar, Cos Winding Up]

[Add requisite schedules.]

Form 640.

[Title as in Petition.]

Certificate
where no
creditors.

I hereby certify that the result of the inquiry which has been made in pursuance of the order in this matter, dated the — of —, and the general order of Ct in that behalf, is as follows:—

The petitioner, the above-named company, has attended by its solicitors.

There were no creditors of the above-named company on the — of —

Pursuant to the said order of the — of —, notice of the petition presented by the said company for confirming a reduction of their capital has been inserted in the *London Gazette* of the — of —, and in the *Times* newspaper of the — of —, and in the — *Examiner* newspaper of the — of —, and an office copy of the affidavit of N., filed the — of —, stating that there were no creditors or persons having claims upon the said company, was left at my chambers on or before the — of —.

Notice to persons claiming to be creditors of the said company on the — of —, requiring such persons, on or before the — of —, to send their names and particulars of their claims, and the name and address of their solicitor (if any), to Messrs. —, the solicitors of the company, and in default thereof they would be precluded from objecting to the proposed reduction of capital, has been inserted in the *London Gazette* of, &c.

The evidence adduced on this proceeding consists of, &c.

Dated this — day of —.

—, Registrar, Court of Winding Up

Form 641.Note that
certificate
has become
binding.

The certificate made by me of the result of the settlement of the list of creditors in this matter, pursuant to the order therein, dated the — day of —, has been filed and become binding

Dated this — day of —.

Masters —.

To the Senior Registrar of the Chancery Division

See as to this, Rules 16, 17, 18, *infra*, pp. 1664, 1665.

Form 642.

[Title as in Petition.]

Advertisement
of day
fixed for
hearing.
Form 8 in
schedule

Notice is hereby given that a petition presented to the High Court of Justice, Chancery Division, on the — day of —, for confirming a resolution reducing the capital of the above-named company from £ — to £ —, is directed to be heard before his Lordship Mr. Justice — on — day, the — day of —.

C. D., of —,
Agents for E. & F., of —,
Solicitors for company

See Rule 19, *infra*, p. 1665, as to advertising day fixed for hearing.

[Title as in Petition.]

Form 643.

To A. B. & Co., the solors of the above-named coy.

GENTLEMEN,—We beg to inform you that our client, Mr. —, of —, will appear at the hearing of the petition presented by the above-named coy for confirming the resolution reducing its capital, and will oppose the applicon thereby made.

Notice of
intention to
appear and
oppose.

Yours, &c.

As to who may appear at the hearing, see Rule 20, *infra*, p. 1665.

[Title.]

Form 644.

Upon the petition of the — Coy, Limtd and Reduced, on the —, 19—, preferred unto this Ct, and upon hearing counsel for the petrs and for —, and upon reading the sd peton, an affidavit of —, filed the — of —, the order dated, &c., and the several exhibits therein referred to, an order dated —, the *London Gazette* of the —, the *Times*, *Standard* and *Daily Telegraph* of the —, each containing a notice of presentation of the sd peton pursuant to the sd order, the Master's certificate dated —, the *London Gazette*, the *Times*, *Standard* and *Daily Telegraph* of the — of —, each containing an advertisement of or notice that the sd peton was appointed to be heard the — of —, an affidavit of —, filed, &c.

Order
confirming
reduction

This Ct doth hby order that the reduction of the capital resolved on and effected by the special resolution passed and confirmed at two extraordinary general meetings of the sd coy, held resply on the — day of —, 19—, and the — day of —, 19—, and which resolution was in the words and figures following, that is to say 'set out', be and the same is hby confirmed.

And it is ordered that this order be produced to the Registrar of Companies, and it is ordered that an office copy of this order be delivered to him, together with a minute in the words or to the effect set forth in the schedule hto.

And it is ordered that notice of the registration by the Registrar of Companies of this order and of the sd minute be published as follows, that is to say, one each in the *London Gazette* and the — [other newspapers] within 10 days after such registration, and it is ordered that the words "and Reduced" form part of the title of the sd coy for one month from the date of this order.

THE SCHEDULE above referred to.

[Here set out Minute.]

The capital of the — Coy, Limtd [and Reduced, is £ — divided into — shares of £ — each, instead of the original capital of or reduced from] £ —, divided into — shares of £ — each.

Form 644. At the time of the registration of this minute, the whole of the shares have been issued, and have been and are to be deemed to be fully pd up.

See further as to minutes, *infra*, p. 1304.

In relation to the order the following points should be noted:—

1. The order should confirm the reduction, not the resolution.
2. The order should approve of the minute.
3. The order should fix the time for discontinuing the use of the words "and Reduced." See *infra*, pp. 1298, 1299.
4. The order should provide for delivery of an office copy, &c. to the registrar.
5. The order should provide for advertising.

As to dealing with creditors at hearing who oppose or who have not consented, see Rules 21 and 22, *infra*, p. 1665.

As to sect. 50 of the Act.—The Court has jurisdiction to sanction the reduction only "if satisfied with respect to every creditor of the company who, under this Act, is entitled to object to the reduction, that either his consent to the reduction has been obtained, or his debt or claim has been discharged or has determined, or has been secured."

Who then is a creditor entitled to object? Sect. 49 of the Act answers this question. Every creditor of the company who, at the date fixed by the Court, is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company. As to this, the widest possible door is open to proofs. See sect. 206 of the Act defining what debts may be proved, and Ch. XXXVII. of Part II. of this work.

As to Non-Assenting Creditors.—In *Crédit Foncier of England*, 11 Eq. 356. Bacon, V.-C., held that creditors named in the list whose debts were not yet due, and were secured, and who had neither assented to nor dissented from the proposed reduction, were not to be considered creditors who did not assent within sect. 14 of the Act of 1867, but must be taken to have assented.

But in *Patent Ventilating Granary Co.*, 12 C. D. 254, Fry, J., declined to follow this decision, holding that the words "does not consent" must have their ordinary plain meaning, and the order in that case was only made conditionally on consents being obtained from the non-assenting creditors.

This decision was subsequently followed by Chitty, J., in *Bull Hotel Company, Limited*, 21st April, 1883; 27 S. J. 434, and has frequently been followed since. *e.g.*, in *Debenture Corporation*, by Joyce, J., 14th Dec., 1901.

As to setting apart and appropriating for the security of a creditor who does not consent, see sect. 49 of the Act of 1908, and Forms 645 and 646, *infra*.

As to the words "and Reduced."—Except where the reduction is brought within the proviso to sect. 48 of the Companies Act, 1908, the Court never dispenses with the use of the words "and Reduced" prior to the hearing, and it is useless to apply for a dispensation order. There is no jurisdiction to grant dispensation. But at the hearing the Court has power to fix the date up to which the words "and Reduced" shall be used (see sect. 48, *supra*, p. 1269); and this is usually done by directing the use of the words to be continued up to a specified date, or by giving liberty to discontinue after a specified date.

One month is a very common period to fix. *Ocean Queen, &c. Co.*, (1893) 2 Ch. 666; *Assets Realization Co.*, Chitty, J., 19th February, 1891; *Boston Riding School*, Chitty, J., 28th November, 1891; *Leicester Mortgage Co.*, Hardy, J., 12th August, 1901; *Barrow Hematite Iron Co.*, 39 Ch. D. 582.

Fourteen days has not been unusual. *Patent Ventilating Co.*, 12 C. D. 254: **Form 644.**
National Arms Co., W. N. (1897) 31.

Liberty to drop at once is sometimes given. *New Assets, &c. Co.*, 20th February, 1886; and Form 645, *infra*. *New Zealand Trust and Loan Co.*, Wright, J., 14th Dec. 1901.

Upon the petition of the *International, &c.*, on 30th July, 1881, preferred unto this Ct, and upon hearing counsel for the petrs, and upon reading the order dated 2nd August, 1881, the Chief Clerk's certificate, &c., the aft, &c., this Ct doth order that the petrs do on or before the 16th day of June, 1883, set apart and appropriate the sum of 58*l.* 12*s.* 6*d.* by paying the same to an account to be opened in the name of the coy with Messrs. Glyn, Mills, Currie & Coy, bankers, to be there retained until further order, to answer such claims (if any) to creditors of the society as may be established by the persons named in the second part of the second schedule to the Chief Clerk's certificate, dated the 7th May, 1883, and order that the petrs do on or before 16th June, 1883, pay into Ct to the credit of In the matter, &c. of the *International, &c., Limtd., Newfoundland Telegraph Trust*, the sum of 23*l.* 9*s.* 10*d.* cash; And it is ordered that the petr do place in a box certificates for the 150*l.*, being part of the certificates for the several amounts of stock of the Anglo-American Telegraph Coy mentioned in the third schedule to the Chief Clerk's sd certificate, and such box is to be endorsed "In the High Ct of Justice, Chancery Division, in the matter of the *International, &c. Limtd.*, certificates for 212*l.* stock of the Anglo-American Telegraph Coy, Limtd"; and it is ordered that the petrs, &c. [other similar provisions] and any persons interested are to be at liberty to apply in chambers as to the moneys for the time being to the credit of sd matter with Messrs. Glyn, Mills, Currie & Coy, and as to the cash to be so pd into Ct and the sd stock certificates to be placed in the sd boxes and deposited in the Ct as afsd; And order that the reduction resolved on, &c. [resolutions for paying off capital in excess of the wants of the coy and reducing the nominal amount of the shares accordingly] be confirmed and [minute approved]; And order that this order and an office copy of the receipt from the bank for such payment and deposit in Ct as afsd be produced to the Registrar, and an office copy delivered to him, together with a copy of the minute, and order that notice of the registration of this order be published in such newspaper as the Judge in chambers shall direct, and order that the addition of the words "and Reduced" to the title of the coy be forthwith discontinued. *International, &c. Co.*, Chitt J., 29 May, 1883, A. 821.

Form 645.

Order where assets distributed—payment into bank for security of non-consenting creditors.

Form 646.

Another,
lodgment in
Court where
creditors do
not consent.

Upon the peton of R. C. and Sons, Limtd and Reduced, on — of —, preferred unto this Ct, and upon hearing counsel, &c., and the Chief Clerk's certificate, the *London Gazette*, &c., each containing, &c., an afft, &c., this Court doth order that R. C. and Sons, Limtd and Reduced, on or before 11th March, 1890, make a lodgment into Ct of 5,900*l.* as mentd in the schedule hto; and the petr and the creditors named in the sd afft of R., filed 5th Feb., 1890, are at liberty to apply to the judge concerning the applicon of the sd cash when so lodged on or after 1st Jan., 1891, or at such earlier date as such debentures may be pd off; and it is ordered that upon such lodgment into Ct being made the special resolution passed, &c., be confirmed; and it is ordered that this order, together with the original receipt from the bank for such lodgment into Ct as afsd, be produced to the Registrar, &c., and [*directions to advertise*]; and order that the words "and Reduced" form part of the name of the coy for one month from the date of the order.

LODGMET SCHEDULE.

In the matter of Robert Campbell and Sons, Limtd and Reduced.

Ledger credit as above.

The account of the debenture holders mentioned in the affidavit of D. Reid, filed 5th Feb., 1890.

In first column: "Particulars of funds to be lodged. Cash invest and accumulate in New Consols."

In second column: Name of the coy. In third column: 5,900*l.*

Robert Campbell and Sons, Limtd and Reduced, Chitty, J., 15th Feb., 1890. B. 285.

Form 647.

Reduction of
capital by
cancellation
of paid-up
shares and
substitution
of debentures
for same.

Upon the peton of John Shaw & Sons, Limtd and Reduced, on the 8th day of September, 1899, preferred unto this Court, and upon hearing counsel for the petr and for, &c., the exors of the will of Samuel Shaw (and others), being all the shareholders of the above-named coy, and upon reading the sd peton, the order dated, &c., the Master's certificate, dated, &c., and filed the 23rd day of March, 1900, the following affts, all filed the 24th day of April, 1900, &c., and the exhibits therein referred to, the following newspapers, namely, &c., this Court doth order that the reduction of the capital of the sd coy resolved upon by the special resolution passed and confirmed at extraordinary general meetings of the petr held on, &c., which resolution was in the words and figures following, that is to say: "That it is desirable to cancel the pd-up capital of the coy which is unrepresented by available assets to the extent of 72,000*l.*, and to substitute 40,000*l.* of debentures of the coy for 40,000*l.* of fully

pd-up shares and to cancel such shares, and accordingly the capital of the coy be reduced from 250,000*l.*, divided into 25,000 shares of 10*l.* each, to 138,000*l.*, divided into 13,800 shares of 10*l.* each, and that such reduction be effected by cancelling 11,200 fully pd shares in the coy of 10*l.* each, namely, the eight shares, numbered — to — inclusive, held by W. R. S., the — shares, numbered, &c., &c., held by [and so on], and by issuing 400 debentures of the coy, each for the sum of 100*l.*, in substitution for 4,000 of the sd cancelled shares held by the sd W. R. S., and others as aforesaid," be confirmed in conformity with the provisions of the Companies Acts, 1867 and 1877, and it is ordered that the words "and Reduced" continue to form part of the name of the sd coy for one month from the date of this order; and this Court doth approve of the minute set forth in the schedule hto, and it is ordered that an office copy of this order be delivered to the Registrar of Joint Stock Companies together with the sd minute in the words or to the effect set forth in the schedule hto, and it is ordered that notice of the registration of this order and of the sd minute be published as follows, that is to say: Once in the *London Gazette*, the *Times*, *Daily Telegraph*, the *Leeds Mercury*, the *Yorkshire Post*, and *Halifax Courier* within 14 days after registration of the minute. *John Shaw and Sons, Limtd and Reduced*, Cozens-Hardy, J., 28th April, 1900, A. 1676.

Form 647.

Upon the petition of the above-named, the United States Debenture Corporation, Limtd and Reduced, and upon reading, &c., and the Judge dispensing with the enquiry as to creditors. This Ct doth order that the cancellation and reduction of capital of the above-named coy resolved on and effected by the special resolutions passed &c., and which resolutions were in the words and figures following, that is to say:

Form 647a.

Redeeming
founders'
shares.

- (1) That the capital of the Corporation be reduced from 2,699,600*l.*, consisting of 173,090*l.* preference stock, 150,000*l.* ordinary shares of 8*l.* each, and with 1*l.* per share pd thereon, 200 founders' shares of 8*l.* each, with 1*l.* per share pd thereon, and 133,491 unissued preference shares of 10*l.* each, to 2,698,000*l.*, and that such reduction be effected by returning to the holders of founders' shares the sum of 1*l.* per share pd thereon, and by cancelling all the founders' shares.
- (2) That in case the capital of the Corporation be reduced by repayment of the amount pd on the founders' shares and cancelling those shares, there be pd to every holder of founders' shares out of the reserve fund (in addition to the repayment of the capital pd thereon) the sum of 200*l.* per share on every founders' share held by him at the date of such reduction becoming effective,

be and the same are hereby confirmed.

Form 647a. [Approve minute. File office copy with Registrar, and use words "and Reduced" for one month from the date of order.]

AND IT IS ORDERED that the petr^s, the sd United States Debenture Corporation, Limtd and Reduced, do pay to the sd H. and 66 others and to the sd C. their costs of the sd peton, such costs to be taxed, but on such taxation only one set of costs is to be allowed between the sd R. G. Hill and the sd 66 others. Warrington, J., 1 Aug. 1905

[SCHEDULE.]

Form 647b. Upon the petition of the above-named Kodak, Limtd and Reduced. and of the Eastman Kodak Coy, on the 13th December, 1901. preferred unto this Ct. and upon hearing counsel on the 15th April, 1902. for the petitioners, &c., and upon reading, &c., the *London Gazette* of the 4th April, 1902, the *Times* and the *Liverpool Courier* newspapers, both dated the 4th April, 1902, and the *Glasgow Herald* newspaper, dated the 5th April, 1902, and each containing a notice of the presentation of the sd petition, and that the same was appointed to be heard on the 15th April, 1902, &c.

Kodak Co.
Distribution
of shares in
another
company.

And it appearing by the sd afft of F., filed the 28th April, 1902. that the sum of 30,300*l.* (the amount agreed upon by counsel on behalf of the petitioners and the sd Commissioners of Inland Revenue to be invested in New Consols as security for the claim of the sd commissioners, amounting to the sum of 30,287*l.* 13*s.* 8*d.*, item 135 of Part III. of the schedule to the sd certificate of the Registrar, or such pt of the sd claim as shall hnfr appear or be proved to be owing by the petitioner, the above-named Kodak, Limtd and Reduced) has been invested in 31,930*l.* 15*s.* 4*d.* New Consols, in the joint names of the chairman for the time being of the Board of Inland Revenue and Sir J. P. (baronet) in accordance with such agreemt.

And K., a member of the firm of K—, the petitioners' solors, by the petitioners' counsel undertaking to pay the sum of 3*l.* 4*s.* (item 246 of Part III. of the schedule to the sd certificate of the Registrar) due to H. K.

And it appearing by the sd afft of F., filed 28 April, 1902, that the whole of the current rent, rates, taxes, gas, electric light and water rates referred to in Part III. of the schedule to the sd certificate of the Registrar, and thereby estimated not to exceed the sum of 670*l.*, have since been pd.

IT IS ORDERED that the cancellation and reduction of the capital of the above-named Kodak, Limtd and Reduced, resolved on and to be effected by the special resolutions passed and confirmed at two extraordinary general meetings of the petitioner, the sd Kodak, Limtd and Reduced, held resply on the 11th November, 1901, and the

26th November, 1901, and which resolution was in the words and Form 647b. figures following, that is to say:—

"That having regard to the provisions of the agreement dated the 31st day of October, 1901, and made between F., on behalf of the coy, of the first pt, Sir J. P., the Right Honourable, &c., &c., of the second pt, and the Eastman, &c. Coy, of the third pt, the capital of this coy be reduced to 250,000*l.*, divided into 250,000 ordinary shares of 1*l.* each, and that such reduction be effected by distributing in redemption of capital amongst the holders of shares in this coy (other than the 250,000 ordinary shares therein owned by the Eastman Kodak Coy of New Jersey) the 30,555 fully pd up 6 p.c. cumulative preference shares, and the 90,938 fully pd up common shares in the Eastman, &c. Coy, receivable under the sd agreement in manner following, that is to say:—

"(1.) By distributing amongst the holders of the preference shares in this coy the 30,555 preference shares in the Eastman, &c. Coy, rateably in proportion to the preference shares in this coy held by them resp'y, and by distributing amongst the holders of the ordinary shares in this coy (other than the 250,000 ordinary shares afcd) the 90,938 common shares in the Eastman, &c. Coy, rateably in proportion to the ordinary shares in this coy held by them resp'y, but so that shares which but for this provision would be distributable in fractions shall be sold by the coy and the net purchase money substituted for the fractions, and

"(2.) By cancelling the whole of the shares in this coy's capital other than the sd 250,000 ordinary shares—

he and the same is hby confirmed in conformity with the provisions of the above-mentd Acts.

AND IT IS ORDERED that this order be produced to the Registrar of Joint Stock Cos, and that an office copy thof be delivered to him, together with a minute in the words or to the effect set forth in the schedule hto.

AND IT IS ORDERED that notice of the registration by the Registrar of Joint Stock Cos of this order and of the sd minute be published as follows: that is to say, once each in the *London Gazette* and the *Times*, the *Liverpool Courier* and the *Glasgow Herald* newspapers within ten days after such registration.

AND IT IS ORDERED that the addition of the words "and Reduced" to the title of the sd coy be continued until the 15th May, 1902.

AND IT IS ORDERED that the petitioner, Kodak, Limtd and Reduced, and the Eastman Kodak Coy, do pay to the Commissioners of Inland Revenue their costs of the said petition, such costs to be taxed. Buckley, J., 28 Ap. 1902. See *supra*, p. 1264.

SCHEDULE (see *infra*).

Minutes.

As to minutes approved by the Court, see *supra*, pp. 1285, 1286

Save as below mentioned, it has for upwards of a quarter of a century been the practice in cases where a reduction has involved the payment off of paid-up capital to ignore the amount to be paid off in stating in the minute the amount "which is to be deemed to have been paid up on each share" (sect. 4, Act of 1877). Thus, where 5*l.* per share was to be paid off on 10*l.* fully paid shares and the shares to be reduced to 5*l.* shares, the minute in accordance with the practice stated the capital as altered, and that upon each share 5*l.* was to be deemed to have been paid up, and it ignored the 5*l.* per share paid off. It being assumed that the amount would be paid off in due course after the registration of the minute. And it is submitted that this practice is correct and for these reasons:—Sect. 9 of the Act of 1867 (sect. 51 (2) of the Companies Act, 1908) provided that no resolution for reduction should "come into operation until an order of the Court confirming the reduction is registered by the registrar as hereinafter provided," and sect. 15 of 1867 (sect. 51 (1) of the Act of 1908), as modified by sect. 4 of 1877 (sect. 48 of the Act of 1908) (see App., *infra*), provided for the registration of the order and of a minute (approved by the Court) showing with respect to the capital of the company *as altered* by the order the amount of such capital, the number of shares, the amount of each share, and the amount proposed to be deemed to have been paid up on each share. And sect. 15 (sect. 51 (2) of the Act of 1908) also provided that on the registration (that is, of the order and minute) "the special resolution confirmed by the order so registered shall take effect." And the minute had to be framed on the footing of sect. 16 of 1867 (sect. 52 of the Act of 1908), see App., for when registered it was to be "deemed to be substituted for the corresponding part of the memorandum of association of the company, and shall be of the same validity . . . as if it had been originally contained in the memorandum of association."

Clearly, then, the Act contemplated that no payment off of capital under the resolution would or could be made until after the registration of the minute, for until then the resolution for payment off is ineffective. Moreover, the Act contemplated that the minute would show the capital "as altered," and accordingly the minute could not treat the amount paid off as capital "proposed to be deemed to have been paid up on the shares."

However, in *Calgary and Edmonton Land Co., Limited*, 19th Dec., 1905 (reported in (1906) 1 Ch.), Buckley, J., being under the impression (contrary to the fact) that the practice had been in such cases, first, to obtain on the hearing of the petition an order confirming the reduction and approving of the minute, then to pay off the capital and prove such payment off to the Court or to the registrar, and then to take the order post-dated so as to bring the minute into accord with the facts, directed that course to be adopted in the case before him, and without much discussion counsel for the company assented. The objection to adopting the course thus approved is that it departs from the long-settled practice of the Court, and that it compels the company to *act* on the resolution by paying off capital before, by registration of the order and minute, the resolution has become effective and before it is known whether there will or will not be an appeal from the order. The reason suggested for departing from the settled practice is that unless the capital is actually paid off before the minute is registered, that minute, in ignoring the capital to be paid off, will not truly state the facts; but the reason does not seem to be sound, for the

minute is to deal with the capital "as altered" (sect. 15 of 1867 (sect. 31 of the Act of 1906), *infra*, App.); it is to deal *not* with the capital which has been paid up but with the capital which is "proposed to be deemed to have been paid up." Then it is said that the sum to be paid off must be capital, for the resolution is for payment off of capital, and therefore that the minute cannot ignore the amount, but the answer is that the sum is capital which is to be paid off and not capital which is proposed to be deemed to have been paid off within sect. 4 of 1877, and this reasoning seems to apply equally under the new Act.

Amongst the numberless cases in which the settled practice has been followed in past years are the following, elsewhere referred to in this work:

British and American &c. Co. v. Cuniper, (1894) A. C. 399.

Coldhurst Spinning Co., Hall, V.-C., 1902.

International &c. Co., Chitty, J., 1883, *supra*, Form 645.

Pope & Pearson, 24th Dec., 1891, Form 497, *supra*.

Safety Oil Co., North, J., W. N. (1892) 133.

Robert Campbell, 1890, Form 646.

John Shaw & Sons, Cozens-Hardy, J., April, 1900, Form 647.

Kodak, Limited and Reduced, Buckley, J., April, 1902, *supra*, Form 647.

See also *Artians', &c. Co.*, (1904) 1 Ch. 796.

In the result *Calgary and Edmonton Land Co.*, (1906) 1 Ch. 141, cannot be considered good law. Eady, J., in *Lea Brook Spinning Co.*, (1906) 2 Ch. 394; Warrington, J., in *Estate and Finance Co.* (1907); and Parker, J., in *General Industries Development Syndicate*, W. N. (1907) 23—all declined to follow the decision.

The following are a few examples of minutes where capital has been paid off:

[*British and American, &c. Co.*, 1894, *supra*, pp. 1119, 1259.] The capital of [the company] is 1,691,737*l.* divided into 160,767 ordinary shares of 10*l.* each and 81,067 general founders' shares of 1*l.* each instead of the 2,000,000*l.* divided into 178,600 ordinary shares of 10*l.* each and 114,000 general founders' shares of 1*l.* each, and at the time of registration of this minute 35,276 of the said ordinary shares are issued, and on each of them the sum of 2*l.* has been and is deemed to be paid up, and 42,365 of the said general founders' shares are issued and have been and are to be deemed fully paid up. The residue of the said ordinary shares, namely, 125,491, and the residue of the said general founders' shares, namely, 41,702, are unissued and nothing is to be deemed to be paid up thereon.

[*Kodak, Limited*, 1904.] The capital of [the company] henceforth is 250,000*l.* divided into 250,000 shares of 1*l.* each, reduced from 1,600,000*l.* divided into 600,000 preference shares of 1*l.* each and 1,000,000 ordinary shares of 1*l.* each, by reducing and extinguishing the said preference shares and 750,000 of the said ordinary shares. The 250,000 ordinary shares, part of the 1,000,000 ordinary shares, are numbered, &c. At the time of the registration of this minute the full sum of 1*l.* per share has been and is to be deemed paid up on the said 250,000 ordinary shares.

[*Robert Campbell & Sons, Limited*, 1890.] The capital of [the company] is 620,000*l.* divided into 60,000 shares of 10*l.* each, on each of which the full amount per share is to be deemed to be paid up, instead of the original capital of 600,000*l.* divided into 60,000 shares of 10*l.* each on which 7*l.* per share has been paid up thereon.

"The capital of the Fore Street Warehouse Company, Limited, is 480,000*l.*, divided into 30,000 shares of 16*l.* each. At the time of the registration of this minute the whole of the said 30,000 shares have been issued and allotted, upon each of which the sum of 14*l.* has been and is to be deemed to be paid up. Minute where capital liable to be recalled.

up, but in respect of each of the said shares the company is empowered to pay off or return 3/ of the amount so paid up upon the footing that the amount paid off or returned, or any part thereof, may be called up again." Kay, J., 23rd June, 1888, 59 L. T. 214. And see *Craven Line Co., Limited*, where a similar minute was approved by North, J., 21st April, 1898. And Farwell, J., approved of a similar minute in *Junction Spinning Co., Limited and Reduced*, 16 Ap. 1901.

Cancelling
lost capital.

"The capital of the Express Assurance Corporation, Limited, henceforth is, &c., and on each of the said 71,768 shares the sum of 10s. has been and is to be deemed paid up, except that upon the undermentioned shares there are the following arrears of calls:—

Denoting Numbers of Shares.

Amount of Calls in Arrear.

"The right to receive the said arrears is expressly reserved by the order of the High Court of Justice, Chancery Division, made in the matter of the said corporation." Wright, J., 1 Nov. 1900.

Form 64B

In the matter, &c.

Advertisement
of
order, &c.

NOTICE IS HEREBY GIVEN that the order of the High Court of Justice, Chancery Division, dated the — day of —, confirming the reduction of the capital of the above-named coy from £— to £—, and the minute approved by the Ct showing with respect to the capital of the coy as altered the several particulars required by the above statutes, was registered by the Registrar of Companies on the — day of —. The said minute is in the words and figures following:—

The capital, &c. [*here set it out*].

Dated the — day of —.

— & —,
Solicitors for the Coy.

Form 648a.

Articles pro-
viding for
issue of
surplus
certificates
on reduction
of capital.

133A. In case the capital of the coy be reduced to 250,000*l.* by the cancellation of unissued shares and by the cancellation of 182,602*l.* of the stock resulting from the conversion of ordinary shares, then, as from such reduction becoming effective, Art. 133 shall cease to be in force, and thereafter the following regulations shall take effect.

133B. The directors shall forthwith issue to each holder of stock resulting from the conversion of preferred shares, or other the person entitled to the arrears of dividend on the said shares resp'y, surplus certificates of the coy declaring the bearer thereof to be entitled to receive out of the profits of the coy available for the purpose under the pro-

visions herein contained, a sum equal to the arrears of dividend at the rate of seven p.c.p.a. accrued up to, and including the dividend for, the year ending the 31st March, 1895, upon the preferred shares represented by the stock held by such stockholder at the time of issue, and shall also pay in cash to the persons enttd thereto a dividend at the full rate of 7 p.c. for the year ending the 31st March, 1896, on the stock represented by the sd preferred shares.

Form 648a.

133c. The profits of the coy for the year ending the 31st March, 19—, and each subsequent year available for dividend, shall, subject to the rights of holders of shares (if any) hereafter issued with any preferential right as to dividend, be applied first and preferentially in payment of a dividend at the rate of six p.c.p.a. upon the 250,000l. stock of the coy, and of the balance of such profits one-half shall be applied in the purchase, at a price below par or in the redemption by drawings, to be deducted as the board may determine, of surplus certificates, and the other half shall be distributed amongst the members as further dividend in proportion to the stock held by them, but without prejudice to the authority of the directors to exercise the powers conferred upon them by Arts. 125 and 136. Provided always, that until the sd certificates shall have been extinguished by payment or redemption, nothing in the sd arts contained or otherwise shall be construed to authorize the directors to create or maintain a reserve fund exceeding a sum of 20,000l., and any additions hereunder made to such reserve fund shall be invested in first class securities.

133d. The decision of the directors as to the amount of profits to be applied in the purchase or redemption of surplus certificates shall be absolutely binding upon the holders of all such certificates, and shall not be questioned, and no holder of a surplus certificate, not being a shareholder, shall be enttd, as such holder, to any account of the coy's dealings, transactions, or profits, or to any information whatever with regard to the coy, and all surplus certificates shall be issued subject to a condition to the effect of this art.

The — Coy, Ltd.

No. — Street, London, E.C.

Surplus Certificate to Bearer for £ —

No. —

This is to certify that the bearer hereof is enttd to receive out of the profits of the above-named coy (hereafter called "the coy") available for the purpose under the provisions of the coy's arts of assn the sum of £— in respect of arrears of dividend accrued up to and including the dividend for the year ending 31st March, 19—, upon certain deferred shares now represented by stock, and the coy promises to make payment accordingly.

This certificate is issued subject to the provisions of the coy's arts of assn, and in particular of clauses 133c and 133d indorsed hereon.

Form 648a. This certificate is to be treated as a negotiable instrument, and all persons are invited by the coy and the owner for the time being of this certificate to act accordingly.

Notice to the bearer of this certificate may be given by advertisement once in two London daily papers.

For the — Coy. Ltd:

—, Director.

—, Secretary.

Sect. 51 of the Companies Act, 1908 (sect. 15 of the Act of 1867), provides for the registration of the order and minute with the Registrar of Companies, and requires notice of such registration to be published in such manner as the Court may direct. The Court cannot dispense with the publication, so held by Chitty, J., in *London Steamboat Co.*, 31 W. R. 781; W. N. (1883) 135, for Parliament has enacted that there shall be such publication.

The terms of sect. 52 of the Act (as to embodying a copy of the minute in the company's memorandum) (representing sect. 18 of the Companies Act, 1867), should be borne in mind.

In some cases a copy of the order has been advertised instead of a notice as above, but that is not what the section requires.

Abandonment of Reduction.

Form 649. Upon motion this day made unto this Ct by counsel for the above-named coy, being a renewal of the applicon on the 21st day of Nov. 1885, refused by the Vice-Chancellor Bacon, the time for such motion having been generally acknowledged by the Ct, and upon reading an afft of Thomas Jones, filed 12th day of August, 1885, of the sa coy by their counsel alleging that the peton on the 30th day of July, 1885, preferred unto this Ct by them for the confirmation of the resolutions for reduction of capital in the sd afft referred to has been withdrawn, and that it has been determined not to proceed with such reduction, this Ct doth order that the sd coy be at liberty forthwith to discontinue the addition to its name of the words "and reduced." *Morley, Carney & Co., Limited and Reduced*, C. A., 11 Jan. 1886; 53 L. T. 736

Order on
abandonment
of proceed-
ings.

The like order was made by Malins, V.-C., on the application of the author, in *Fion Co.*, 25 May, 1880, B. 1653.

Where it is found that a proposed reduction cannot be carried into effect because too many creditors declare that they will oppose, or because the company finds that it will be unable to adduce the requisite evidence, *e.g.*, of loss or depreciation, application can be made for leave to withdraw the petition and to drop the words "and reduced." The following is a specimen of an order made in such a case:—

Form 650. Upon the applicon of the above-named syndicate, by summons dated 23rd day of February, 1900, for directions as to the proceedings to be taken for settling the list of their creditors or filed to object to

Reduction
of capital.

the proposed reduction of the capital of the syndicate, as in their petition presented in this matter on the 8th day of February, 1900, mentd. and that the advertisement for the creditors might be dispensed with, and upon hearing the solors for the applicants and upon reading the sd petition, and the applicant not desiring to proceed further with the sd petition, it is ordered that all further proceedings in the matter of the sd petition be stayed; and it is ordered that an office copy of this order be delivered to the Registrar of Joint Stock Cos within fourteen days from the date of this order; and it is ordered that the use of the words "and reduced," mentd in the Cos Act, 1867, be dispensed with, and that the advertisement or publication of notice of the registration of this order be also dispensed with. *Castle Gold Exploration Syndicate, Limited and Reduced*, Stirling, J., 3 April, 1900, A.

Form 650.

Order staying proceedings.

ALTERATION AND EXTENSION OF A COMPANY'S OBJECTS.

The unalterability of a company's memorandum of association, while based on a sound principle of public policy, was attended with many inconveniences. It operated often as an unreasonable obstacle in the way of a company enlarging or consolidating its business or adapting it to changed conditions. In the Companies (Memorandum of Association) Act, 1890 (the provisions of which are now embodied in sects. 9 and 264 of the Companies (Consolidation) Act, 1908), the Legislature recognized the necessity for a change in the law, and, without abandoning the principle of unalterability, relaxed it—subject to proper safeguards—in certain classes of cases.

The sections above referred to run as follows:

9.—(1) Subject to the provisions of this section a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it—

Alteration of objects of company.

- (a) to carry on its business more economically or more efficiently; or
- (b) to attain its main purpose by new or improved means; or
- (c) to enlarge or change the local area of its operations;
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or
- (e) to restrict or abandon any of the objects specified in the memorandum

(2) The alteration shall not take effect until and except in so far as it is confirmed on petition by the Court.

(3) Before confirming the alteration the Court must be satisfied

- (a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and
- (b) that, with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court;

Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

(4) The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.

(5) The Court shall, in exercising its discretion under this section, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement: Provided that no part of the capital of the company may be expended in any such purchase.

(6) An office copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within fifteen days from the date of the order, be delivered by the company to the registrar of companies, and he shall register the same, and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company.

The Court may by order at any time extend the time for the delivery of documents to the registrar under this section for such period as the Court may think proper.

(7) If a company makes default in delivering to the registrar of companies any document required by this section to be delivered to him, the company shall be liable to a fine not exceeding 10*l.* for every day during which it is in default.

Sect. 264 of
the Act
of 1908.

Power to
substitute
memorandum
and articles
for deed of
settlement.

264.—(1) Subject to the provisions of this section, a company registered in pursuance of this Part [VII.] of this Act may by special resolution alter the form of its constitution by substituting a memorandum and articles for a deed of settlement.

(2) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall so far as applicable apply to an alteration under this section with the following modifications:—

(a) There shall be substituted for the printed copy of the altered memorandum required to be delivered to the registrar of companies a printed copy of the substituted memorandum and articles; and

(b) On the registration of the alteration being certified by the registrar the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company's deed of settlement shall cease to apply to the company.

(3) An alteration under this section may be made either with or without any alteration of the objects of the company under this Act.

(4) In this section the expression "deed of settlement" includes any contract of copartnership or other instrument constituting or regulating the company, not being an Act of Parliament, a royal charter, or letters patent.

In the above sections "a company" means any company formed and registered under this Act (sect. 285 of the Act of 1908) or an existing company (*i.e.*, a company formed and registered under the Joint Stock Companies Acts or under the Companies Act, 1862).

Sect. 285 is silent as to companies registered but not formed under the Joint Stock Companies Act, 1856, the Joint Stock Companies Acts, 1856 and 1857,

or the Act to enable joint stock companies to be formed on the principle of limited liability, or under Part VII. of the Companies Act, 1862. But sects 246 and 263 make the Act applicable to such companies. See *Nitro Phosphate Co.*, W. N. (1893) 141; *General Credit Co.*, W. N. (1891) 153; *Hong Kong and China Gas Co.*, W. N. (1898) 158; *Copiapó Mining Co.*, W. N. (1899) 25; *Euphrates and Tigris Steam Navigation Co.*, (1904) 1 Ch. 360; *Scottish Australian Investment Co.*, Warrington, J., 20th January, 1912. In that case the company was registered but not formed under the Joint Stock Companies Act, 1856, with a deed of copartnery. It subsequently adopted a memorandum and articles (with largely extended objects), and the Court confirmed the substitution under sect. 264.

The Court has a discretion under sect. 9 of the Act, and the order may be made on such terms and conditions as to the Court seem fit. Accordingly, the Court under the repealed Act sometimes required an advertisement of the order, and occasionally required an alteration of the name where the extension of objects rendered the name inappropriate or misleading. *Foreign and Col. &c. Co.*, (1891) 2 Ch. 395; *Indian Mechanical Gold Extracting Co.*, W. N. (1891) 153; *Oriental Telephone Co.*, *ibid.*; *Alliance Insurance*, (1892) 1 Ch. 300. And see *Copper Mines Tinplate Co.*, W. N. (1897) 20, *infra*; but, as a general rule, this was not required. *Lancaster Banking Co.*, W. N. (1897) 3.

There is no doubt jurisdiction in the High Court to sanction an alteration of the objects of an unlimited company with no shares or capital, but which is a company under the Act of 1908. *North of England Iron Steamship Insurance Assoc.*, (1900) 1 Ch. 481.

In *National Boiler Insurance Co.* (1882), 1 Ch. 311, Kekewich, J., being prepared to confirm the resolutions with modifications, required a further special resolution approving of the modifications; but the learned judge, in several subsequent cases, held that he had jurisdiction to sanction the modified resolutions without further special resolution; *Law Union, &c. Co.*, 16th January, 1892, where the proposed extension was cut down to some extent; *Law Union and Crown*, in which the same judge confirmed a resolution adopting a memorandum and articles in which he required certain modifications. And the Courts have on many occasions added words so as to limit the extent of the alterations. *Spiers and Poul*, W. N. (1895) 135; *Fleetwood Estates Co.*, W. N. (1897) 20; *Consett Iron Co.*, (1901) 1 Ch. 236. The Court has put a liberal construction on the provisions of the Companies (Memorandum of Association) Act, 1890, and of sect. 9 of the Act of 1908, as to alteration of objects, and has rarely refused to confirm an alteration adopted by special resolution and coming within the words of the section. As Lord Loreburn, L. C., said in *Pooler v. National Bank of China*, (1907) A. C. 296, "It is no part of the business of a Court of justice to determine the wisdom of a course adopted by a company in the management of its own affairs."

The Court found no difficulty in confirming an alteration in wide terms and does not require evidence that the company immediately require to act on the extended objects.

The following instances will afford some indication of the extent to which the enactments have been utilised:—

A telephone company was empowered to manufacture electrical apparatus. *Oriental Telephone Co.*, W. N. (1891) 153.

Several insurance companies have been allowed to extend their objects so as to include cognate businesses, e.g., *Employers' Liability Co.*, Chitty, J., 29th June, 1891; marine insurance extension, *Alliance Marine*, (1892) 1 Ch. 300; boiler insurance extension, *National Boiler*, (1892) 1 Ch. 306; guarantee company extension to indemnity, burglary and other special kinds of insurance, *Law Guarantee*, May, 1895; *British Empire, &c. Co.*, 1897; *Equity and Law*

Sanctioning
subject to
modifications.

Life, 1897, large extension: *North of England, &c. Assoc.*, (1900) 1 Ch. 481; *Norwich Union Life*, Stirling, J., Jan. 1893; *Equitable Life*, Chitty, J., April, 1893; *Guardian Assurance*, Parker, J., May, 1910; *Reliance Marine*, April, 1911. Several companies have taken power to transact trustee and executorship business. *Union of London and Smiths Bank*, *London and South Western Bank*, *Lloyds Bank*, *Baring Bros. & Co.*, June, 1910.

Trust investment companies have been allowed to extend their objects. *Foreign and Colonial Trust Co.*, (1891) 2 Ch. 395; *Government Stock, &c. Co.*, (1892) 1 Ch. 597; *Trust and Agency Co. of Australasia*, 25 T. L. R. 61.

Several banks have largely extended or defined their objects. *London and Midland Banking Co.*, 1891; *Manchester and Liverpool District Banking Co.*, 1895; *York City and County Banking Co.*, 1896; *London and Westminster Bank*, 1897, North, J.; *Lincoln and Lindsey Banking Co.*, Swinfen Eady, J., 28th Oct. 1902; *National Provincial Bank of England, Limited*, North, J., 1895; *Birmingham District and Counties Banking Co., Limited*, Parker, J., May, 1907; *Union of London and Smiths Bank, Limited*; *London and South Western Bank, Limited* (the like); *Sheffield and Hallamshire Bank, Limited*, By: J., J., 4 Dec. 1899; *London Joint Stock Bank, Limited*, Chitty, J., Nov. 1892.

A considerable number of companies have been empowered to raise money by debentures and perpetual debenture stock. *Reversionary Interest Society*, (1892) 1 Ch. 615; *Law Reversionary Interest Society*, May, 1893, North, J.; *P. Phipps' Northampton and Worcester Breweries*, 1897; *Empire Trust*. Restriction on borrowing removed. *Midland Educational Co.*, Stirling, J., 30th April, 1892. Borrowing powers extended. The like in *Union Rolling Stock Co.*, Kekewich, J., Jan. 1894.

The area of the company's operations has been enlarged in several cases. *Indian Mechanical, &c. Co.*, (1891) 3 Ch. 538; *London Joint Stock Bank*, Chitty, J., Nov. 1892; *R. Bell & Co.*, matchmakers, were given power to carry on business abroad. See also *Crompton and Sons*, Vaughan Williams, J. (cotton spinning); *London General Omnibus Co.*, Neville, J., Feb. 1912.

In several cases objects have been extended so as to enable a company to acquire other business concerns of a like nature. *London Joint Stock Bank*, Chitty, J., Nov. 1892; *Norwich Union*, Kekewich, J., 1893; *York City and County Banking Co.*, North, J., Nov. 1894; *Leicestershire Banking Co.*, North, J., June, 1895; *New Westminster Brewery Co.*, 56 Sol. J. 141; or enter into arrangements for partnership or joint working; *Aux Classes Labourennes, Limited*, Neville, J., Feb. 1912; and many others, including *Anglo-American Telegraph Co.*, 56 Sol. J. 141. In some cases objects have been extended so as to allow the promotion of and holding shares in foreign companies. *Ocean Accident, &c. Co.*, Chitty, J., July, 1893; *Crompton & Sons*, Vaughan Williams, J.

In *Re Jewish Colonisation Trust*, (1908) 2 Ch. 287, the Court refused to sanction an alteration involving an abandonment of objects of a fundamental character, and restrict the promotion of the Zionist movement to a limited local area; and in *Re Cyclists Touring Club*, (1907) 1 Ch. 260, the Court refused to allow a cyclists' touring club to extend its objects by including among them the promotion of the interests of motorists, being of opinion that such an alteration was not within either clause (a) or (d) of sect. 1 (5).

In *Consett Iron Co.*, (1901) 1 Ch. 236, Cozens-Hardy, J., expressed doubts whether the Court had jurisdiction under the Act to sanction an alteration amounting to a re-writing of the objects in modern form; and, accordingly, in that case the old objects were left, whilst five times as much matter in the shape of new objects (in modern form) was added. Apparently, therefore, the doubt is confined to the question whether the Court has jurisdiction to sanction an

alteration which introduces a series of new objects in modern form *instead* of the old objects. This question has been answered again and again in the affirmative by the High Court. Thus, Henn Collins, J., in 1891, in the *Birmingham and Midland Bank, Limited*; Kekewich, J., in 1893, in the *Law Union and Crown Insurance Co., Limited*; North, J., in 1894, in the *York City and County Bank, Limited*; North, J., in 1895, in the *Leicestershire Banking Co., Limited*; Chitty, J., in 1896, in the *Equity and Law Life Assurance Society*; Vaughan Williams, J., in 1896, in the *Union Steamship Co., Limited*; North, J., in 1897, in the *London and Westminster Bank, Limited*; Stirling, J., in 1897, in the *British Plate Glass Co., Limited*; Byrne, J., in 1899, in the *Halifax Joint Stock Bank, Limited*; Kekewich, J., in July, 1901, in the *Carlisle and Cumberland Banking Co., Limited*; Byrne, J., 10th Aug. 1901, in the *London Joint Stock Bank, Limited*; and shortly afterwards in the *Midland Wagon Co.*; and Swinfen Eady, J., in the *Lincoln and Lindsey Banking Co.*, 28th Oct. 1902; *Euphrates Co.*; Swinfen Eady, J., W. N. (1901) 23; *Buenos Ayres Great Southern*, Joyce, J. June, 1910; *Reliance Marine*, April, 1911; *Standard Bank of South Africa, Limited*, Eve, J., Feb. 1911, sanctioned alterations which substituted a complete new set of objects in modern form for the old concise and imperfectly expressed objects.

In some of these cases the Court was sanctioning the alteration of the objects in a memorandum of association, and in others the adoption of a memorandum and articles of association, in substitution for a deed of settlement. See now sect. 264 and *London and Edinburgh Shipping Co.* (1909), S. C. 1 Ct. of Sess. But it is apprehended that, as regards the jurisdiction to sanction an alteration of objects, there is no distinction in principle. There is nothing to indicate that in the one case the objects can only be supplemented, but that in the other case they may be re-written with alterations; and accordingly the Court has, in the cases above referred to and many others, exercised its jurisdiction on broad principles.

In relation to this, it is to be noted that sect. 9 of the Act of 1908 (like the repealed Act) empowers the company by special resolution to "alter" its objects, and not merely to "extend" or "add" to them.

Kekewich, J., in *Carlisle and Cumberland Banking Co.* (July 16th, 1901) said he was sorry *Consell Iron Co.*, *supra*, had been reported, as he did not understand Cozens-Hardy, J., to have done more than express his first impression.

In several cases companies constituted by deed of settlement have, under the repealed Act, adopted a memorandum and articles of association in lieu of the deed of settlement, including the several banks and insurance companies and wagon company above mentioned. This useful power is now contained in a late section of the Act of 1908, s. 264.

When a company formed not for the purposes of gain and without the word "Limited" as part of its name, desires to alter its objects, it must first submit the proposed alterations to the Board of Trade. *St. Hilda's Incorporated College, Cheltenham*, (1901) 1 Ch. 556.

Practice under sects. 9 and 264 of the Act.

As to special resolutions generally, see sects. 69, 70 of 1908, and *supra* pp. 1092 *et seq.*

For notices of the meetings to pass such resolutions, see Forms 436 and 437 and notes thereto.

No preliminary alteration of articles is necessary. For resolutions under sect. 9, see Forms 519, 512. *supra*.

Special
resolutions
and notices
of meetings

Confirmation by the Court. "The alteration shall not take effect until and except in so far as it is confirmed on petition by the Court which has jurisdiction to make an order for winding up the company." Sect. 9 (2).

What companies. As to the companies which may take advantage of the Act, and its scope as defined by the Courts, see *supra*, pp. 1310, 1311.

The Court. As to the Courts and judges which had jurisdiction under the repealed Act, see *Mining Shares Investment Co.*, (1893) 2 Ch. 660, and *supra*, p. 1265.

The Court, in sects. 9 and 264 of the Act, means the Court having jurisdiction to wind up the company (sect. 285), and as to this, see sects. 131 and 133. The jurisdiction is exercisable by the judges of the Chancery Division, including the winding-up judges, and the latter have not exclusive jurisdiction. *Islington and General Electric Supply*, W. N. (1892) 81; *Essex and Suffolk Equitable Insur. Soc., Ltd.*, W. N. (1909) 102. The Court has jurisdiction even where the company has no capital or shares. *Re North of England Iron Steamship Assoc.*, (1900) 1 Ch. 481.

Transfer to County Court. Where the paid-up capital of the company did not exceed 10,000*l.*, and the petition was presented in the High Court instead of the County Court, Wright, J., confirmed the alteration, but ordered the proceedings to be transferred to the County Court. *Rugley Gas Co.*, W. N. (1899) 127; *Southsea Garage*, 27 T. L. R. 295.

Where the company is registered under sect. 10 of the Act of 1908 (replacing sect. 23 of the Companies Act, 1867) by licence of the Board of Trade without the addition to its name of the word "limited," the proper course is to apply in the first instance to the Board of Trade, and submit to it the memorandum showing all the proposed alterations; and if the Board approve them as being consistent with the continuation of the licence, the Court will then entertain the company's application for the sanction of the Court. *St. Hilda's Incorporated College, Cheltenham*, (1901) 1 Ch. 556.

Thus, where the original principal object of an association registered under sect. 23 was to encourage sheep-breeding, but was confined to the United Kingdom, and the object-clause proposed to be inserted was as follows:—

"(a) To encourage and improve the breeding of sheep and to promote the general interests of sheep-breeders in the United Kingdom of Great Britain and Ireland, the British Colonies, and any foreign country, and, with a view thereto, to admit to membership of the association [representatives of], and to affiliate or federate any association or society of sheep-breeders, whether incorporated or not, and whether at present existing or to be hereafter found in the United Kingdom of Great Britain and Ireland or elsewhere."

the Board of Trade required the insertion of the words in square brackets and the following addition:—

"(b) None of the funds of the association shall be paid to any affiliated or federated association or society which does not prohibit payment of dividend or profit to its members."

And the alterations were sanctioned subject to the above amendments. *National Sheep-Breeders' Association*, Buckley, J., August 8th, 1902.

Petition. Sub-sect. 2 shows that the application for confirmation must be by petition. For examples of petitions, see Forms 651—653, *infra*.

Summons and evidence. As to the summons with reference to creditors and fixing date of hearing of petitions, and as to the evidence, see Form 654, *infra*, and notes.

The order made in chambers, or, in the alternative, the certificate as to creditors, will follow Form 655 or Form 656, *infra*.

Debenture holders and creditors. The Court must, before confirming any alteration, be satisfied as to notices to debenture holders, &c.

Sub-sect. 3 contemplates notices being given by advertisement before the petition is heard. Directions as to this advertisement are given in the above-mentioned summons. For examples of advertisements, see *infra*, Forms 658, 659.

The Court may add words to the resolution so as to limit the extended objects. *Spurs & Pond*, W. N. (1895) 135; *Fleetwood Estate Co.*, W. N. (1897) 20, and see *infra*, Form 660.

For examples of orders on petitions, see Forms 660-663a, *infra*.

When the order is not passed and entered within the fifteen days limited by sub sect. 6 (Companies (Consolidation) Act, 1908, s. 9 (6)) for filing the order, i.e., the Court will extend the time for registration. *Reversionary Interest Society*, W. N. (1892) 60; *Brin's Oxygen Co.*, W. N. (1899) 41.

A supplemental order extending the time was made by Swinfen Eady, J., in *Lincoln and Lindsey Bank*, November 12th, 1902.

Advertisement of the order is sometimes required as a condition. See p. 1311, *pra*, and Form 663b. There is jurisdiction to require it, but, as a general rule, it will not be required, per Stirling, J., *Leicester Banking Co.*, W. N. (1897) 3. In one case Kekewich, J., directed the order to be advertised in the same way as the petition was advertised. *Copper Mines Tinplate Co.*, W. N. (1897) 20.

Advertisement of petition

Order on petition
Extending time for registration

Advertisements

In the High Ct of Justice,
Chancery Division.
Mr. Justice —

Form 651.

Petition to confirm extension of objects

In the matter of The — Coy, Limtd.
and

In the matter of the Cos (Consolidation) Act, 1908.

To His Majesty's High Court of Justice:

The humble petition of The — Coy, Limtd.

SHOWETH as follows:—

1. Your petr, the above-named coy (herein called "the coy"), was incorporated in the year 1888, under the Cos Acts, 1862 to 1886, as a coy limtd by shares.

2. The registered office of the coy is situate at, &c.

3. The capital of the coy is 1,000,000*l.*, divided into 100,000 shares of 10*l.* each, in respect whereof the sum of 5*l.* per share constitutes a reserved liability, and is not capable of being called up except in the event of and for the purpose of the coy being wound up. All the said shares have been issued and are paid up to the extent of 1*l.* per share.

4. The objects for which the coy was established are set forth in clause 3 of its memorandum of association as follows:—[*Here set out the objects.*]

5. Shortly after its incorporation the coy commenced, and has continued ever since, to carry on business, and has carried on the same with considerable success.

6. By special resolution of the coy duly passed and confirmed in accordance with sect. 69 of the Cos (Consolidation) Act, 1908, at

Form 651 extraordinary general meetings of the coy, held resply on. &c., it was resolved as follows, that is to say:—

"That the provisions of the memdum of assen of the coy with respect to the coy's objects be altered [by adding to paragraph 6 of clause 3 of such memdum of assen the words following, that is to say," &c., &c.].

7. The proposed extension of the objects of the coy is required to enable the coy to carry on its business more efficiently, and also to carry on certain businesses and classes of business which, under existing circumstances, may conveniently and advantageously be combined with the business of the coy.

8. In the course of such business the coy has accumulated a reserve fund of upwards of 44,000*l.* besides its original capital of 100,000*l.* which includes 76,209*l.* 14*s.* 0*d.* vested in trustees. It has now a large and continually extending connection, and it has extensive opportunities of doing business of the character authorized by the proposed extension of objects, and experience has shown that its objects as they stand are inconveniently restricted, and that its existing business is detrimentally affected by the absence of the powers which would be conferred by the objects set forth in the resolution. Those additional objects are required in order to enable the coy to meet the wants of its customers, and to take full advantage of the opportunities which it has for doing business.

9. It is apprehended that on the true construction of the coy's memdum of assen the existing objects of the coy comprise some of the objects set forth in the sd special resolution, and in particular indemnity business would appear to fall within the existing objects of the coy, and some of the other objects set forth in the resolution would seem to fall within the words of paragraph 12 of clause 3 of the sd memdum of assen, which empower the coy "to carry on any other business which may seem to the coy capable of being conveniently carried on in connection with the above," but in order to facilitate the business of the coy it is desirable to preclude any question or doubt in the matter.

10. The coy has no debenture debt whatever, but is usually indebted to general creditors for wages and salaries and otherwise to the extent of about 300*l.* a week, and this indebtedness varies from week to week as the accounts come in and are pd off.

11. The coy has issued in the course of its business a large number of policies of guarantee and other obligations which are now current.

12. The coy has ample working capital, and its assets are far more than sufficient to pay all its debts and to make good the whole of its pd-up capital, and, moreover, has plenty of capital to work its business and the proposed additional business.

13. No one will be prejudiced by the proposed extension of the coy's objects, and it is just and equitable that the sd special resolution for the proposed extension of such objects should be confirmed.

Your petir therefore humbly prays as follows:-

Form 651.

- (1) That the alteration of the coy's objects proposed to be effected by the sd special resolution set forth in paragraph 6 of this peton may be confirmed by the Court pursuant to sect. 9 of the Cos (Consolidation) Act, 1908.
- (2) Or that such other order may be made in the premises as to this Honourable Court may seem meet.

And your petitioner will ever pray, &c.

NOTE.- It is not intended to serve this petition on any person.

8. By special resolution of the coy duly passed and confirmed at general meetings of the coy, held resply on, &c., it was resolved as follows, that is to say:-

Form 652.

Another.
[Power to
acquire other
business.]

"That Article 9 of the deed of settlement of the coy, dated, &c., be altered by inserting therein, immediately before the words 'but of no other adventure,' the words 'including the acquisition and taking over of the goodwill of any other banking business, and the whole or any part of the assets and liabilities of the proprietors thof in connection therewith.'"

9. The proposed extension of the objects of the coy as afsd is required to enable the coy to carry on its business more economically and more efficiently than heretofore, and to attain its main purpose by new or improved means, and also to enlarge the local area of its operations, and, further, to enable it to carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the coy.

10. In particular, if the sd extension of objects is sanctioned, the coy will be in a position to adopt and carry out the provisional arrangements which have already been made for the acquisition by the coy on favourable terms of another important and profitable banking business, and the acquisition of that business would enable the coy to carry on its business more economically and more profitably, for it would extend the bulk of the coy's business and profits without involving a proportionate increase in management expenses. Unless the coy's objects are extended as afsd, it cannot acquire this business.

11. There is now great competition in banking business, and that kind of business is not so profitable as it was. The larger a banking business is the more economically and profitably it can be carried on, and the best and cheapest way of adding to the extent of the bank's business is to acquire and absorb other businesses of a sound and profitable character, but by reason of the limtd scope of its objects this course is not at present open to the coy.

12. The financial business of the coy is good. At the date of the

Form 652. last balance-sheet issued by the directors, that is to say, that of the 31st day of December, 1910, the financial position was shown to be and was as follows:—

Assets other than uncalled capital	£
Debts and liabilities	£
 Surplus	 £

To which must be added:—

1. Capital uncalled, but capable of being called up on the present issued 40,000 shares at 5l. per share	£
2. Reserve capital only capable of being called up in the event of winding-up on the present issued 40,000 shares, that is to say, at 10l. per share	£
 Total assets over liabilities	 £

The coy has moreover, unissued 1,000 shares of 25l. each, or 100,000l. of capital. The position of the coy since the date of the sd balance-sheet has not materially altered.

13. The profits of the coy for the year ending the 31st day of December, 1910, were upwards of £—

14. The market value of the coy's shares with 10l. per share pd up is 24l. per share or thbts.

15. No one, &c.

Finish as in Form 651.]

Form 653.

Heading as in Form 651.]

Petition for obtaining memorandum and articles under the Act of 1908, s. 264.

1. Your petr, the above-named coy (hnfr called "the coy"), was established by a deed of settlement, dated the 31st day of March, 1854, and was completely registered under the Act of the 7th & 8th Vict. c. 110, under the name of "The L. Fire and Life Insurance Coy." and was registered in the year 1862 under the Cos Act, 1862, as an unlimited coy, under the same name. The sd deed of settlement has from time to time been altered by resolution of the members of the coy, passed and confirmed in conformity with the sd Acts resply

2. In the year ——— the business of the C. Life Assurance Coy was, with the sanction of the Chancery Division of Her Majesty's High Ct of Justice, amalgamated with that of the coy, and the name of the coy was then altered to its present name, that is to say, the L. and C. Fire and Life Insurance Coy.

Form 653

3. The registered office of the coy is situate at

4. The capital of the coy is 2,000,000*l.*, divided into 200,000 shares of 10*l.* each, 143,120 of which have been issued, and are pd up to the extent of 12*s.* per share, and no more.

5. The main objects of the coy were originally set forth in clause 1 of the sd deed of settlement, but in the month of Dec., 1891, that clause was modified by special resolution, so as to extend the coy's objects, and such special resolution was, in the month of January 1892, sanctioned by this Honourable Ct under the Cos (Memdum of Asson) Act, 1890. The sd clause, as thus modified, states, in effect, that the shareholders are associated as a coy "for effecting insurances," &c., &c.

6. Shortly after its incorporation the coy commenced business, and has ever since continued to carry on the same with considerable success.

7. The form of the coy's constitution having been found inconvenient, and the deed of settlement afd having been found cumbersome, it became desirable to alter the form of the coy's constitution and accordingly a memdum and arts of asson were prepared, under the supervision of the directors of the coy, and were recommended by them for adoption, and with reference thereto the special resolution hntfr mentd was passed

8. By special resolution, &c. (as in clause 6 of Form 519), it was resolved as follows, that is to say:-

9. The following is a copy of the sd proposed memdum of asson that is to say, &c.

10. Clause 3 of the sd memdum of asson, in accordance with the modern practice, specifies the objects of the coy in considerable detail, but not so as to alter or extend the leading and principal objects of the coy. The adoption, however, of this clause involves a limited extension of objects, in order to invest the coy with ancillary powers which it desires to possess, and which are conveniently vested in other like cos. The proposed arts of asson contain a code of regulations suitable for the purposes of the coy.

11. The alteration in the form of the coy's constitution by substituting a memdum and arts of asson as afd for a deed of settlement, is expedient, for the following among other reasons, that is to say:

(1.) Because, having regard to the terms of sect. 263 of the Cos (Consolidation) Act, 1908, which is applicable to the coy, doubts may be raised as to which clauses of the deed of settlement of the coy must be regarded as conditions, and which must be reg:l'd as regulations of the coy within the meaning of that section, and accordingly it is practically impossible without thus altering the form of the constitution to simplify the provisions of the deed of settlement as desired.

Form 663

- (2.) Because it is desirable, in accordance with modern practice, to express the objects of the coy in greater detail so as to avoid and preclude, so far as may be, all doubts as to the coy's powers within the ordinary scope of its business.
- (3.) Because a constitution by memorandum and articles of association is now so well understood both at home and abroad that the possession of such a constitution facilitates business, and precludes questions as to how far a coy constituted by deed of settlement, though registered, stands in a like position.
- (4.) Because in order to meet the existing demands and prospective development of business and the growing competition, it is necessary to secure some extension of the objects of the coy.

12. All the objects of the coy set forth in clause 3 of the proposed memorandum of association are necessary for the due working and development of the coy's business, in accordance with the practice of assurance coys of the kind as now prevailing in England, and so far as the adoption of such objects involves an extension of the present objects, such extension is required to enable the coy to carry on its business more economically and more efficiently than heretofore, and to attain its main purpose by new or improved means, and also to enlarge the local area of its operations, and further enable it to carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the coy.

13. With the exception of the obligations of the coy in respect of policies and annuities, and of the current expenses for the management and conduct of its affairs, and of the sum of £ — and current interest owing in respect of debenture stock of that amount, issued as hereinafter mentioned, the coy is not indebted to any persons or companies whatsoever.

14. The said sum of £ — debenture stock was issued by the coy in the year 1909, as authorized by clause 7 of the said deed of settlement, as amended by special resolution in the year 1871. Such clause as amended provides, amongst other things, that in the event of the business of the C. Life Assurance Coy being taken over as aforesaid, the directors of your petitioner might constitute a debenture stock not exceeding £ —, to be called 4 p.c. L. & C. Debenture Stock, the principal of such debenture stock to be made payable on the 31st day of December, 1942, and that such debenture stock should carry interest at the rate of 4 p.c.p.a., and that such interest should be secured as a first charge on the annual profits of the coy applicable to the payment of dividends, and in priority to all such dividends, and that the deed constituting such stock should be in the terms of the draft therein mentioned, and that the said directors might issue such stock in accordance with the agreement for the acquisition of the

business of the C. Life Assurance Coy as sanctioned by the Ct as Form 653
 1901.

15. The sd debenture stock was, in pursuance of such agreemt. issued to the shareholders of the sd C. Life Assurance Coy, or their nominees, as fully pd up, and as pt of the consen for the sd amalgamation, or otherwise dealt with as provided for by such agreemt.

16. The financial position of the coy is extremely good. At the date of the last balance sheet (31st December, 1901), the position was as follows:—

Assets other than uncalled capital	£
Debts and liabilities (here give particulars)	£

Surplus	£
---------------	---

To which must be added capital uncalled, but capable of being called up	£
---	---

Total surplus of assets over liabilities	£
--	---

The position of the coy since the date of the sd balance sheet has been strengthened financially and otherwise.

17. The profits for the thirteen months ending 31st December, in respect of the coy were upwards of £

18. No one will be prejudiced by the proposed alteration in the form of the constitution of the coy, or by any extension of the coy's objects involved therein; and it is just and equitable that the sd special resolution for substituting the sd memorandum and arts of assen for the sd deed of settlement should be confirmed.

Your petitioner therefore humbly prays as follows:

(1) That the alteration in the form of the coy's constitution proposed, &c.

Finish as in Form 651. but referring in (1) to sects. 9 and 264.]

[Title as in Form 651.]

Form 654.

Let, &c., on the hearing of an applicon on the pt of the Limitd, that it may be declared that the extension of objects proposed by the petition presented herein on the — day of —, will not affect the creditors of the coy. And that a day may be fixed for hearing the sd petition, and directions given for advertising the presentation of the sd petition.

Summons for declaration as to creditors being unaffected by extension, and for fixing date of hearing petition.

Dated, &c

Signature of Judge.]

Immediately after the presentation of a petition under sect. 9 of the Companies (Consolidation) Act, 1908, replacing the Companies (Memorandum of

Form 654. Association) Act, 1890, a summons should be taken out. The summons may be in the above terms, or it may be an ordinary summons to proceed. It should be supported by affidavit evidence verifying the petition, and stating in what newspapers the advertisements should be inserted in order to bring the matter to the notice of creditors. A copy of the memorandum and articles of association and the original minute book of the proceedings of general meetings should be made exhibits, and there should be strict evidence of the meetings having been duly convened. *Omnium Investment Co.*, (1895) 2 Ch. 127. In due course, the Master, or, if the case is to be heard by the winding-up judge, the Registrar, will give the requisite directions, and either sign a certificate within the fold of the petition as in Form 657, or make an order as in Form 655. Sometimes the summons asks for a declaration that the creditors are not entitled to object. See proviso to sub-sect. 3 of the section.

Form 655. It appearing that there are no debenture holders or creditors who are entitl to object, or persons whose interests are affected by the proposed alteration and extension of objects, the judge directs that this petition is to be placed in the paper for hearing before his Lordship on — day, the — day of —, and that the sd petition and the sd day appointed for the hearing thof, be advertised once each in the *London Gazette*, the *Times*, the *Standard*, the *Daily Telegraph*, the *Daily News*, and the *Morning Post* newspapers. The insertion of the last of such advertisements to be at least ten days before the sd — day of —.

Order in chambers for petition to be heard, and advertisement.

Chief Clerk.

Form 656. Upon the applicon by summons, dated the 16th December, 1897, of the above-named coy, the petitioners named in the petition preferred unto this Ct on the 14th December, 1897, and upon hearing solors for the applicants, and upon reading the sd petition and an afft of E., filed. &c., and the exhibits therein referred to, and it appearing that there are no debenture holders of the above-named coy, and the Ct being of opinion that the advertisements huftr directed will be sufficient notice to all persons whose interests will be affected by the proposed alteration and extension of objects of the above-named coy, it is ordered that the sd peton be placed in the paper for hearing before his Lordship, Mr. Justice Wright, on Wednesday, the 12th day of January, 1898, and that the presentation of the sd peton and the sd day appointed for the hearing thof be advertised on or before the 31st December, 1897, once each in the *London Gazette* and in the *Times* newspaper.

Another.

Wright, J., 21st December, 1897.

The following was the certificate in an important case in 1892:

[Title.]

I certify

- (a) That there are no holders of debentures or debenture stock of the coy. Sufficient notice has been given to all persons, or class of persons, whose interests will be affected by the alterations in the deed of settlement mentd in this peton.
- (b) There are no creditors of the coy entld to object to the alterations except the policy holders and annuitants, and they have had sufficient notice. The only other debts of the coy are current office expenses. The shareholders also have had sufficient notice.

Chief Clerk

Form 657

Master's certificate as to creditors and notices

The following is the usual form of advertisement:

Notice is hby given that a peton was on the — day of —, 19—, presented to His Majesty's High Ct of Justice by the above-named coy to confirm an alteration of the sd coy's objects proposed to be effected by a special resolution of the coy [unanimously] passed at an extraordinary general meeting of the sd coy held on the — day of —, 19—, and subsequently unanimously confirmed at an extraordinary general meeting of the sd coy held on the — day of —, 19—, and which resolution runs as follows:—

Form 658.

Advertisement notice as to presentation and intended hearing of petition

[Set it out.]

And notice is further given that the sd peton is directed to be heard before the Honourable Mr. Justice —, on Saturday, the — day of —, 19—, and any person interested in the sd coy, whether as creditor, policy holder, or otherwise, desirous to oppose the making of an order for the confirmation of the sd alteration under the above Act, should appear at the time of hearing, by himself or his counsel, for the purpose, and a copy of the sd peton will be furnished to any such person requiring the same by the coy's solors, Messrs. — of No. —, Bedford Row, London, W.C., on payment of the regulated charge for the same.

Dated the — day of —, 19—

—, Solors for the coy.

Notice is hby given that a peton was presented to the High Ct of Justice, Chancery Division, on the — day of —, for confirming special resolutions passed on the — day of —, and confirmed on the — day of —, to the effect following, namely:—

[Set it out]

Form 659

Another (debenture holders).

Form 659. And further take notice, that such peton is directed to be heard before his Lordship, Mr. Justice North, on the — day of —.

Any person, being a debenture holder of the society, desiring to oppose the making of an order for so altering the provisions of the deed of settlement of the sd society under the above Act is required, within three weeks from the service by post of this notice, to send notice of such desire, with the grounds of his or her objections, to the secretary of the sd society, Mr. A. B., at the registered office of the society, No. —, —, London, W.C., and a copy of the peton will be furnished to any person being a debenture holder of the sd society requiring the same, by the undersigned, the solors of the sd society, on payment of the regulated charges for the same.

And further take notice, that any such debenture holder who has given such notice may, if so advised, attend in Ct on hearing of the sd peton and be heard thereon.

Dated this — day of —.

—, Solors of the sd society.

The above form of circular to debenture holders was approved by Mr. Justice North in a case before him.

Form 660. Upon the peton of the — Society, Limtd, on, &c., preferred unto this Ct, and upon hearing counsel for the petrs, and upon reading the sd peton, signed by Mr. —, the general manager and secretary of the sd society, and — and —, two of the directors of the sd society, and having the seal of the sd s-riety affixed thereto, the three following affidavits, all filed the — of —, namely, (1) an affidavit of the sd — and the exhibits therein referred to; (2) an affidavit of —, (3) an affidavit of — and the exhibits therein referred to, and the *London Gazette*, the *Times*, the *Morning Post*, the *Daily Telegraph*, the *Daily News*, and the *Standard* newspapers, all dated the — day of —, and each containing an advertisement of the presentation of the sd peton: This Ct doth order that the special resolution of the sd society, passed and confirmed in accordance with sect. 51 of the Cos Act, 1862, at extraordinary general meetings of the coy, held resply on, &c., altering the memdum of asson of the sd society, as in the schedule hto set forth, be confirmed, in pursuance of the provisions of the Cos (Memdum of Asson) Act, 1890. And it is ordered that an office copy of this order, together with a printed copy of the memdum of asson, altered in accordance with the sd resolution, be delivered to the Registrar of Joint Stock Companies within fifteen days from the date of this order.

Order on
petition.

Upon the petition of The Halifax, &c. Banking Coy, Limtd, on the 13th of March, 1899, preferred unto this Court, and upon hearing counsel for the petitioners, and upon reading the said petition, an order dated the 25th of April, 1899, an affidavit of W., a joint affidavit of —, an affidavit of P., and a joint affidavit of —, all filed the 11th May, 1899, and the exhibits therein referred to in the *London Gazette*, 28th April, 1899, the *Times* newspaper of the 28th April, 1899, the *Halifax Courier* newspaper of, &c. [and several other local newspapers], each containing an advertisement of the presentation of the said petition, and of the day fixed for the hearing thereof, and a notice to creditors, shareholders, stockholders, and depositors: This Court doth, pursuant to the Cos (Memorandum of Asson) Act, 1890, confirm, with certain modifications, the alteration in the form of the constitution of the above-named — proposed to be effected by the special resolution (duly passed — confirmed at general meetings of the above-named coy, held on — in January, 1899, and the 10th day of February, 1899), substituting the memorandum and articles of association submitted to the said meetings for the coy's deed of settlement dated the 25th November, 1829, as amended by the coy's supplementary deeds, dated the 8th August, 1843, the 14th April, 1853, the 7th September, 1863, and for all regulations of the coy subsequently made and then in force. And office copy with printed copy of memorandum and articles of association to be delivered to the Registrar within fifteen days from the date of this order. Byrne, J., 13th May, 1899.

Form 661

Order for
general
adoption of
memorandum
and articles in
substitution
for deed of
settlement

[SCHEDULE.]

It will be noted that the above order confirms the alteration to be effected by the resolutions. This is, no doubt, the correct form: it is what the Act authorizes. But in some cases the order, by an oversight, has been to confirm the resolutions, just as in reduction cases it used to be the practice to confirm the resolutions instead of the reduction.

Upon the petition of the Wakefield and Barnsley Union Bank, Limtd (hereafter called "the coy"), on the 20th of July, 1897, preferred unto this Court, and upon hearing counsel for the petitioners, and upon reading the said petition, a deed of settlement dated the 1st Dec., 1832, and a deed poll dated 17th Oct., 1883, an affidavit of S., chairman of the directors of the above-named coy, filed 26 July, 1897, and the several exhibits resply therein referred to "B." and "C." being the said deed of settlement and deed poll, the *London Gazette* of the 30th July, 1897, the *Times* newspaper of the 30th July, 1897, the *Daily Telegraph* newspaper of the 30th July, 1897, the *Wakefield and West Riding Herald* newspaper of the 31st July, 1897, the *Wakefield Express* newspaper of the 31st July, 1897, the *Osselt Observer* of the 31st July, 1897, and the *Yorkshire Post* newspaper of the 31st July, 1897, each containing an advertisement of the time fixed

Form 662.

Another

Form 662. for the hearing of the sd peton pursuant to the direction of the Master endorsed on the sd peton dispensing with any further notice except at the hearing:

THIS COURT DOth ORDER that the special resolution of the coy passed and confirmed in accordance with sect. 51 of the Cos Act, 1862, at extraordinary general meetings of the coy held resply on the 24 May, 1897, and the 14 June, 1897, altering the constitution of the sd bank by the substitution of the memdum of asson with extended objects as therein referred and the arts of asson approved by the sd meeting for the bank's deed of settlement dated 17th Oct., 1883, which sd memdum of asson is set forth in the schedule hto, be confirmed in pursuance of the provision of the Cos (Memdum of Asson) Act, 1890:

AND IT IS ORDERED that an office copy of this order together with a printed copy of the memdum of asson in accordance with the sd resolution be delivered to the Registrar of Joint Stock Cos within fifteen days from the date of this order. North. J., 7 Aug., 1897

[SCHEDULE.]

The following are some other cases in which similar orders were made:--

London Joint Stock Bank, Chitty, J., 12th Nov. 1892; *York City and County Banking Co.*, North, J., 24th Nov. 1894; *Law Union and Crown Insurance Co.*, Kekewich, J., 27th April, 1893 or 1895; *Manchester and Liverpool District Banking Co.*, 1895; *Leicester Banking Co.*, North, J., 7th April, 1895; *Equity and Law Life Assurance Society*, Chitty, J., 1896; *London and Westminster*, North, J., 17th April, 1897; *Wakefield and Barnsley Union Bank*, North, J., 7th Aug. 1897; *Sheffield and Hallamshire Bank*, Byrne, J., 4th Dec. 1899; *London and County Bank*, 22nd Feb. 1898; *Halifax Commercial Banking Co.*, Farwell, J., 2nd April, 1901; *Carlisle and Cumberland Banking Co.*, Kekewich, J., 16th April, 1901; *London Joint Stock Banking Co.*, Byrne, J., 10th Aug. 1901; *Lincoln and Lindsey Banking Co.*, Swinfen Eady, J., 28th Oct. 1902; *Trust and Agency Co. of Australasia*, 25 T. L. R. 61, Eve, J.; *Scottish Australian Investment Co.*, Warrington, J., 20th Jan. 1912; see Form 663. With a few exceptions the documents used in the above cases were settled [by the author] on the lines set forth in this work.

Form 663. On the petition of the above-named coy on 16th November, 1911. preferred unto this Court, and upon hearing counsel for the petitioners, and upon reading the sd petition, the *London Gazette*, &c. containing notice of the presentation of the sd petition, and that the same was duly heard on the 20th January, 1912, &c., this Court being satisfied by the evidence afsd that sufficient notice has been given to every person or class of persons whose interests in the opinion of the Court will be affected by the alteration or extension of the objects of the petitioners intended to be effected by the resolutions hnfr mentioned, and that there are no creditors of the petitioners other than debenture holders who will be affected, doth, in

in pursuance of the provisions of the Companies (Consolidation) Act, 1908, confirm the alteration in the form of the constitution of the above-named coy effected by the special resolutions in the schedule hereto set forth passed and confirmed at extraordinary general meetings of the petitioners held on the 30th day of June, 1911, and the 28th day of July, 1911.

Form 663.

THE SCHEDULE above referred to.

That the draft memorandum and articles of association submitted to this meeting and identified by the signature of the chairman thereof and the same are hereby approved, and that pursuant to the provisions of sect. 264 of the Companies (Consolidation) Act, 1908, the form of the coy's constitution be altered by substituting such memorandum of association with the extended objects and enlarged area of operations as therein set forth, and such articles of association for the coy's deed of copartnership and for all the regulations of the coy subsequently made and now in force, and that the directors be and they are hereby authorized to apply to the Court to confirm this resolution under the sd Act. *The Scottish Australian Investment Co., Ltd.*, Warrington, J., 20th January, 1912.

The coy in the above case was registered in England in the year 1856 under the Joint Stock Companies Act, 1856, but has never been re-registered under the Act of 1862 or the Act of 1908.

Upon application of The Harrington, & Co. Limtd, on the 17 March, 1900, preferred unto this Ct, and upon hearing counsel of the coy on the 24 March, 1900, and upon reading the sd petition, two affidavits of, &c. filed in reply, and the exhibits therein referred to; the *London Gazette*, 2 March, 1900; the *Times* of 2 March, 1900; the *Wokington Star* of 2 March, 1900; the *Whitehaven News* of the 1 and 8 March, 1900, each containing a notice of the sd petition and the consents in writing of The --- Banking Coy, Limtd, James Bain & Coy, and George Beattie: this Ct doth order that so much of the special resolution passed at an extraordinary general meeting of the sd coy, held on the 12 Oct. 1899, and confirmed at an extraordinary general meeting of the sd coy held 31 Oct. 1899, as is in the words and figures following, that is to say:—

Form 663a.

extended objects under Companies Memorandum of Association Act, 1890.

"That the provisions of the coy's memorandum of association with respect to the objects of the coy be altered by substituting for sect. 3 thereof the following clauses:—

- "(a) To manufacture, buy, hire, or otherwise acquire, sell, and supply gas in the parish of Harrington, in the county of Cumberland, and such other towns, parishes or places as the coy may from time to time determine upon:

Form 663a. "(b) To deal with, manufacture and render saleable coke, coal tar, pitch, asphalt, and other residual products obtained in the manufacture of gas:

"(c) To construct, manufacture, and maintain works for holding receiving and purifying gas, and all other buildings and works, meters, pipes, lamps, fittings, machinery, apparatus and appliances necessary or convenient for the purposes of the coy, and to manufacture, buy, sell, let on hire, and deal in stoves, engines and other apparatus and conveniences which may seem calculated, directly or indirectly, to promote the consumption of gas, and to light the streets, harbours, piers, docks, markets, theatres, houses, ships buildings, and places, both public and private, with such gas":

be and the same is hereby confirmed; and it is ordered that an office copy of this order be within fifteen days from the date hereof delivered to the Registrar of Joint Stock Cos, together with a printed copy of the memorandum of assent so altered. *Stirling, J., Harrington Gas Light Coy, Limtd.* 3 May, 1900. A. 1469.

Occasionally the order for confirmation directs that the registration of the order shall be advertised once in certain newspapers, e.g., the *Times*, *Standard Daily News*, and *Morning Post*, and the following is a specimen of the form of advertisement:—

Form 663b. In the High Court of Justice, Chancery Division. In the matter of the — Coy, Limtd, and in the matter of the Cos (Consolidation) Act, 1908, s. 9. Notice is hereby given, that by an order of the Chancery Division of the High Court of Justice, made on, &c., by his Lordship, Mr. Justice —, the alteration of the provisions of the memorandum of assent of the above-named coy, made by the special resolution passed at an extraordinary general meeting of the sd coy, held on, &c., and subsequently confirmed at an extraordinary general meeting of the sd coy, held on, &c., was approved by the said Court, and an office copy of the sd order, together with a printed copy of the memorandum of assent as so altered, were on, &c., duly filed by the sd coy with the Registrar of Joint Stock Cos.

Advertisement of order made on petition

Dated this — day of —. S. & Co., — Street, London, W.C. agents for — & Co., of —, Solicitors for the Coy.

But there is no rule that the order must be advertised as above (*Lancashire Banking Co., W. N. (1897) 3*); and the ordinary practice is *not* to advertise

Form 663c. The London and Westminster Bank, Limtd, having by special resolution altered the form of its constitution as confirmed by an order of the High Court of Justice, Chancery Division, bearing date

Certificate of registration.

the 17th day of July, 1897, I hereby certify the registration of the said order and of a printed copy of the memorandum of assent and assent of assent as substituted for the copy's deed of settlement of 3rd Feb. 1881. Form 663c

Given under my hand at London this 30th day of July, 1897.

Sect. 9 (6) of the Act of 1908 provides for the giving of a certificate which is to be conclusive evidence that all the requirements of the Act have been complied with. See *supra*, p. 1310.

LIFE ASSURANCE COMPANIES.

Amalgamation and Transfer.

See the provisions of sects. 13 and 14 of the Assurance Companies Act, 1909 (which came into operation 1st July, 1910).

Sect. 13 provides that—

"No assurance company shall amalgamate with another, or transfer its business to another, unless the amalgamation or transfer is sanctioned by the Court in accordance with this section."

These sections—sects. 13, 14—take the place of sect. 14 of the Life Assurance Companies Act, 1870, and on that section it was held by Mr. Justice Chitty, in *Royal Farmers', &c. Insurance Co.*, 25 Feb. 1888, that the section did not confer on a life assurance company power to transfer its business; it merely restricted the company's power, where it had power, and that the Court had no jurisdiction to confirm the transfer, unless it appeared that, apart from the Act, the transaction was within the powers of the company. See also his Lordship's decision to the same effect in *Sovereign Life Assurance Co.*, 42 C. D. 540. When the constitution of the company does not confer the requisite power it can pass a resolution to wind up voluntarily, authorizing a transfer under sect. 192 of the Companies Act, 1908 (sect. 161 of the Companies Act, 1862), and ask the Court to sanction the transfer. *Southall v. British Mutual*, 6 Ch. 614. This course has been adopted in several cases.

And a company, though not under the Act of 1862 or 1908, may, in exercise of a power to alter the regulations, take power to transfer. *Argus Life Assurance Co.*, 39 C. D. 571.

In a compulsory winding-up the liquidator can, with the sanction of the Court, sell the undertaking under sect. 151 of the Companies (Consolidation) Act, 1908 (corresponding to sect. 95 of the Act of 1862).

There is nothing in this section to bind a policy-holder to accept a policy of the company to which the transfer is made in lieu of his old policy, or to novate, or to release the old company. But there may, of course, be provisions in the constitution of the company sufficient to bind the policy-holders and relieve the transferring company. See *Hort's case*, 1 C. Div. 307; *Dowse's case*, 3 C. Div. 384; *Cocker's case*, *ibid.* 1; *Baily v. British Equitable Assurance Co.*, (1906) A. C. 35.

It is to be observed that policy-holders will include annuitants. See *Sovereign Life* (*ubi supra*).

In the absence of such provisions, the only way to bind the dissentients to novation or release is by proceeding under sect. 120 of the Companies (Consolidation) Act, 1908. A policy-holder who is not by the last-mentioned Act, or otherwise, bound to go over to the purchasing company may say, "I look to

the old company and to the assets obtained by that company as the consideration for the transfer," and if the old company is in liquidation he can go in and prove, and the shareholders can get nothing till he is paid.

In one case where a life assurance company was being wound up voluntarily under supervision, a scheme of arrangement between the company and its current policy-holders was sanctioned, under which the proportion of the assets of such policy-holders was made over to another company in consideration of new policies of that company being given to such policy-holders. *Imperial Life Assurance Society*, Bacon, V.-C., March, 1886.

In that case the scheme was not put forward under sect. 14 of the Life Assurance Act, 1870, but under the Joint Stock Companies Arrangement Act, 1870 (Companies Act, 1908, s. 120). Afterwards, one of the policy-holders belonging to the class intended to be bound by the scheme sought to prove in the winding-up of the transferring company; but it was held by Kay, J., that he was bound by the scheme, and the Court of Appeal affirmed that decision.

As to notice to policy-holders, under the Assurance Companies Act, 1909, sect. 13 refers to sect. 136 of the Companies Clauses Consolidation Act, 1845, which is as follows:

"Notices requiring to be served by the company upon the shareholders may, unless expressly required to be served personally, be served by the same being transmitted through the post, directed according to the registered address or other known address of the shareholder, within such period as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the giving of such notice; and in proving such service it shall be sufficient to prove that such notice was properly directed, and that it was so put into the post-office."

And the Act also provides in sect. 27 that

"Any notice which is by this Act required to be sent to any policy-holder may be addressed and sent to the person to whom notices respecting such policy are usually sent, and any notice so addressed and sent shall be deemed and taken to be notice to the holder of such policy."

It is unnecessary to send notice to the holders of policies taken out between the presentation and the hearing of the petition. *Universal Life Assurance Society*, 18 T. L. R. 198.

As to notice to policy-holders abroad, see *Briton, &c. Co.*, 35 W. R. 803.

There have been very few proceedings for amalgamation or transfer since the Act of 1870. The following are some of the principal instances:—*Citizen Assurance to Provident*, 1871; *London and Southwick to London and Lancashire*, 1880 (see 28 W. R. 565; 42 L. T. 247); *Colonial Assurance to London, Edinburgh, and Glasgow*, 1891; *Great Britain Mutual to National*, 1882; *Royal Farmers to Alliance*, 1888; *Argus Life to Imperial*, 1888; *Provincial to Alliance*, 1890; *Briton Medical to Sun*, 1892; *Crown to Law Union*, Jan. 1892; *Reliance to Norwich Union*, 1893; *Positive to British Empire* (Jan. 1896); *Imperial to Alliance*, 1902; *London, Edinburgh, and Glasgow to Pearl Life*, 1910.

Winding-up of Subsidiary Companies.

Sect. 16 of the Act (Assurance Companies Act, 1909) provides for the winding-up of subsidiary companies, that is, of companies which have transferred their business whenever the principal or transferee company is being wound-up; so that the Court can adjust all the equities; but to constitute a "subsidiary company" within the meaning of the section there must be a transfer of the business of the company, or some part thereof, to the "principal company." A treaty of re-insurance is not such a transfer. A guarantee of all the policies is not such a transfer. Nor is a transfer of the majority of the

shares of a company a "transfer" of the business. It merely makes the transferee company the principal shareholder in the business. *Leicestershire Plate Glass, Fire and Rural Life Insurance Co.*, 105 L. T. 570.

Deposit.

As to dealing with the 20,000*l.* statutory deposit in the liquidation of a life assurance company which transfers its business to another company, see *In re Life and Health Assurance Association, Limited*, (1910) W. N. 45. In that case there was a petition by the company and its liquidators, and the purchaser company prayed that out of the deposit fund 5,500*l.* might be paid to the purchaser company as representing the interests of the transferred policy-holders therein, and the balance paid to the liquidators; and it was held that the association could not by transferring the life assurance contracts relieve itself of liability thereunder in the absence of a release or novation by the assured; but on general principles the judge would be prepared to hold that no part of the deposit could be paid to the association until the Court was satisfied that all the assured had released, and thereby abandoned their contractual rights to have the deposit returned to answer their claims. Sect. 7 of the (repealed) Life Assurance Companies Act, 1872, as to there being no abandonment of claim by a policy-holder unless by some writing signed by him, and the cases of *Ex parte Scottish Economic Life Assurance Society* (1890), 15 C. D. 220, and *In re Popular Life Assurance Co., Limited*, (1909) 1 Ch. 80, were referred to by the judge.

Sometimes an amalgamation or transfer is carried out by special Act of Parliament.

Reduction of Contracts

The Assurance Companies Act, 1909, s. 19, empowers the Court, in the case of an insolvent company, to reduce the amount of its contracts in lieu of making a winding-up order. This power has only been exercised in one case *Great Britain Mutual Society*. There a winding-up order was made by Hall, V.-C.; but the Court of Appeal (November, 1880) discharged it, and directed a meeting of policy-holders to be held for the purpose of ascertaining whether they desired the contracts to be reduced: 16 C. D. 246. Hall, V.-C., then referred it to an eminent accountant "to inquire and report upon what terms, and subject to what conditions, the contracts of the society should be reduced in place of making a winding-up order, and to settle a scheme for reducing such contracts for the approval of the Court." Questions of importance having arisen, the referee stated a special case, and the opinion of the Court was taken thereon. *Great Britain Mutual*, 19 C. D. 39; 20 C. D. 351.

The Court held, (1) that the date of the presentation of the petition was the one at which the calculation should be made for settling the scheme; (2) that the claims of policy-holders and annuitants which had matured before the date of the presentation of the petition must be paid in full; (3) that annuities payable after that date must be reduced; (4) that participating and non-participating policy-holders current must be reduced *pari passu*; (5) that all payments in arrear of premiums, including half-premiums left as a charge on the policies, must be paid in full.

The scheme was then settled, and in due course it was confirmed by the Court, 6th May, 1882. Shortly afterwards an agreement was made with another company, under which that company undertook to receive the premiums, and, in consideration of a commission, apply them in paying the claims as they matured, and this agreement was sanctioned by the Court.

In referring it to Chambers to consider the scheme for reduction, the Court directed separate meetings of the shareholders and policy-holders to be held for that purpose. *British Medical General Life Assurance*, 54 L. T. 14.

The above case shows that the power to reduce contracts, conferred by the Act of 1870, is defective, inasmuch as it leaves untouched claims which happen to have matured before the presentation of the petition. Where such claims amount to a considerable sum, it would seem better to take a winding-up order, and then adopt a scheme under sect. 120 of the Companies (Consolidation) Act, 1908, either by sale to a new company or by a subsequent stay of proceedings. This can either provide for a reconstruction by transfer to a new company, in consideration of policies of reduced amounts, or it may provide for a reduction of policies, and then a stay of all further proceedings in the winding-up. The difficulty which arose in regard to a scheme in *Albert Life Assurance Company*, 6 Ch. 381, would seem no longer to exist, since the mode of valuing policies and annuities has been settled by the Life Assurance Act, 1872. Upon such a scheme the matured claims would *not* be entitled to preferential payment.

A scheme proceeding on a principle of inequality of reduction is not within the section. Per Buckley, J., *Nelson & Co.*, (1905) 1 Ch. 551.

Form 664.

Petition to
confirm trans-
fer of life
assurance
business.

In the High Court of Justice,
Chancery Division.
Mr. Justice Chitty.

In the matter of the Assurance Companies Act, 1909,
and

In the matter of the B. Insurance Company.

To His Majesty's High Court of Justice.

The humble petition of, &c., the directors of the above-named company
sheweth as follows:

1. The object of this petition is to obtain the sanction of the Court, as required by sect. 13 of the Assurance Companies Act, 1909, to the transfer of the business of the above-named company (hereinafter called "the B. Company") to the A. Company (hereinafter called "the A. Company").

2. The B. Company is a company which was originally constituted by deed of settlement, dated the — day of —, and has been registered under the Companies Act, 1862. The said deed of settlement provided, amongst other things, that the style or firm of that company should be the B. Company. And that the objects and business thereof should, amongst others, be to grant or effect insurances on a life or lives, and survivorships on the joint continuance of two or more lives, or for any term or terms of years to be absolutely or contingently determinable on a life or lives; and also to grant and to purchase and sell endowments, annuities, life, reversionary, and other estates and interests personal, and to advance money by way of loan on personal security; and also to grant assurances against fire upon dwelling-houses, warehouses, houses of business, farm buildings, farming stock and crops, and all other property whatsoever, the risk of which was ascertainable by way of average; and also the goods and general outfit of passengers, in steam or sailing vessels, against fire or loss at sea.

3. Clause 131 of the deed of settlement is as follows:—

"That an extraordinary board of directors specially called for that purpose may come to a resolution either to sell or transfer the business of the company to any other society or company of a similar nature, or to purchase or accept a transfer from such other society or company as last aforesaid of their businesses, and upon such terms and conditions and stipulations and agreements as the

Form 664.

said board shall think fit, and if such resolution shall be adopted and confirmed by a majority of at least three-fourths of the proprietors present, either personally or by proxy, to be given in such manner as is hereinbefore in that behalf mentioned at an extraordinary general meeting specially called for that purpose, but not otherwise, then such sale or transfer or acceptance of purchase or transfer, as the case may be, shall be effected or take place."

4. The original capital of the B. Company was 100,000*l.*, divided into 10,000 shares of 10*l.* each, which in September, 1853, was duly increased to 200,000*l.*, divided into 20,000 shares of 10*l.* each, all of which shares have been issued, and the sum of 1*l.* 5*s.* per share paid up thereon.

5. The B. Company commenced business as a fire insurance office only in the year 1852, shortly after its formation, and in September, 1853, took up the business of life assurance also, and made fair progress in both departments down to the year 1864, in which year and several succeeding years considerable losses occurred in its fire department, and owing to these circumstances the B. Company accepted an offer from the A. Company to purchase all the business of the said fire department, and such purchase was duly carried into effect in the year .

6. Since the sale of the business of the said fire department, the B. Company has continued to carry on the business of a life assurance office and other businesses authorized by the said deed of settlement, except those of a fire insurance office, and has met with considerable success and profit thereby.

7. In the month of December, 1909, the A. Company proposed to the B. Company to take a transfer of the business of the latter company on the terms and conditions contained in the conditional agreement next hereinafter stated, and accordingly that agreement was entered into.

8. The said conditional agreement is in the terms following: [set out].

9. The said agreement was executed by your petitioner R. V. K., the first named party thereto under the authority conferred by the resolution of the board of directors next hereinafter stated.

10. At an extraordinary board of directors of the B. Company, specially called for the purpose, and held on the — day of —, before the execution of the said conditional agreement, a resolution was passed unanimously to the effect that the chairman of the board (being your said petitioner R. V. K.) should be, and he was thereby authorized and requested to sign the said agreement on behalf of the B. Company, and at the same meeting it was further resolved unanimously as follows:

"That the business and undertaking of this company be sold and transferred to the A. Company on the terms and conditions set out in the conditional agreement dated the — day of —, —, and made between R. V. K. of —, chairman of this company, for and on behalf of this company, of the one part, and the A. Company, by their chairman, —, of the other part."

11. At an extraordinary general meeting of the proprietors of the B. Company, specially called for the purpose, and held on the 27th day of February, 1908, the following resolution was passed unanimously, that is to say:

"That the following resolution passed by an extraordinary board of directors, held on the 12th day of February instant, be adopted and confirmed: — That the business and undertaking of this company be sold and transferred to the A. Company on the terms and conditions set out in the conditional agreement dated the — day of —, —, and made between R. V. K. of —, in the county of —, chairman of this company, for and on behalf of this company, of the one part, and the A. Company, by their chairman, —, of the other part."

12. On the — day of —, —, the B. Company forwarded to each policyholder, by the same being transmitted in manner provided by sect. 136 of the

Form 664. Companies Clauses Consolidation Act, 1845, for the transmission to shareholder of notices not required to be served personally, a statement of the nature of the said proposed transfer, together with an abstract containing the material facts embodied in the said conditional agreement, and also copies of the actuarial reports upon which such agreement was founded.

13. The said conditional agreement will, on the day of , have remained open for the inspection of the policy-holders and shareholders of the B. Company at the office of that company for a period of fifteen days from the issue of the before-mentioned abstract.

14. The A. Company is a company constituted by the A. Company Act, 1886 and was originally formed in the year 1821 by deed of settlement dated the 4th day of August in that year, with a capital of 5,000,000*l.* divided into 250,000 shares of 20*l.* each, all of which have been issued, and the sum of 2*l.* 4*s.* per share has been paid up thereon.

15. The A. Company carries on a large and successful business, and the present market value of its shares is from 10*l.* to 11*l.* per share, and its present invested funds amount to very nearly 3,000,000*l.*, and its premium and other income amounts to upwards of 625,000*l.* per annum, and it is one of the most important of the principal life assurance companies in the United Kingdom.

16. By the regulations of the A. Company it is, among other things, provided and declared as follows:

"The company may from time to time and at any time, with the sanction of an extraordinary general Court, acquire, sell, or transfer, on such terms and conditions as may be arranged, the whole or any part of the business, assets, undertaking and liabilities of any other company carrying on any assurance business which this company is authorized to carry on, and the terms and conditions aforesaid may include provision for payment by the company of the expenses of and incident to the winding-up and dissolution of the selling company, and provision for satisfaction of any part of the price or consideration by the issue of shares in the company credited as partly paid up, and may provide for the concession to the policy-holders, annuitants, creditors, directors, employés, and members of the selling company, of any special rights, privileges, and advantages, and may include any other provisions which the directors may think expedient: and the agreement containing such terms and conditions shall, when sanctioned by an extraordinary general Court and confirmed by the High Court of Justice (when requisite), be effective, notwithstanding any inconsistency between the provisions thereof and the provisions of the company's laws and regulations."

17. The conditional agreement aforesaid was submitted to an extraordinary general court of the A. Company, duly convened and held on the day of , , and at that meeting the resolution following was unanimously passed:

"That it is expedient to acquire and take over the business, assets, and undertaking of the B. Company, and that with a view thereto the conditional agreement in that behalf submitted to this Court, dated the day of , , be, and the same is hereby, sanctioned and approved, and that the directors be and they are hereby authorized to apply to the High Court of Justice to confirm such agreement, and when confirmed to carry the same into effect."

18. The arrangement intended to be effected by the said conditional agreement is an equitable arrangement, and it is expedient, and it will be for the mutual benefit of the proprietors and policy-holders of the B. Company and the A. Company that the said agreement should be confirmed and carried into effect.

Your petitioners therefore humbly pray

1. That the said conditional agreement dated the day of , , and the transfer intended to be effected thereby, may be sanctioned

RESTORATION OF COMPANY'S NAME.

1886

and confirmed by this honourable Court and carried into effect, and that your petitioners, the directors of the B. Company, may be at liberty to execute and do all assurances and things which shall be necessary for that purpose.

Form 664

2. That such further or other order may be made in the premises as to the Court shall seem fit.

And your petitioners will ever pray, &c.

NOTE. It is intended to serve this petition on the A. Company.

Restoration of Company's Name.

In, &c.

In the Matter of the Companies Acts, 1862 to 1880 (now the Companies (Consolidation) Act, 1908, s. 242)

and

In the Matter of the Company, Limited.

Form 665

Petition for restoration to register of company's name.

To His Majesty's High Court of Justice.

The humble petition of — and —, contributories of the above-named company, sheweth as follows:

1. The above-named company (hereinafter called the company) was incorporated in the month of May, 1875, as a company limited by shares, for the objects specified in its memorandum of association, which objects included, amongst others—(1) The purchasing, leasing, or otherwise acquiring in fee simple, or for any estate, term, or interest whatsoever, of any freehold, copyhold, leasehold, or other real or personal property whatsoever, or any undivided share or interest therein, or any easements, rights, liberties, or privileges in, on, over, or through any lands or hereditaments; and (2) the maintaining, cultivating, repairing, altering, demolishing, rebuilding, improving, developing, building upon, or otherwise improving and realising, all or any part or parts of the freehold, copyhold, leasehold, and real estate of the company, and the managing, working, letting, leasing (either with or without a premium, and for any term), exchanging, partitioning, selling (in consideration of gross sums only, or wholly or partially of rents), mortgaging or otherwise dealing with and disposing of all or any part or parts thereof respectively, and the acquiring, granting, releasing, or extinguishing of any rents, rights, easements, or privileges for or in respect of the same or any part or parts thereof, or in any wise belonging or appertaining thereto respectively, in such manner and on such terms and for such purposes as the company think proper.

2. By the memorandum of association of the company it was declared that the registered office of the company would be situated in England, and that the capital of the company was 20,000*l.*, divided into 4,000 shares of 5*l.* each.

3. Shortly after its incorporation the company commenced business, and in the month of December, 1875, it acquired, on lease for 995 years from the 1st day of November, 1875, a plot of land at Coalshaw Green, in the township of Chadderton, in the county of Lancaster, at a rent of 120*l.* 12*s.* 6*d.* per annum. Subsequently the company sublet part of this land by deed dated the 4th August, 1884, for a term of 985 years, at a rent of 85*l.* 8*s.* 4*d.* per annum, and on part of the remainder the company erected a number of cottages and the residue was retained by the company for building purposes, and is still occupied.

Form 665.

4. The company's building operations did not prove remunerative, and considerable difficulty was experienced in letting the cottages so erected, and in disposing of any further land, and in consequence the company, since the year 1880 (pending the advent of better times), abstained from erecting any further buildings, and confined its operations to receiving the rents arising from its property and applying the same in payment of the rates, taxes, and outgoings, and the administration expenses of the company.

5. Prior to the month of June, 1885, 1,850 *5l.* shares in the capital of the company had been issued, and the sum of 5,690*l.* had been paid up thereon: 70 of the said shares have been fully paid up, and 3*l.* per share on each of the others. Your petitioner, W. H. K., holds 100 of the said shares, upon which the sum of 3*l.* per share has been paid up, and your petitioner, T. P., holds 25 of the said shares, upon which 3*l.* per share has been paid up. Your said petitioners have respectively held their said shares for several years.

6. On or about the — day of — the Registrar of Joint Stock Companies in England, pursuant to sect. 7 of the Companies Act, 1880, struck the name of the company off the register of companies kept by him in accordance with the Companies Act, 1862, and notice thereof was published by him in the *London Gazette* on the 17th July, 1885. It is alleged by the Registrar of Joint Stock Companies, and your petitioners have no reason to doubt, that, before striking off the company's name as aforesaid, the Registrar of Joint Stock Companies duly sent the notices, and otherwise complied with the provisions contained in paragraphs 1, 2, and 3 of clause 7 of the said Act: but, through the negligence of the company's secretary, the several notices sent to the company, in accordance with those provisions, were not communicated to the directors or members of the company, nor did the notice (published in the *London Gazette* pursuant to paragraph (3) of such section) come to the knowledge of the company's directors until after the company had been struck off the register.

7. W. H. K. and T. P., your petitioners, were not at any time aware that proceedings were being taken with a view to striking the company's name off the register. Nor was the company at any time aware thereof, save as aforesaid.

8. On the 17th July, 1885, the company was carrying on business and was in operation, that is to say, it was in possession of the property aforesaid and of divers other assets, and was receiving the income arising from such property, and paying the outgoings in connection therewith, and was negotiating for the sale or leasing of further parts of such property. The property of the company, exclusive of unpaid or uncalled capital, is of the value of 2,500*l.*, and the debts of the company do not exceed 200*l.*

9. Your petitioners feel aggrieved by the name of the company having been struck off the register, and it is just and equitable it should be restored to the register.

Your petitioners therefore humbly pray as follows:

1. That the name of the company may be restored to the register of companies in England, and that the Registrar of Joint Stock Companies may be directed to advertise in his official name in the *London Gazette* the order of the Court to be made on this petition:
2. Or that such further or other relief may be given as to this Honourable Court may seem meet.

And your petitioners will ever pray, &c.

NOTE. —It is intended to serve this petition on the Registrar of Joint Stock Companies.

Upon the petition of the Hollinwood Estate Company, Limited:

And the above-named company by their counsel undertaking to send in to the Registrar of Joint Stock Companies (now the Registrar of Companies) their returns now in arrear:

This Court doth order that the name of the above-named Hollinwood Estate Company, Limited, be restored to the register of joint stock companies. And, pursuant to the Companies Act, 1880 (now sect. 242 (6) of the Consolidation Act, 1908), the said Hollinwood Estate Company, Limited, is to be deemed to have continued in existence as if the name had never been struck off.

And it is ordered that the Registrar of Joint Stock Companies do advertise this order in his official name in the *London Gazette*. And it is ordered that the petitioners do pay to the Registrar of Joint Stock Companies his costs of and occasioned by the said petition, such costs to be taxed by the taxing master. *Hollinwood Estate Co., Limited* (Chitty, J., 15th December, 1886. A. 203). W. N. (1887) 17.

Form 666.

Order on
petition of
restoration.

The present jurisdiction to make the order for restoration is given by sect. 242 (6) of the Companies Act, 1908 (sect. 7 of the Companies Act, 1880, amended by sect. 26 of the Companies Act, 1900).

Sect. 7 of the Act of 1880 was a singular specimen of drafting. By paragraph (4) the company was to be dissolved, yet by paragraph (5) it was still to be regarded as in existence, for it might feel aggrieved and apply to be restored to the register; further, by paragraph (4), it was "provided that the liability of every director, managing officer, and member of the company should continue and might be enforced as if the company had not been dissolved"; and finally, notwithstanding the dissolution, the company might be wound up by the Court. *Anglo-American, &c. Co.*, (1898) 1 Ch. 100.

There have been many cases of restorations under the Act of 1880, and considering the many hundreds of companies which have been struck off the register, it is surprising that more cases for restoration have not occurred. A company which is being wound up is still in operation within the section. *Financial Corporation*, 27 S. J. 199; *Estates Investment Co.*, *Ibid.* 585.

Orders for restoration have usually been made by the winding-up judge, and by judges exercising his jurisdiction, e.g., Form 695 in Part II., 10th ed.; but North, J., held that he also had jurisdiction (*City Lands Investment Corporation*, W. N. (1897) 162); and although Buckley, J., appears to have entertained some doubt whether the application ought not to be made to the winding-up judge, Kekewich, J., made an order in *Chaco (Paraguay) Land Co.*, W. N. (1901) 124. See also Part II. p. 727.

Before the Act of 1900 was passed it was held that a creditor was not a person "aggrieved" within the meaning of sub-sect. 5 of sect. 7 of the Act of 1880 (*Anglo-American, &c. Co.*, (1898) 1 Ch. 100); but this was altered by the Act of 1900 (see now the Act of 1908, s. 242 (6)). As a result, neither the company, nor a member, nor a creditor, can now obtain a winding-up order without first restoring the company's name.

The petition should be intitled "In the matter of the Companies (Consolidation) Act, 1908, and of the Company." *Johannesburg Mining and General Syndicate*, W. N. (1901) 46. The same case shows that the liquidator of a company in course of winding-up cannot petition in his own name alone, but must add the company as a petitioner.

For further orders, see Part II. pp. 728, 729. When a company is in winding-up it is not the practice for the order to require the returns, which ought to have been sent in previously to the winding-up, to be made to the Registrar. *Johannesburg Mining and General Syndicate*, W. N. (1901) 46.

In a case of *Brown-Bayley's Steel Works*, 21 T. L. R. 375, Buckley, J., dealing with this point, referred to the returns, &c., which had to be made under sects. 26 and 45 of the Act of 1862, and sect. 19 of the Act of 1900 (see now Companies Act, 1908, s. 26), and complained of the frequency with which the duties as to making returns were neglected, and while pointing out that he had no power to impose a penalty (on ordering restoration of a company's name) he simply made an order that the name of the company should be restored on the terms of its making the proper returns and paying the costs of the Board of Trade, and omitted the usual direction that the company should "be deemed to have continued in existence as if its name had never been struck off," thus, it was suggested, leaving officers and members of the company under possible liabilities. It would, however, seem that the omission did not, in fact, have this effect.

The Court must be satisfied before restoring the company's name that some object is to be gained by the restoration, *e.g.*, that some debts or calls are unpaid, *North, J. Carpenter v. Patent Boat Co.*, 1 Meg. C. R. 26.

Thus, in *British Incandescent Heating Syndicate*, 9 Feb., 1904, Byrne, J., dismissed the application to restore with costs when the only apparent objects of the restoration were to save the stamp duty payable on a reconstruction, and to obtain payment of certain costs.

As to a vesting order after dissolution, see *Taylor's Agreement Trusts*, (1904) 2 Ch. 737; *Re Higginson*, (1899) 1 Q. B. 385; *Bonave Road* (No. 9), (1906) 1 Ch. 359.

WRITS OF SUMMONS.

CHAPTER XVIII.

In the High Ct of Justice,
Chancery Division.

Mr. Justice —,

Between [A.],
and

Plaintiff,

Form 687.

Common form
writ.

[The — Coy, Limtd, B., C., and D.],

Defendants.

George the Fifth, by the Grace of God, of the United Kingdom of Great Britain
and Ireland and of the British Dominions beyond the Seas, King,
Defender of the Faith.

To [The — Coy, Limtd, of — B., of — C., of — and D.,
of —]:

We command you that within eight days after the service of this writ on
you, inclusive of the day of such service, you do cause an appearance to be
entered for you in an action at the suit of A., and take notice that in default
of your so doing the plaintiff may proceed therein, and judgment may be given
in your absence.

Witness, Robert Threshie, Earl Loreburn, Lord High Chancellor of Great
Britain, the — day of —, in the year of our Lord one thousand nine
hundred and —.

Memorandum to be subscribed on the writ.

N.B.— This writ is to be served within twelve calendar months from the date
thof, or, if renewed, within six calendar months from the date of the last
renewal, including the day of such date, and not afterwards.

The defendant [or defendants] may appear hereto by entering an appearance
[or appearances] either personally or by solor at the Central Office, Royal
Courts of Justice, London.

Indorsements to be made on the writ before issue thof.

The plaintiff's claim is for, &c.

[See Forms 669 *et seq.*, *infra*.]

This writ was issued by the sd plaintiff, who resides at —; or This writ
was issued by E. F., of —, whose address for service is —, solor for the sd
plaintiff, who resides at —; or This writ was issued by G. H., of —,
whose address for service is —, agent for —, of —, solor for the sd
plaintiff, who resides at — [mention the city, town, or parish, and also the
name of the street and number of the house of the plaintiff's residence, if any].

Indorsement to be made on the writ after service thof:

This writ was served by me at — on the defendant — on —, the
day of —, 19 —.

Indorsed the — day of —, 19 —.

(Signed)

(Address)

Form 667.

In the case of a company in liquidation the plaintiffs' address should run:

"—, plaintiffs, who are a company in liquidation. The liquidator is [*name of liquidator*], of [*address of liquidator*]." See Ann. Pr. 1912, App. A. p. 2.

In the case of a foreign corporation registered in England (see Ann. Pr. 1912, Ord. IX. r. 8 (nn), p. 60, "Foreign Corporation—Service in England." &c.) the plaintiffs' address should run thus:—"—, plaintiffs, who are a foreign corporation registered in England under sect. 274 of the Companies (Consolidation) Act, 1908. The registered name and address of the person to be served are [*here add registered name and address*]." See Ann. Pr. Vol. II. p. 2; and as to affidavit of service, see App. B. Pt. I. No. 4A.

As to the title and assignment of action in the case of debenture actions, see Part III. 10th ed. p. 475.

See R. S. C. 1883, Appendix A. for other forms of writ.

Ord. XX. r. 1 provides that:

"Whenever a statement of claim is delivered, the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ."

But this does not apply where the claim is filed. *Kingdon v. Kirk*, 37 C. D. 141.

As to service, by sect. 116 of the Companies (Consolidation) Act, 1908, a document—which includes summons, notice, order and other legal process and registers—may be served on a company by leaving it at or sending it by post to the registered office of the company.

Sect. 116 must be read in conjunction with sect. 26 of the Interpretation Act, 1889, which runs thus: "Where an Act passed after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and, unless the contrary is proved, to be effected at the time at which the letter would be delivered in the ordinary course of post."

Ord. IX. r. 8, of R. S. C., provides that in the absence of any statutory provision regulating the service of any process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation. . . . And where by any statute provision is made for service of any writ of summons, bill, petition, summons, or other process upon any corporation, or upon any society or fellowship, or any body or number of persons whether corporate or incorporate, every writ of summons may be served in the manner so provided. The words in the above rule referring to statutory provision include sect. 116 of the Companies (Consolidation) Act, 1908, so far as regards companies subject to that Act, and accordingly, if a company registered in Scotland or Ireland is to be served with a writ issued in England, service must be in accordance with sect. 116 of the Companies (Consolidation) Act, 1908, and not at a branch office in England (*Wood v. Anderston Foundry Co.*, 36 W. R. 918; *Watkin v. Scottish Imperial Insurance Co.*, 23 Q. B. D. 285), and liberty to so serve out of the jurisdiction must be obtained. See the above cases, and *Watkins v. Caledonian Railway Co.*, (1892) 1 Q. B. 823; Ann. Pr. notes to Ord. IX. r. 8; see also *Logan v. Bank of Scotland*, (1904) 2 K. B. 495, which shows that a Scottish corporation is for some purposes a foreign corporation.

In a recent case (*Rylands' Glass Engraving Co. v. Phemie Co.*, (1911) 2 Ir. R. 532), the plaintiff, as a further security, registered the letter, enclosing the writ, and *bona fide* believing that the writ would be delivered in ordinary course of post, signed judgment on non-appearance immediately after expira-

tion of the period allowed for appearance. In fact, owing to the registration, the letter was delayed a day: Held that the judgment must be set aside as prematurely signed. **Form 667.**

If a foreign corporation carries on its business in this country in such a way that it may be said to be resident here, English process may be served upon it in the manner provided by Ord. IX. r. 8. *Newby v. Van Oppen*, L. R. 7 Q. B. 793; *Haggis v. Comptoir d'Escompte de Paris*, 23 Q. B. D. 519; *La Bourgogne*, (1899) 1 P. 1, 12, affirmed by the House of Lords, (1899) A. C. 431; *Compagnie Générale Transatlantique*, (1899) A. C. 431; *Dunlop Pneumatic Tyre Co. v. Letten Gesellschaft für Motor, &c.*, (1902) 1 K. B. 342, 349; *De Beers, Ltd. v. Howe*, (1906) A. C. 455; *supra*, p. 95.

To make a foreign company liable to be sued as carrying on business in England, the business carried on must be the business of the company, not work merely ancillary thereto. *Allison v. Independent Press Cable Assoc.*, 28 T. L. R. 128 (C. A.). The foreign company's agent renting an office with the name of the company painted up and selling the company's goods is enough (*Saccharin Corp. v. chemische Fabrik*, (1911) 2 K. B. 516), or having an office in England with a board of directors, though only financial business is transacted there. *Actieselskabet Dansk Hercules v. Grand Trunk Pacific Railway*, 28 T. L. R. 28 (C. A.).

It does not follow that because the company is registered in England, and the action relates to its shares, the Court will allow the writ to be served in a foreign country on a necessary party residing there. *Lopes v. Charavri*, W. N. (1901) 115.

Foreign companies carrying on business in the United Kingdom must now file with the registrar the name and address of some person authorized to accept service of process and notices. Companies (Consolidation) Act, 1908. s. 274 (1) (c).

As to proving service, see sect. 116 of the Act.

As to treating service as valid notwithstanding irregularity, see Ord. LXX. r. 1. *Dickson v. Law*, (1895) 2 Ch. 62.

Substituted service may be ordered of a writ for service within the jurisdiction when defendant, knowing of the issue of the writ, has gone out of the jurisdiction to avoid service of it. *Jay v. Budd*, (1898) 1 Q. B. 12.

As to the costs of substituted service, see *Flatau v. Cullen*, 81 L. T. 402; W. N. (1899) 206.

As to re-service of amended writ, see *Jamaica Railway Co. v. Colonial Bank*, (1905) 1 Ch. 677.

As to service out of the jurisdiction, see Ord. XI. Ann. Pr. 1912, p. 75.

Indorsements.

[Plaintiff, the coy. Defendant, the shareholder.]

Form 668.

Special for call.

Statement of Claim.

The plaintiff coy's claim is for calls due from the defendant as a member of the plaintiff coy, and for interest thereon.

Form 608.

PARTICULARS.

15th January, 19	To call of 2 <i>l.</i> per share made the 1st of October, 1904, and payable this day on 100 ordinary shares in the capital of the plaintiff coy standing in the name of the defendant	£200
Interest from 15th January, 1905, to date, at the rate of 10 p.c.p.a., payable under the coy's arts of asson.		20
	Amount due.	£220

And the sum of £— (or such sum as may be allowed on taxation for costs; and also, in case the plaintiff obtains an order for substituted service, the further sum of £—). If the amount claimed be pd to the plaintiffs or their solors or agents within four days from the service hereof, further proceedings will be stayed.

Place of trial

(Signed)

Calls are commonly sued for on a writ specially indorsed in accordance with Ord. III. r. 6, of the Rules of the Supreme Court. And then application is made under Ord. XIV. for an order to enter judgment forthwith. See further Annual Practice, notes to Ord. XIV., and *Faire Electric Co. v. Phillipart*, 38 L. T. 525. "The delivery of statements of claim shall be regulated as follows:— (a) Where the writ is specially indorsed under Ord. III. r. 6, no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim. (b) Subject to the provisions of Ord. XIII. r. 12, as to filing a statement of claim where there is no appearance, no statement of claim shall be delivered unless the same be ordered under Ord. XXX. or Ord. XVIII. r. 3. (c) Where delivery of a statement of claim is ordered the same shall be delivered within the time specified in the order, or, if no time be so specified, within twenty-one days from the date of the order, unless in either case the time be extended by the Court or a judge." Ord. XX. r. 1.

An indorsement of claim for interest on a writ of summons, in order to be a good special indorsement within the meaning of Ord. III. r. 6, and Ord. XIV. r. 1, must show either that the interest claimed is payable under an agreement, or that it is fixed by statute. *Gold Ores Reduc. Co. v. Pave*, (1892) 2 Q. B. 14. And, as appears from this case, the defect was, upon an application for summary judgment under Ord. XIV., fatal, and could not be made good by affidavit evidence; nor could the defect be cured by amendment without rendering a fresh application under Ord. XIV. necessary. *Parson v. Baird*, (1893) 1 Q. B. 139. But now paragraph (b) of Rule 1 of Ord. XIV. allows some scope for amendment; and where unconditional leave to defend has been given on account of a technical defect in the writ, the plaintiff may, after the defect has been cured, apply again for final judgment. *Dunlop & Son v. Playfair Bros.*, (1897) 1 Q. B. 368; and see Annual Practice, notes to Ord. XIV. r. 1 (b).

As to restraining calls and enforcement it was held by Hamilton, J., in *Tatham v. Palmer Restaurants*, 53 Sol. J. 743, on an application for an injunction, that the Court will not restrain a call or the enforcement thereof even where the shareholder has commenced an action to try the question as to his liability—for in the action he can by resisting payment get the question settled without an injunction.

The plt coy's claim is for moneys due from the dft as a member of the plt coy. in respect of 2,250 shares of 1*l.* each held by him in the capital of the plt coy. with interest thereon at the rate of 10 p.c.p.a. under the terms of clause 18 of the plt coy's arts of asson.

Form 669.
Company's
claim for call-
and interest.

The following are the particulars:

1911.	To amount due on application 2 <i>s.</i> 6 <i>d.</i>	
Feb. 28th.	per share	£281 5 0
	Interest thereon to date of writ	3 12 0
	To amount due on allotment, 5 <i>s.</i> per share	562 10 0
	Interest thereon to date of writ	7 4 0
Nov. 23rd.	To amount of call of 2 <i>s.</i> 6 <i>d.</i> per share due this day	281 5 0
	Interest thereon to date of writ	2 16 0
		£1,138 12 0

The plts also claim interest on the sum of 1,125*l.* at the rate of 10 p.c.p.a. under clause 18 *afsd.* until payment or judgment.

The plt coy's claim is for moneys due from the dft in respect of 100 shares in the capital formerly held by the dft, but forfeited on the day of --

Form 670.
Claim where
shares
forfeited.

PARTICULARS.

15th November, 1907.	To call of 2 <i>l.</i> per share, payable this day, in respect of the above-mentd shares.....	£200
	To interest thereon from the day of -- to the 15th of March, 1907, when such shares were forfeited, at the rate of -- p.c.p.a., as provided by the arts of asson of the plt coy	30
		£230
	To interest on the sd sum of 230 <i>l.</i> from the sd 15th of March, 1907, to the day of --, at the rate of 5 p.c.p.a., as provided by the plt coy's arts of asson ...	23
	Total amount	£253

Plt. C. Dft. A.]

Form 671

The plt's claim is for 530*l.*, amount of first call of 5*s.* per share on 2,120 shares of 1*l.* each, held by the dft in the plt coy (being a coy

Claim for call

Form 671. incorporated under the Cos (Consolidation) Act, 1908), due by the dft to the plt coy on the 18th day of Oct., 1909, in accordance with the terms of the prospectus of the plt coy, and of which shares the dft is the registered holder, whereby an action has accrued to the plt coy, and 5*l.* 4*s.* 6*d.* for interest at the rate of 10*l.* p.c.p.a. on the sd sum of 530*l.*, being the amount of the above first call from the date of such call to the date hof, and which amount of interest became due and payable pursuant to clause 13 of the arts of asson of the plt coy.

PARTICULARS.

1909.	To amount of first call of 5 <i>s.</i> per share on	
18th Oct.	2,120 shares of 1 <i>l.</i> each	£530 0 0
23rd Nov.	To amount of interest on same at the rate	
	of 10 <i>l.</i> p.c. from the 18th day of	
	October, 1909	5 4 6

		£535 4 6

Place of Trial, Middlesex.

(Signed) X. and Y

And the sum of 3*l.* 5*s.* (or such sum as may be allowed on taxation) for costs. If the amount claimed be pd to the plts or their solrs within four days from the service hof, proceedings will be stayed.

Form 672. In the High Ct of Justice,
King's Bench Division.

Notice by
advertisement to
defendant.

Between the Coy, Limtd, Plts,
and
, Dft.

To the above-named dft.

Take notice that this action was on the 30th day of September, —, commenced against you, and that the plts by their writ of summons claim the sum of 375*l.* for moneys in which you, as a member of The — Coy, Limtd, were indebted to that coy for balance of allotment money of 12*s.* 6*d.* per share on 500 shares in the sd coy allotted to you as such member at your request, and for a call of 5*s.* per share upon the 500 shares in the sd coy of which you were the registered holder, and also 175*l.* 13*s.* 8*d.* for interest on the afd amount under Art. 15 of the arts of asson of the sd coy, which sd moneys were, under and by virtue of two several indentures, dated respy the 17th June, 1904, and 30th July, 1904, absolutely assigned to and became vested in the plts, express notice whereof in writing was given you on or about the 13th August, 1904.

And further take notice that the Ct has, by order dated the 9th day of October, —, authorized service of the sd writ of summons upon you by sending a copy thof and a copy of the sd order by a prepaid post letter addressed to you at — Lane, E.C., and by the insertion of one advertisement in the *Times* and *Daily Telegraph* newspapers of the issue of the sd writ, and of the sd order. And further take notice that you are required to appear to the sd writ of summons within eight days after the insertion of the last of the sd advertisements in manner aforesaid, inclusive of the day of such insertion, and that in default of your so doing the plts may proceed therein, and judgment may be given against you in your absence.

Dated 15th day of October,

& Co., — Street, E.C.,
Solicitors for the Plts.

As to service by advertisement, see R. S. C. Ord. IX. r. 2.

The plaintiff's claim is for money received by the dfts for the plt's use, that is to say, for return of 500*l.*, being amount pd by plt to dft as deposit upon applicon for 1,000 preference shares of 5*l.* each in the dft coy, which applicon was withdrawn by the plt before allotment to him.

Form 673.

Claim for recovery of deposit where application for shares withdrawn before allotment

PARTICULARS.

13th May, 1908. To amount pd by plt to dft coy, being 10*s.* per share on applicon for 1,000 preference shares of 5*l.* each in the dft coy now returnable to plt, he having, before allotment of such shares to him, withdrawn his said applicon £500

Where the writ is specially indorsed no further statement of claim is to be delivered, but the indorsement on the writ is to be deemed to be the statement of claim. R. S. C., Ord. XX. r. 1 (a).

Plt, A.; dft, The — Coy. Limtd.]

The plt claims:

1. A declaration that he was induced to take 100 shares in the dft coy by misrepresentation and non-disclosure of material facts.
2. Rescission of the contract to take such shares and rectification of the register of members of the dft coy by the removal of his name.
3. Repayment of the amounts pd by him on the sd shares with interest.
4. An injunction to restrain the dft coy from making or attempting to enforce by action or otherwise any call in respect of the sd shares.

Form 674

Rescission of contract to take shares.

Form 674.

The above form can be used where there is no case of fraudulent misrepresentation, and the plaintiff claims relief merely on the ground of non-disclosure or innocent misrepresentation. See *supra*, pp. 186, 204.

Sometimes in such circumstances there may be a case against the directors under sect. 84 of the Companies (Consolidation) Act, 1908, replacing the Directors' Liability Act, 1890 (see *supra*, p. 208 *et seq.*); and if so, the directors can be made defendants along with the company. *Frankenburg v. Great Horseless Carriage Co.*, (1900) 1 Q. B. 504. See notes to next form, and the following claim can be added:

5. Or, in the alternative, for a declaration that the dfts, — and —, are, under sect. 84 of the Cos (Consolidation) Act, 1908 (the Directors' Liability Act, 1890), liable to pay the plt compensation for the loss sustained by him by reason of untrue statements contained in the sd prospectus, and judgment against such dfts for the payment of such compensation.

As to the Directors' Liability Act, 1890 (now embodied in sect. 84 of the Act of 1908), see *supra*, pp. 208 *et seq.*

The following is another form, sometimes used instead of clauses 1 and 2, above:

1. To have the contract by virtue of which he becomes entitled to — shares in the capital of the defendant company set aside on the ground that he was induced to enter into that contract by misrepresentation and non-disclosure of material facts, and to have the register of members of the company rectified by striking out his name as the holder of such shares.

Form 67.

Rescission
and damages
(fraud
alleged).

[Plt, A.; dfts, the coy, and A., B., and C., directors.]

The plt claims:

1. A declaration that he was induced to take 200 shares in the dft coy by the fraudulent misrepresentations of the dfts.

2. Rescission [as in Form 675 (2).]

3. Damages for the loss occasioned to him by such fraudulent misrepresentations.

4. An injunction [Form 675 (4).]

5. Or, in the alternative, as against the dfts —, —, and —, damages for the loss occasioned to the plt by such fraudulent misrepresentations, and indemnity against all liability in respect of such shares.

The above form can be used where the prospectus was issued before 18th August, 1890, when the Directors' Liability Act, 1890, came into operation, if the action is not statute-barred. That Act only applied to prospectuses and notices issued after that day, and accordingly any claim for damages in respect of misrepresentation in a prospectus or notice previously issued must be made in an action of deceit. See *supra*, p. 202. In such an action fraud must be proved.

The form may also be used where the claim is barred by lapse of time under the Directors' Liability Act, 1890 (p. 208), but is not barred upon the footing of an action of deceit (p. 202).

Some persons, instead of claiming damages (3.), claim "To have judgment against the defendants jointly and severally for the repayment of the amounts paid by the plaintiff upon the said shares, with interest"; but, of course, this may not cover the damages sustained. See *Mathias v. Fetta*, 46 L. T. 197, where a contract was rescinded and damages awarded. In *Ridgway v. Hurd*, 20 C. Div. 1, a contract was rescinded, but the claim for damages failed because there was no allegation that the defendant made the misrepresentations complained of fraudulently.

It is enough to establish at the hearing a case for inquiry as to damages. See *Shepherd v. Broome*, (1904) A. C. 342, 348.

Joinder of Parties.

As to the joinder of plaintiffs, Ord. XVI. r. 1, as originally framed, commenced with the words "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative"; but for these words the words in italics below were substituted in October, 1896, and the rule now stands as follows:

All persons may be joined in one action as plaintiffs in whom any right to relief in respect of a claim arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or judge may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a judge in disposing of the costs shall otherwise direct.

The rule in its old form was dealt with in *Smurthwaite v. Hannay*, (1894) A. C. 491; *Peninsular and Oriental Co. v. Tsune Kijima*, (1895) A. C. 661; and *Carter v. Rigby*, (1896) 2 Q. L. 113, and other cases referred to in the Annual Practice. None of the three cases referred specially to actions relating to company matters; though in *Carter v. Rigby*, A. L. Smith, L. J., said that he read *Smurthwaite v. Hannay* "as applying to both contract and tort."

But in *Arnison v. Smith*, 41 Ch. D. 98 (C. A.), which was commenced in 1887, when the rule stood in the old form, fifty-four persons who had severally taken debenture stock in a company sued the directors for damages for misrepresentation in a prospectus, and Kekewich, J., held that the forty who appeared at the trial were entitled to judgment, although each of them had a distinct cause of action, and although it may be that the joinder in this case was irregular under the old rule, it would be regular under the rule as amended in 1896.

And when four persons, each of whom had separately taken debentures on the faith of the statements in a prospectus and covering letter issued by the directors of a company, joined as co-plaintiffs in an action against the directors, claiming damages for misrepresentations contained in the prospectus and covering letter, Byrne, J., held that, as the several causes of action were the same and arose out of the same transaction, and were against the same defendants, the action was properly constituted. *Dringbier v. Wood*, (1898) 1 Ch. 393. And see the remarks of Byrne, J., at p. 397, as to the meaning of the word

transaction." See also *Walters v. Lyeon*, (1899) 3 Ch. 696, and *Pope v. Daintrey*, 85 L. T. 263.

But a plaintiff cannot in one action sue directors for damages for fraudulent misrepresentation inducing him to purchase shares, and also on behalf of himself and the other members for *ultra vires* payment of dividend. *Strand v. Lawson*, (1898) 2 Q. B. 44.

By Ord. XVI. r. 2 "Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a judge may, if satisfied that it has been so commenced through a *bond fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do order any other person to be substituted or added as plaintiff upon such terms as may be just." The Court of Appeal has held that where an action has, through a *bond fide* mistake, been commenced in the name of the wrong person as plaintiff, the fact that the original plaintiff has no cause of action does not take away the jurisdiction of the Court to order the substitution of another person as plaintiff. *Hughes v. Pump House Hotel Co.* (No. 2), (1902) 2 K. B. 485.

As regards defendants, Ord. XVI. rr. 4 to 7, are as follows:

4. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. Judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any apportionment.

5. It shall not be necessary that every defendant shall be interested in the relief prayed for, or as to every cause of action included in any process against him; but the Court or a judge may make such order as may be just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.

6. The plaintiff may, at his option, join as parties to the same action all any of the persons severally or jointly and severally liable on any one contract including parties to bills of exchange and promissory notes.

7. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent the question as to which, if any, of the defendants is liable, and to whom the debt may be determined as between all parties.

Rules 4 and 6 were discussed by Lords Herschell and Russell in *Thwaite v. Hannay*, *supra*, the latter saying (1891) 15 Q. B. 504 "It is the rule in its original form 'is to have this with one defendant' viz., that any number of persons with any number of distinct causes of action might join in one action." Rule 4 must receive an equal construction. And he dissented from the view that Rule 6 applied to "all persons" persons charged on distinct grounds of liability" and by "any" plaintiffs with distinct cause of action.

Rule 4 is still, it is to be observed, in its original form. In *Sadler v. Great Western Rail. Co. and Midland Rail. Co.* (1898) 1 A. C. 450, one plaintiff sued two companies claiming damages, and an injunction in respect that each of the defendants by their combined acts, and the defendants by their combined acts, had obstructed the plaintiff's access to his premises; and the House of Lords held that a claim for damages against two or more defendants in respect of their several and distinct torts could not be combined in one action. This decision governs the rules bearing on the question. See *Cover v. Couldridge*, (1899) 14 Q. B. (C. A.) at p. 352.

In this case, *Cover v. Couldridge*, (1899) 14 Q. B. 348, where two only out of

three defendants were joined for alleged fraudulent conspiracy to promote a company to buy a worthless business and induce the plaintiff to take shares therein, and all three were sued under the Directors' Liability Act and for false and fraudulent statements in the company's prospectus, the Court of Appeal held that the claim against the two could not be combined with the claim against the third. And see *Pope v. B. & C.*, 17 T. L. R. 717; 85 Q.B. 263.

Franklin v. Great Hunzeless Carriage Co., (1900) 1 Q. B. 544, the Court of Appeal held, that where an action is brought by a shareholder against the directors for relief in respect of an improperly issued prospectus, the fact that the relief claimed against the several defendants is different in detail is no ground for objection that the action is had as joint causes of action against separate defendants, for in substance there is only one cause of action, namely, the improper issue of the prospectus, and that it is not improper to join in such an action the legal persons or representatives of a deceased director alleged to have been a party to the issue of the prospectus.

Consolidation Co. v. Martin (16 T. L. R. 186) 1900, 1 Q. B. 544, the Court of Appeal held, that where an action is brought by a shareholder against the directors for relief in respect of an improperly issued prospectus, the fact that the relief claimed against the several defendants is different in detail is no ground for objection that the action is had as joint causes of action against separate defendants, for in substance there is only one cause of action, namely, the improper issue of the prospectus, and that it is not improper to join in such an action the legal persons or representatives of a deceased director alleged to have been a party to the issue of the prospectus.

But A. L. Smith, L. J., said that in his opinion the claim was not governed by *Condliffe (supra)*, as in the case before him the allegation was that there was a cause of action for conspiracy against the defendants, and that the same cause of action it was alleged that the defendants were guilty of breach of duty as directors. In his opinion the claim ought not to be struck out, but ought to be allowed to proceed. Neither did he see any reason why the Court in the exercise of its discretion should order the charge of conspiracy to be tried separately from the other part of the action; and Vaughan Williams and Romer, L. JJ., delivered judgment to the same effect.

And the principle of *Sadler v. Great Eastern Ry. Co.*, *supra*, does not apply where several defendants are sued in one action not on account of several liability for several torts, but jointly in respect of their joint acts. *Walters v. Green*, (1899) 2 Ch. 696.

Rule 4 of Ord. XVI. is not confined in its operation to joinder of parties, but extends also to joinder of causes of action, so that persons may now be joined as defendants who are alleged to be liable in respect of causes of action, which are not necessarily limited to the same exact state of facts, contracts and circumstances as showing liability, and in respect of which relief is claimed by the plaintiff in the alternative. *Companie Saussem v. Houbler*, (1910) 2 K. B. 354.

And see notes to Ord. XVI. r. 4, Ann. 13, 14, 15.

As to suing Trade Unions and their members, see p. 11.

Plt., A. J. dms. B. & C. Ltd.

The plt's claim is for damages for loss occasioned to him by the fraud of the dfts, whereby the plt was induced to take 100 shares in the Coy, Ltd, and for indemnity against all liabilities in respect of the sd shares.

Form 676

Damages for fraud.

Form 676.

This form is for use where the plaintiff sues, in an action of deceit, the directors, or other persons who, by issuing a fraudulent prospectus, induced him to take shares, and does not seek rescission either because he has lost the right or prefers to keep the shares. *Supra*, pp. 202, 205. The form is available both in the case of common law fraud, and also fraud under the now repealed sect. 38 of the Act of 1867, where that section can now be proceeded with, and, if necessary, the statement of claim can allege an alternative case.

As to the measure of damages in such a case, see *Peck v. Devry*, 37 C. Div. 541; *Twyeross v. Grant*, 4 C. P. Div. 40; *McConnell v. Wright*, (1903) 1 Ch. 546; and *supra*, p. 207.

As to action for fraud, in inducing purchase of shares on the market as distinguished from original allotment, see *Andrews v. Mockford*, (1896) 1 Q. B. 372 (C. A.).

Where two or more defendants join in a defence, the jury, in awarding damages, has no power to sever such damages—so much against one defendant, so much against another. *Daniels v. Modern Soc., Lim.*, 27 T. L. R. 174.

Form 677.

Compensation
under the
Directors'
Liability Act,
1890 (s. 84 of
the Act of
1908).

[Plt, A.; dfts, B., C., and D.]

The plt's claim is for compensation for the loss sustained by the plt by reason of untrue statements contained in a prospectus of the — Coy, Limtd, on the faith of which prospectus the plt subscribed for 100 shares in the sd coy. The dfts B. and C. are sued as directors, and the dft D. as promoter of the sd coy, or as having authorized the issue of the sd prospectus.

As to proceedings under the Act, see *supra*, p. 208.

Form 678.

Damages
under sect. 81
of the Com-
panies Act,
1908.

[Plt, A.; dfts, B., C., and D.]

The plt's claim is for damages for the loss occasioned to him by the dfts' non-compliance with the requirements of sect. 81 of the Cos (Consolidation) Act, 1908, as regards a prospectus of The — Coy, Limtd, whereby the plt was induced to take up — shares in that coy.

Form 679.

Specific per-
formance of
agreement to
allot shares.

[Plt, A.; dfts, the coy.]

The plt's claim is:

1. Specific performance of an agreement to allot to the plt 1,000 shares of 1*l.* each in the dft coy, and an injunction to restrain the dft coy, its directors and agents, from allotting the unallotted shares in the dft coy in such manner as to render it impossible for them to perform the sd agreement.

2. Or, in the alternative, damages for the breach of the sd agreement

Specific performance will be ordered of an agreement to take shares where the remedy of damages is inadequate (see *Fry on Specific Performance*, 34; *Oriental Island Steam Co. v. Briggs*, 31 L. J. Ch. 241; *Odeon Tramways Co. v. Mendel*, 8 Ch. D. 235; *Dunell v. Albrecht*, 12 Sim. 189); but it is wise to

claim damages in the alternative, for specific performance may be impossible, *e.g.*, where all the shares have been allotted. *Ferguson v. Wilson*, 2 Ch. 77.

As to the measure of damages, see *Michael v. Hart & Co.*, (1901) 2 K. B. 867.

In such an action it is not proper to make the directors defendants. *Ferguson v. Wilson*, *supra*.

An injunction against the company will bind them. Seton, pp. 709 to 721.

Specific performance may now be ordered of a contract with a company to take and pay for debentures of the company. Companies (Consolidation) Act, 1908, s. 105.

Form 679.

[Plt, the coy; dfts, A., B., C., D., and E.]

1. A declaration that an agreement, dated, &c., and made between the dft B., of the one pt, and the plt coy, of the other pt, and an indenture of assignment, dated, &c., made between the sd dft, of the one pt, and the plt coy of the other pt, are resp'y fraudulent, and are voidable at the option of the plt coy.

2. A declaration that the dfts are jointly and severally liable to make good to the plt coy all profits derived by the dfts, or any of them, in respect of the sale, the subject of the sd agreement and indenture.

3. In case the plt coy shall elect to avoid the sd agreement and assignment, judgment that the sd agreement and assignment be resp'y set aside and delivered up to be cancelled, the plt coy offering to account for all (if any) the profits derived by the plt coy in working the mines, the subject of the sd sale. And in any case

4. Judgment against the dfts, jointly and severally, for the surrender to the plt coy of so many of the 50,000 fully pd-up shares of 1*l.* each in the plt coy, issued as the common for the sd sale, as are still held by the dfts, or any of them, or in lieu of such surrender, and at the option of the plt coy, judgment for the payment of the maximum value of any of the sd shares since the date of the incorporation of the plt coy, with interest.

5. Judgment against the dfts, jointly and severally, for the amount of all money and other profits received or derived by the dfts, or any of them, in respect of such of the sd 50,000 shares as have been sold or disposed of, or otherwise received in respect of the sd sale, with interest, but, in case the plt coy shall elect to retain the ppty sold, giving credit to the dfts for 3,500*l.*, the amount pd by them, with interest at 4 p.c. from January, 1880.

6. 10,600*l.* damages for the loss occasioned to the plt coy by the fraud and collusion of dfts.

The above is an example of the indorsement used in a case somewhat resembling *New Sombrero Co. v. Erlanger*, 5 C. Div. 111; 3 App. Cas. 1218. The defendants, having purchased a property for 3,500*l.*, promoted the plaintiff company, and sold the property to it for 50,000*l.*, without disclosing their profit or position and made misrepresentations.

Form 680.

Rescission of
contract for
sale of mine
to company

Form 681. [Plt, the coy; dfts, A., B., and C.]Bribe to
directors.

1. A declaration that the dfts are jointly and severally liable to pay to the plt coy the maximum value, with interest, of 700 shares in the capital of the plt coy, which shares were issued to B. as pt of the consen for ppty sold by him to the plt coy, and were by him gratuitously transferred to the dfts, who were directors of the plt coy.

2. Judgment against the sd dfts, jointly and severally, for the payment of such maximum value with interest.

There have been a good many cases in which directors have been held liable for paid-up shares privately given them by the vendor or promoters. See *infra*, Chap. XX. And it has been held that in such case they are liable for the maximum value. *Nant-y-Glo Co. v. Grave*, 12 C. D. 738; and see *infra*, Form 726. See also *Carling's case*, 1 C. Div. 115; *McKay's case*, 2 C. Div. 1; *De Ruvinne's case*, 5 C. Div. 306; *Pragnon's case*, 4 C. Div. 222; 5 C. Div. 336; *Weston's case*, 10 C. Div. 579; *Metcalf's case*, 13 C. Div. 169; *Eden v. Riddale Lamp Co.*, 23 Q. B. D. 368; *Postage Stamp Automatic Delivery Co.*, (1892) 3 Ch. 566; *Boston v. Ansell*, 39 Ch. D. 339; *Coats v. Crossland*, 20 T. L. R. 800. But where there is no real market for the shares, the damages are the value at the time of allotment to the delinquent director. *Shaw v. Holland*, (1900) 2 Ch. 305. And see Part II. Chap. XLIV., and the Prevention of Corruption Act, 1906 (6 Edw. 7. c. 34).

When the company is in liquidation, the procedure under sect. 215 of the Companies Act, 1908 (sect. 10 of the Companies (Winding-Up) Act, 1890), is often preferable to an action; and when the winding-up is under a compulsory order, evidence under Rule 70 of the Companies (Winding-Up) Rules, 1909, is admissible on proceedings under sect. 215, though not in an action. As to the relief of directors who have acted honestly and reasonably, see sect. 279 of the Companies (Consolidation) Act, 1908.

Form 682. [Plt, the coy; dft, A.]Promoter's
secret profit.

1. A declaration that the dft is liable to pay to the plt coy the sum of 10,000*l.*, being the difference between the amount pd by him for The ---- Colliery and the amount pd him by the plt coy for such colliery, and all other profits (if any) made by the dft when promoter or director of the plt coy, without its knowledge and consent, with interest; and

2. Judgment against the defendant for payment accordingly

See *supra*, p. 133, and note to Form 723.

Form 683.(Title. See note, *infra*.)Debenture
foreclosure.

[Plt, A. (on behalf of himself and all other holders of mortgage debentures in the dft coy); dft, the coy.]

The plt claims as a debenture holder of the dft coy:—

1. A declaration that the mortgage debentures issued by the dft coy, and now outstanding, constitute a [first] charge upon all the ppty of the coy comprised therein.

2. All necessary accounts and inquiries.
3. Payment.
4. Foreclosure or sale.
5. A receiver and manager.

Form 683.

The above and other forms of writ in actions to enforce the rights of holders of debentures and debenture stock will be found in Part III.

Plt, A. (on behalf of himself and all other shareholders in the dft coy, except those who are dfts); dfts, the coy and the directors.] **Form 684.**

The plt's claim is for a declaration that an agreemt dated, &c., and made, &c., is *ultra vires* the dft coy, and for an injunction to restrain the dfts from carrying the sd agreemt into effect. *Ultra vires agreement.*

See *Russell v. Wakefield Waterworks*, 20 Eq. 474; *Whitcam v. Watkin*, 78 L. T. 188; *Towers v. African Tug Co.*, (1904) 1 Ch. 558, as to parties in such actions.

Writ intituled in the matter of the estate of A. B., deceased: plt, the N. Coy, Limtd (on behalf of itself and all others, the creditors of the sd A. B.); dft, C. D.] **Form 684a.**

The plt coy's claim is, as a creditor of A. B. of —, in the county of —, deceased:—

Action against personal representative of deceased shareholder who has transferred property to avoid payment of calls.

1. For a declaration that the following transfers from the said A. B. to the dft, namely, (a) a transfer dated, &c., of — shares, numbered — to — in the X. Co., Limtd; (b) a transfer dated, &c.; (c) a transfer, &c., are respy fraudulent and void as against the creditors of the sd A. B. (including the plt coy) under the statute 13 Eliz. c. 5, and that the sd transfers may be set aside.

2. For a declaration that the sd shares and the proceeds of such (if any) of them as have been disposed of are assets in the hands of the dft, as the legal personal representative of the sd A. B., and available for the payment of the debts due to the creditors of the sd A. B.

3. For administration by the Ct of the personal ppty of the sd A. B. to have the same applied in payment of what is found due to the plt coy, and the other unsatisfied creditors of the sd A. B.

4. For the transfer into Ct of the sd shares and proceeds or the certificates for the sd shares, or (in the alternative) the appointment of a receiver of the sd shares and proceeds, and the income thof.

5. For an injunction to restrain the dft, his brokers and agents from disposing of or otherwise dealing with the sd shares and proceeds, and the income thof.

The dft is sued as the admor of the said A. B., and in his own right as the transferee of the sd shares.

Form 684a.

Shares are within 13 Eliz. c. 5 (avoiding conveyances to defeat or delay creditors), and it is no objection that the transferor has been dead for even a considerable time. *Re Mulderer*, 27 Ch. D. 523. Where the transfer is voluntary, it is unnecessary to show an actual intention to defeat or delay creditors, if that is the necessary effect. *Freeman v. Pope*, 5 Ch. 538; *Cornish v. Clark*, 14 Eq. 184.

The action should be on behalf of all the creditors. *Reas River Co. v. Atwell*, 7 Eq. 347; *Tanqueray v. Bowles*, 14 Eq. 151; *Turquand v. Kirby*, 4 Eq. 123; *European Co. v. Radcliffe*, 7 Ch. D. 733.

As to obtaining a receiver, see *Re Mount*, (1899) 1 Ch. 831.

Form 685.

Debenture
not deed.

[Plt, A. (on behalf of himself and all other the holders of debentures enttd to the benefit of the indenture mentd in the indorsement on the writ in this action); dfts, the coy and the trustees of the sd indenture.]

The plt claims as a debenture holder of the dft coy:

1. To have an account taken of what is due from the dft coy to the plt and the other holders of debentures enttd to the benefit of an indenture dated, &c., and made, &c.

2. To have the trusts of the sd indenture carried into execution under the order of the Ct.

3. To have a recr and manager of the ppty comprised in the sd indenture appointed.

The dfts — and — are sued as trustees of the sd indenture.

The trustees are properly made defendants. *Montage Insurance Corporation v. Canadian Agricultural, &c. Co.*, (1901) 2 Ch. 377.

Form 686.

Ultra vires
resolution.

[Plt, A. (on behalf of himself and all other holders of B. shares in the dft coy, except those who are dfts); dfts, the coy and the directors.]

1. A declaration that the special resolution of the coy, passed at the general meeting held on the — day of —, is *ultra vires* and illegal.

2. An injunction to restrain the dfts from acting on the sd resolution or applying the profits of the coy otherwise than in accordance with the special resolution of the coy passed the — day of —.

This form was adopted when a resolution was passed purporting to alter the rights of different classes of shareholders as defined by a former special resolution.

Form 687.

Ultra vires
business.

Parties as in Form 686.

1. A declaration that it is beyond the powers of the dft coy to carry on the business of —, and that in carrying on such business, and applying thereto the funds of the coy, the dfts A., B. and C. have acted *ultra vires* and in breach of trust, and that they are liable

to make good to the dft coy all losses sustained by the coy by reason of such breach of trust. **Form 667.**

2. All necessary accounts and inquiries.

3. Judgment against the dfts A., B. and C. for the amount of such losses.

4. An injunction to restrain the dfts from further carrying on the sd business.

This is a simple case. Where there have been changes of directors, nice questions as to liability and parties arise.

An action, not a winding-up petition, is the proper mode of proceeding in case of *ultra vires*. *Ex parte Fox*, 6 Ch. 176; and see *Crouch Bank*, 38 W. R. 667.

Where directors are doing anything which is *ultra vires* the company, any shareholder may bring an action to restrain them. *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Cas. 712; *Rochford v. Eagle*, (1902) A. C. 83.

Plt and dfts as in Form 684.]

The plt claims as a holder of preference shares in the dft coy:

1. A declaration that the resolution, passed at the ordinary general meeting of the coy on the — day of —, declaring a dividend on the ordinary shares is *ultra vires* and illegal as against the holders of preference shares in the dft coy.

2. An injunction to restrain the payment of the dividend so declared, and to restrain the declaration or payment of any other dividends on the ordinary shares in prejudice of the rights of the holders of preference shares in the dft coy.

Form 686.

Dividend in prejudice of preference shares.

Plt, A. (on behalf); and dfts, the coy and the directors.]

1. A declaration that the resolution declaring a dividend, passed at the ordinary meeting of the dft coy held on, &c., is *ultra vires* and illegal.

2. An injunction to restrain the dfts from acting or further acting on the sd resolution, and from paying such dividend or any dividend out of the capital of the dft coy.

3. A declaration that the dfts, other than the dft coy, are jointly and severally liable to make good to the dft coy all moneys (if any) paid by them out of the dft coy's assets on account or in respect of the dividend so sanctioned, and judgment against them jointly and severally for repayment of such moneys accordingly.

Form 689.

Dividend out of capital.

As a general rule the company ought to sue for the recovery of any assets misapplied. *Gray v. Lewis*, 8 Ch. 1036. But in such a case as above the Court would have jurisdiction. *Russell v. Wakefield Waterworks*, 20 Eq. 481. But a shareholder who has, with knowledge of the facts, received part of the illegal dividend cannot as *particeps criminis* at any rate while he retains the same—maintain such an action. *Towers v. Abieson Tag Co.*, (1904) 1 Ch. 558.

Form 690.

Plt, the coy; dfts, the directors, and (sometimes) the auditors.

Recovery of dividends improperly paid.

1. A declaration that the dividends pd to the shareholders in the plt coy since its formation have all been pd out of the plt coy's capital, and that the dfts are jointly and severally liable to make good the amount of the dividends so pd, with interest.

2. Judgment against the dfts accordingly.

As regards misapplication of the moneys of a company, it must be borne in mind that "the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agent of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with a notice that it is being applied to other purposes cannot in this Court say that he is not a constructive trustee." Per Jessel, M. R., *Russell v. Wakefield Waterworks Co.*, 20 Eq. 479; and see *Ernest v. Crocadill*, 2 D. F. & J. 172; *Great Eastern Rail. Co. v. Turner*, 8 Ch. 149; and *Mozham v. Grant*, (1900) 1 Q. B. 88. And in case of fraud or breach of trust the parties are jointly and severally liable. See Form 723, *infra*; *Wye Valley Rail. Co. v. Hawes*, 16 C. Div. 489; *Leeds Estate Co. v. Shepherd*, 36 Ch. D. 807; and *Flitcroft's case*, 21 Ch. D. 519.

The auditors may also be sued. *Leeds Estate Co. v. Shepherd*, *supra*. See further, as to liability for dividends paid out of capital, the cases cited in Part II. 10th ed. pp. 644, 645. If the company was in liquidation, proceedings were generally taken under sect. 10 of the Act of 1890 (now sect. 215 of the Companies Act, 1908). See Part II. Chap. XLIV.

Form 691.

Plt, the coy and A., on behalf, &c. Dfts, the directors.]

To enforce resolution of company.

An injunction to restrain the dfts from acting in contravention of a resolution to the effect that, &c., passed at a general meeting of the coy, held on, &c.

In the above case it is assumed that A., a shareholder, makes the company a plaintiff in order to escape complying with the rule in *Foss v. Harbottle*, *infra*, p. 1357. See *Pender v. Lushington*, 6 C. D. 70; *Harben v. Phillips*, 23 C. Div. 14; *La Compagnie de Mayrille v. Whitley*, (1896) 1 Ch. 788.

As a general rule, where by reason of that rule it is necessary to make the company plaintiff, there is no need to make the complaining shareholder also a plaintiff. He can use the name of the company without leave or licence, subject only to this: that in all probability the defendants will deny the plaintiff's right to use the company's name, and in that case the Court usually refers the matter to a general meeting; and if the general meeting approves of the action, it will proceed, whereas, if the meeting disapproves, the company's name will be struck out and the plaintiff will be ordered to pay the costs. In order to provide for this possibility, it may in some cases be wise to make a shareholder a co-plaintiff as above, provided that he has some individual cause of action. See also *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 50, more fully referred to below.

As to discovery from a company, as an "opposite party," where joined as a defendant to an action, by shareholder on behalf, &c., see *Spokes v. Grosvenor Hotel Co.*, (1897) 2 Q. B. 124.

A., plt. The coy, B., C., D., dfts.]

Form 692.

The plt's claim is:—

Exclusion of
director.

1. An injunction to restrain the dfts, other than the dft coy, from preventing or hindering in any way the plt from acting as a director of the dft coy, and from excluding the plt from meetings of the directors of the dft coy.

2. Damages in respect of the matters afd.

See *Pulbrook v. Richmond Mining Co.*, 9 C. D. 610; *Nutton v. English and Colonial Produce Co.*, (1902) 2 Ch. 502; *Bainbridge v. Smith*, 41 Ch. D. 475.

Plts, the coy and A., B., and C. Dfts, D., E., and F.]

Form 693.

1. The plts' claim is for an injunction to restrain the dfts, D., E., and F., from acting as directors of, or dealing with the funds of, or using the seal of, or otherwise interfering in the management of the plt coy, and to restrain the dft D. from acting as a director of, or dealing with the funds of the coy, or using the seal of, or otherwise interfering in the management of the plt coy, otherwise than as a member of the Board of Directors of the plt coy, elected on the 1893 (which Board consists of the plts A., B., and C. and the dft D.), and to restrain the dfts from representing that the four persons who first subscribed their names to the memorandum of association of the plt coy continued after May, 1893, or now continue or are directors of the plt coy, or that either of the dfts E. and F. after that date continued or now continues or is a director of the plt coy, and from preventing or hindering the plts A. and B., or either of them, from acting as directors of, or taking part in the management of the plt coy, or excluding them or either of them from the Board meetings of the plt coy.

To restrain
de facto
directors
from acting.

2. Damages in respect of the matters afd.

In this case the plaintiff, as in *Pender v. Lushington*, 6 C. D. 70, makes the company a co-plaintiff, inasmuch as the company can alone complain of persons not duly appointed acting as directors. *Mardoull v. Gardiner*, 1 C. Div. 13; *Harben v. Phillips*, 23 C. Div. 14; and *Coventry's case*, 14 Ch. D. 660.

See further cases in regard to directors not duly appointed, *Imperial Hydro-pathic Co.*, 23 C. Div. 1; *Harben v. Phillips*, *ibid.* 14; *Munster v. Cammell Co.*, 21 C. D. 183.

Rule in *Foss v. Harbottle*.

It may be convenient here to refer to the rule in *Foss v. Harbottle*, 3 H. 461, and *Mozley v. Alston*, 1 Ph. 790 (already touched on, *supra*, p. 74), namely, that *prima facie* the company can alone sue in respect of wrongs done to the company; that the acts of the defendants complained of were of such a nature as to be capable of confirmation by a majority of the members of the company; that it was for the defendant in its corporate capacity to sue; and that, under these circumstances, the Court could not interfere at the suit of a minority.

In *Mozley v. Alston* (1847), two members of an incorporated railway company filed a bill, in their individual characters, against the corporation and

twelve other members, who were alleged to have usurped the office of directors and to be exercising the functions thereof, as a majority of the governing body injuriously to the company's interests, and praying that the twelve might be restricted from acting as directors, and be ordered to deliver the company's common seal, property and books to six other persons, who were alleged to be the only duly constituted directors. Lord Cottenham, L. C., allowed a demurrer to the bill. In the first place, he pointed out that if there had been no other objection to the bill, the fact of its having been brought by shareholders, not on behalf of themselves and others but in their individual characters only, was fatal. Then he said that a more important objection was that the injury alleged was not to the plaintiffs personally but to the corporation, without any reason being assigned by the bill *why the corporation does not put itself in motion to seek a remedy*. After observing that *Foss v. Harbottle* was identical in principle with the case before him, Lord Cottenham said that the Vice-Chancellor's observations in that case applied with greater force to the present case because there "the bill expressly alleges that a large majority of the shareholders are of the same opinion with [the plaintiffs]; and, if that be so, there is obviously nothing to prevent the company from filing a bill in its corporate character to remedy the evil complained of." Finally, he relied on the ground that it was without precedent for the Court to interfere "solely on the ground of the supposed invalidity of the title of persons claiming to be corporate officers."

These two cases have been frequently followed. James, L. J., in *Guy v. Lewis* (1873), 8 Ch. 1035, 1050, 1051, said: "It is very important, in order to avoid oppressive litigation, to adhere to the rule laid down in *Mozley v. Alston*, and *Foss v. Harbottle*, which cases have always been considered as settling the law of this Court, that where there is a corporate body capable of filing a bill for itself to recover property either from its directors or officers, or from any other person, that corporate body is the proper plaintiff, and the only proper plaintiff. . . . I think that it is of the utmost importance to maintain the rule laid down in *Mozley v. Alston* and *Foss v. Harbottle*, to which, as I understand, the only exception is where the corporate body has got into the hands of directors and of the majority, which directors and majority are using their power for the purpose of doing something fraudulent against the minority, who are overwhelmed by them, as in *Atwood v. Merryweather* (5 Eq. 464, n.), where Wood, V.-C., under those circumstances sustained a bill by a shareholder, on behalf of himself and others, and there it was after an attempt had been made to obtain a proper authority from the corporate body itself in public meeting assembled." The same learned judge, James, L. J., in *Maddougali v. Gardiner*, 1 C. Div. 13, again emphasised the importance of the rule.

"I think," he said, "it is of the utmost importance to all these companies that the rule which is well known in this Court as the rule in *Mozley v. Alston* . . . and *Foss v. Harbottle* should always be adhered to: that is to say, that nothing connected with the internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent, unless there be something *ultra vires* on the part of the company *quâ* company, or on the part of the majority of the company, so that they are not fit persons to determine it: but that every litigation must be in the name of the company if the company really desire it."

And in a case in the Privy Council, *Burland v. Earle*, (1902) A. C. 83, 93, Lord Davey said: "It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do

so. Again, it is clear law that in order to redress a wrong done to the company, or to recover money or damage alleged to be due to the company, the action should *prima facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v. Harbottle* and *Mozley v. Alston*, and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring, directly or indirectly, to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier v. Hooper's Telegraph Works* (1874), 9 Ch. 350. It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish, J., in *Maddougall v. Gardiner*. And by a recent case - *Marshall's Valve Gear Co. v. Manning, Wurdle & Co.*, (1901) 1 Ch. 267 where clause 55 of Table A. of 1862, as to directors' powers, applied, and where the four directors held substantially all the share capital, one of them, who had the majority of votes at general meetings, commenced an action in the name of the company, and the other directors moved to strike out the name and dismiss the action, it was held that by clause 55 the majority [in value] of the shareholders had the right to control the action, and that the motion must be dismissed with costs.

Accordingly, the Court refused to interfere at the suit of a shareholder suing on behalf of himself and others in the following cases:

- (a) Proceedings to compel directors to make good funds of company improperly expended. *Foss v. Harbottle*, *supra*.
- (b) Where directors were acting who had not been duly appointed. *Mozley v. Alston*, *ubi supra*, and *Hattersley v. Shelburne*, 10 W. R. 881.
- (c) To recover property alleged to belong to the company. *Gray v. Lewis*, *ubi supra*; see also *Russell v. Wakefield Waterworks*, 20 Eq. 474.
- (d) Where it was alleged that chairman had improperly refused to take a poll. *Maddougall v. Gardiner*, 1 C. Div. 13.
- (e) Where winding-up resolution passed at meeting convened by order of an irregular board. *Southern Counties Deposit Bank v. Rider*, 73 L. T. 374, C. A.
- (f) Action against company's solicitor and vendor to set aside an agreement alleged to have been a fraud on the company, and to recover money of the company. *Duckett v. Gover*, 6 C. Div. 82. For further proceedings in this case, 25 W. R. 554.
- (g) Action for re-imbursement of dividend paid out of capital, part of which was received and retained by plaintiffs. *Towers v. African Tug Co.*, (1904) 1 Ch. 558.
- (h) Action against company and its directors in respect of an investment of

reserve funds, bona fide but imprudently made in the name of a sole trustee. *Burland v. Earle*, *supra*.

And see *Exeter and Crediton Rail. Co. v. Butler*, 5 Ry. Cas. 311, and *Normandy v. Ind, Coops & Co.*, (1908) 1 Ch. 84.

The exceptions to the rule of *Foss v. Harbottle* are well illustrated in the decision of the Court of Appeal in *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56. Lindley, M. R., in that case, says (p. 69):—"The breach of duty to the company consists in depriving it of the use of the money, which the directors ought to have paid up sooner than they did. I cannot regard the case as one of mere internal management, which, according to *Foss v. Harbottle* and numerous other cases, the Court leaves the shareholders to settle among themselves. It was ascertained . . . that when this action was commenced the defendants held such a preponderance of shares that they could not be controlled by the other shareholders. Under these circumstances an action by some shareholders on behalf of themselves and the others against the defendants is in accordance with the authorities, and is unobjectionable in form. See *Menier v. Hooper's Telegraph Works* (1874), 9 Ch. 350. An action in this form is far preferable to an action in the name of the company and then a fight as to the right to use its name."

The only exceptions therefore to the rule are the following:—

- (a) Where the act complained of is *ultra vires* the company. *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Cas. 712.
- (b) Where the act complained of is a fraud on the minority. *Alexander v. Automatic Co.*, *supra*.
- (c) Where there is an absolute necessity to waive the rule in order that there may not be a denial of justice. See observations of M. R. in *Pender v. Lushington*, 6 C. Div. 70; *Russell v. Wakefield Waterworks*, 20 Eq. 474; *Harben v. Phillips*, 23 C. Div. 14; *Burland v. Earle*, *supra*.

Accordingly, the Court has interfered at the suit of one or more suing as above in *Clinch v. Financial Corporation*, 5 Eq. 480; 4 Ch. 117; *Atwood v. Merryweather*, 5 Eq. 464, n. *Ultra vires* agreement. See Form 739, *infra*.

Ultra vires return of capital. *Holmes v. Newcastle Co.*, 1 C. Div. 682.

Ultra vires purchase of shares. *Hop v. International Financial Society*, 4 C. Div. 327. See Form 747, *infra*.

Payment of dividends out of capital. *Macdougall v. Jersey Hotel Co.*, 2 H. & M. 528. See Forms 744 and 745, *infra*; and compare *Towers v. African Tug Co.*, *supra*.

Majority, or persons controlling majority, proposing to benefit themselves at the expense of the minority. *Menier v. Hooper's Telegraph Works*, 9 Ch. 350; *Alexander v. Automatic Co.*, *supra*.

Action to set aside fraudulent sale to company, the vendor holding the majority of the shares. *Mason v. Hurris*, 11 C. Div. 97.

Where a shareholder desires to complain of a wrong done to the company, and the case does not fall within the above exceptions, and the directors decline to proceed, the shareholder can sue in the company's name. But if it is shown that the majority do not support the action, the company's name will be struck out; and if there is a dispute as to the views of the majority, the Court will take means to ascertain them, e.g., by giving liberty to convene a meeting. *Exeter and Crediton Rail. Co. v. Butler*, 5 Ry. Cas. 311; 11 Jur. 527; *Pender v. Lushington*, 6 C. D. 70; *Du-kett v. Gower*, *ibid.* 82; *Harben v. Phillips*, 23 C. Div. 14. It is therefore advisable that a shareholder commencing an action in the name of the company should himself take immediate steps to procure the

convention of a general meeting. *Morris v. Morris*, W. N. (1877) 6. For "if authority is wanted to use the name of the company, it must be authority got from the proper quarter—either from the directors, or from the shareholder convened for the purpose." *La Compagnie de Mayville v. Whitley*, (1896) 1 Ch. 788, 803.

There must be a strong *prima facie* case for the Court to allow such a bill filed in the name of the company, but without the sanction of a majority of the shareholders, to remain on the file in order to see whether the company will adopt it or not. *East Pant Du United Lead Mining Co. v. Merryweather*, 1 N. R. 541.

But the fact that the approval of the majority has not been obtained before the writ is issued does not prevent the Court from giving interlocutory relief by injunction or otherwise. *Pender v. Lushington*, *ubi supra*. See further, Lindley on Companies, 6th ed. 774; Seton, 602.

As to ordering the plaintiff's solicitor to pay the costs of action brought in name of company without authority, see *La Compagnie de Mayville v. Whitley supra*; *Newbiggin v. Armatrong*, 13 C. D. 310.

Where the company is joined as plaintiff without authority, a motion to strike out the name can be made under Ord. XVI. r. 11. *La Compagnie de Mayville v. Whitley*, (1896) 1 Ch. 788; *Marshall's Valve Gear Co. v. Manning*, (1909) 1 Ch. 267. And where the notice of motion also asks that the solicitor responsible may be ordered to pay the costs, notice of discontinuance subsequently given will not prevent the Court from making the order. *Gold Reefs of Western Australia v. Dawson*, (1897) 1 Ch. 115.

Striking out company's name as plaintiff

The rule above referred to does not of course prevent a member from suing in respect of an individual wrong. *Pender v. Lushington*, *ubi supra*; and see Forms 736 *et seq.*, *infra*.

Appearance.

The subjects of appearance and default of appearance are dealt with in Ords. XII. and XIII.

A company, being a corporation aggregate, can only appear by a solicitor. See Ann. Pr., notes to Ord. XII. r. 11. The appearance of a company by its secretary, &c. is refused at the Central Office. *Ibid*.

If the company is in liquidation, whether voluntary or compulsory, appearance should be entered for "The --- Company, Limited, in liquidation, by M. D., its liquidator duly appointed." Ann. Pr. *ibid*.

As to attaching a solicitor for breach of an undertaking to enter appearance see *Kerly, Son & Verden*, (1901) 1 Ch. 467; and Ann. Pr., note to Ord. IX. r. 1.

Summons for Directions.

Ord. XXX., as amended in July, 1902, is as follows:

1.—(a) Except in the cases mentioned in paragraph (d), the plaintiff in every action shall take out a summons for directions returnable in not less than four days.

(b) Such summons shall be taken out after appearance and before the plaintiff takes any fresh step in the action other than application for an injunction, or for a receiver, or the entering of judgment in default of defence under Ord. XXVII.

(c) Where under Ord. XIV. the plaintiff applies for judgment, or where under Ord. XVIII. the defendant applies for a statement of claim, the

judge may deal with such application as if the plaintiff had been entitled to take out and had taken out a summons for directions.

d) This rule shall not apply to Admiralty actions within the meaning of sect. 31 of the Judicature Act, 1873, or to actions in which the writ is specially endorsed under Ord. III. r. 6, or to actions coming under the provisions of Ord. XVIII., or to any proceeding commenced by originating summons: but in any such action or proceeding a summons for directions may be taken out at the instance of any party thereto.

2. Upon the hearing of the summons the Court or a judge shall, so far as practicable, make such order as may be just with respect to all the proceedings to be taken in the action, and as to the costs thereof, and more particularly with respect to the following matters: Pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial. Such order shall be in the Form No. 4, Appendix K., with such variations as circumstances may require.

3. No affidavit shall be used on the hearing of the said summons except by special order of the Court or a judge.

4. On the hearing of the summons any party to whom the summons is addressed shall, so far as practicable, apply for any order or directions as to any interlocutory matter or thing in the action which he may desire.

5. Any application subsequently to the original summons and before judgment for any directions as to any interlocutory matter or thing by any party shall be made under the summons by two clear days' notice to the other party, stating the grounds of the application.

6. Any application by any party which might have been made at the hearing of the original summons shall, if granted on any subsequent application, be granted at the costs of the party applying, unless the Court or a judge shall be of opinion that the application could not properly have been made at the hearing of the original summons.

7. On the hearing of the summons, the Court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the Court or judge may direct.

8. In any action to which r. 1 of this order applies, if the plaintiff does not within fourteen days from the entry of the defendant's appearance take out a summons for directions under this order, the defendant shall be at liberty to apply for an order to dismiss the action, and upon such application the judge may either dismiss the action on such terms as may be just, or may deal with such application in all respects as if it were a summons for directions under this order.

Ord. XVIII. is the one which deals with cases in which the plaintiff wishes to proceed to trial without pleadings.

For form of summons see Part III. (10th ed.) of this work, p. 491. As to putting parties under conditions, see *Barter v. Holdsworth*, (1899) 1 Q. B. 266.

Where a defendant makes default in entering appearance, the master cannot, on a summons for directions, order the action to be set down for trial without pleadings. *Re No-man*, W. N. (1900) 159; and see *Green v. St. John's Mansions*, W. N. (1900) 9.

See further notes to Ord. XXX. in the Annual Practice.

The summons for directions comes to an end at the trial, after which any interlocutory application ought to be by summons, not by notice. *Brown v. Hain*, W. N. (1905) 120.

Security for Costs by Plaintiff Company.

to this, see Companies (Consolidation) Act, 1908, s. 278, and notes to Form 759.

Discovery

Ord. XXXI, r. 5. If any party to a cause or matter be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons authorized by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

As to who are "opposite parties" for the purposes of interrogatories, see notes to Ann. Pr. Ord. XXV, r. 1. In the case of discovery of documents the words are "any other party" (Ord. 12), but they have been held to mean the same thing as "opposite party."

It is a matter for the discretion of the judge whether any, and what, order should be made. Where the applicant seeks to interrogate the company through its secretary or other such officer, it being his duty to be acquainted with the affairs of the company and to act for them in such matters, it seems to be unnecessary to serve the officer with notice of the application; but in the case of a member who is not an officer, as a rule, notice of the application ought to be served on him. *Chadduck v. British South Africa Co.*, (1896) 2 Q. B. 151, 155.

Unless the judge thinks that there is no officer capable of giving the discovery, a member should not be ordered to be examined. *Berkeley v. Standard Oil Co.*, 13 C. D. 97.

The officer or member is the representative or *alter ego* of the company for the purpose of answering the interrogatories. *Berkeley v. Standard Co.*, 13 C. D. at p. 101. An officer of a company, answering on its behalf interrogatories administered to it, is only bound to answer as to his knowledge acquired in the course of his employment by the company, and as to the result of inquiries made by him of its other officers and agents with regard to their knowledge acquired in the same way, and he is not bound to answer as to his own knowledge, or to make inquiries of the other officers or agents of the company as to their knowledge, acquired accidentally or in some other capacity. The answer of an officer, being the company's answer, can be read against it, and it can only be required to answer as to that with respect to which an individual litigant in its position would have been bound to answer. *Welshuch Incandescent Gas Lighting Co. v. New Southlight Incandescent Co.*, (1900) 1 C. A. 2 Ch. 1. See also Ann. Pr., notes to Ord. XXXI.

If the officer selected to answer have no personal knowledge of the facts he should apply to those servants of the company who have. *Southwick Co. v. Luck*, 5 Q. B. D. 315.

The Court will not, as a rule, compel persons who are parties to an action to produce books which are in their possession as directors of a company which is not a party. *Williams v. Ingram*, 16 T. L. R. 431, 451. Otherwise in the case of a liquidator having absolute control of the documents. *London & Bank Corp.*, 15 Q. B. D. 7, 473. But where a suit was proceeding against some only of the directors of an unincorporated joint stock company, alleging fraud at the expense of the company, an order was made for the production of books and documents which were the joint property of all the directors, and which were in the custody of a solicitor as the agent of the directors. *Wolburn Inc.*, 1 M. & K. 61.

As to ordering copies of entries in business books to be furnished in lieu of inspection, see Ord. XXXI. r. 19a, and *White v. Spafford & Co.*, (1901) 2 Q. B. 241.

As to interrogatories not being put with a view to obtain admissions, see *Clarke v. Clarke*, W. N. (1899) 130.

Form 694.

[Title, &c.]

Interrogatories

Interrogatories on behalf of the dft for the examination of the pls by their secretary delivered pursuant to Order dated —.

1. On what date do you allege that the dft applied for shares in the plt coy? If the applicon was in writing, identify the document containing such applicon.

2. Look at the first document mentd in the schedule of the plt's affit of documents, and state in whose handwriting is the signature "John Smith." From whom, and when, and under what circumstances, did the plt coy receive this document?

3. When, and by whom, was the alleged payment of 50*l.* in respect of ordinary shares made? Was such payment made in cash? If nay, in what form was it made? and if by cheque or cheques, state to whom such cheque or cheques was, or were, made payable; by whom drawn, and on what bank; and whether indorsed or not, and, if yea, by whom indorsed. Was any and what receipt given, and to whom, for the alleged sum of 50*l.*?

4. Prior to the payment of the alleged sum of 50*l.*, did any communication pass, and was any arrangement made, between the plt coy, or anyone on its behalf, and the dft, or anyone on his behalf respecting such payment? If yea, state the nature and substance of such communication and arrangement, and when, and where, and between whom, the same took place. The plt coy is required to answer all these interrogatories by their secretary or other proper officer.

Delivered this — day of — by —, dft's solors

PLEADINGS.

CHAPTER XIX.

19—. C. No. ——. Form 695.
Writ issued —th —, 19—

In the High Court of Justice.
Division.

Action for
calls
Statement of
claim.

Between The C. Coy, Limtd Plaintiffs,
and
A. B. Defendant.

1. The plt coy, hnfr called "the coy," is a coy limtd by shares, and was incorporated under the Companies Acts, 1862 to 1900, in the year 19—, with a memdum and arts of asson. The dft is a member of the coy, and as such is the registered holder of — shares of £— each in its capital. The sd shares are pd up to the extent of £— per share and no more.

2. The sd arts of asson contain the following clauses numbered resply 20 and 21, that is to say:—

"20. The directors of the coy may from time to time make such calls as they think fit upon the members in respect of all moneys mpd on the shares held by them resply, and not by the conditions of allotment made payable at fixed times, and such member shall pay the amount of every call so made on him to the persons, and at the times and places appointed by the directors, and a call shall be deemed to have been made at the time when the resolution of the directors authorizing such call was passed."

"21. One month's notice of any call shall be given specifying the time and place of payment, and to whom such call shall be pd, and if the sum payable in respect of any call or instalment be not pd on or before the day appointed for payment thof, the holder for the time being of the share in respect of which the call shall have been made shall pay interest for the same at the rate of 10 p.c.p.a. from the day appointed for the payment thof to the time of actual payment."

3. In exercise of the power conferred on the directors of the coy as aforesaid, they at a meeting of the directors duly convened and held on the — day of —, duly made a call on the members, including the

Form 695. dft, of £— per share, and determined that such call should be paid to the coy's bankers, Messrs. —, at their banking house at — on the — day of —.

4. Due notice of the sd call was given to the dft, and he was required to pay the sd call in accordance with the terms of the sd resolution.

5. The dft made default in payment of such call, and there is now due to the coy in respect thof a sum of £—, the amount of such call, together with interest thereon at the rate of 10 p.c.p.a. from the — day of —, the day appointed for the payment of such call.

6. The coy claims.

(1) Payment of the sd sum of £—, with interest thereon, at the rate of 10 p.c.p.a. from the — day of — until payment.

(2) Costs.

By sect. 79 of the Companies Act, 1862, it was provided that "in any action or suit brought by the company against any member to recover any call or other moneys due from such member, in his character of member, it shall not be necessary to set forth the special matter; but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other moneys due whereby an action or suit hath accrued to the company." This section is not re-enacted in the Act of 1908—no doubt advisedly—for under the present practice it is found more convenient to state the facts as above. By so doing, the defendant is more certainly compelled to raise and specify in detail the defences on which he relies. Moreover, unless the provisions of the articles are set out, the right to interest after the issue of the writ will not appear. In many cases judgment for payment of calls can be obtained by a specially indorsed writ, and a summons under Ord. XIV. r. 1. See p. 1368.

Very commonly, in an action for calls, allotment money, or instalments, the writ is specially indorsed under Ord. III. r. 6, and there is no other statement of claim. The defendant in such cases may put in a defence and the plaintiff company can reply thereto, *e.g.*, as in Form 697, *infra* (but not now without an order. See Ord. XXII. r. 1).

In an action for calls, the usual defences set up are: (1) That the defendant is not a member of the company, and that the shares were allotted to him without his consent, and in such case there may be a counterclaim to have his name removed, and for damages, or (2) that he was induced to take up the shares by misrepresentation, in which case he would counterclaim to have the contract rescinded, or, when neither of the foregoing defences are available in such case, there could be a counterclaim to rescind the contract, or (3) that the call was irregularly made.

Other defences are: that the call was bad in form (*Cawley & Co.*, 42 Ch. D. 209), that the stipulated period since the last call had not elapsed, that the call exceeds the stipulated amount, that the directors making the call were not duly appointed or duly qualified, that there has been a set-off (unless the company is in winding up), or that the call was made *malâ fide* (*Norman v. Mitchell*, 19 Beav. 278).

As to the defence of fraud to an action for calls see *Aron's Receipts v. Funnell* (1896) A. C. 273.

If the company is in winding-up, the liquidator may obtain a balance-order or may sue (in the company's name) for the calls. The balance-order can be enforced by a *fi. fa.*, but if that remedy results in nothing, and bankruptcy proceedings are in view, a balance-order will not found procedure by bankruptcy notice as it is not a "final judgment" within sect. 1, sub-sect. 1 (g) of the Bankruptcy Act, 1883. *Ex parte Whinney*, 13 Q. B. D. 476; *Ex parte Grimwade, Re Tennent*, 17 Q. B. D. 357. The liquidator cannot sue on the balance-order. *Westmoreland, &c. Co. v. Feilden*, (1891) 3 Ch. 15; *Pritchard v. English and Colonial Syndicate*, (1899) 2 Q. B. 428, 434. But the call is a specialty debt (see sects. 14 (2) and 125 of the Companies Act, 1908 (sects. 16 and 75 of the Act of 1862)), and is not merged in the balance-order. *Westmoreland, &c. Co. v. Feilden* (at p. 25). The liquidator may, therefore, notwithstanding the balance-order, sue for the call in the name of the company and in such an action, sect. 168 of the Companies (Consolidation) Act, 1908 (sect. 106 of the Act of 1862), makes the balance-order *conclusive evidence* that the money is due, and "of all other pertinent matters stated in such order. On obtaining judgment in the action, the company can proceed against the shareholders by bankruptcy notice. Bankruptcy Act, 1883, s. 1 (1) (g).

Form 486

Defence

Title as above

Form 486

Defence to
action for
calls

1. The dft does not admit that the arts of assen of the plt coy (here called "the coy") are sufficiently or accurately set out in the statement of claim, and refers to the same when produced

2. The dft does not admit any of the allegations in paras 3 and 4 of the statement of claim, and in particular the dft denies that the directors of the coy on or about the day of or at any such date, duly or in fact made a call on the members (including the) of £ per share on any call, or that due or any notice of the alleged call was given to the dft

3. If, which the dft does not admit, certain persons purporting to act as directors of the coy purported to make any such call as alleged, such call was invalid. The persons purporting to act as directors were not duly qualified, a quorum was not present at the meeting at which such call is alleged to have been made, and proper notice convening such meeting was given

4. The dft does not admit that a sum of £ or any sum is due from him to the coy

The plaintiff company will then either put in a reply, for leave to do which the company must obtain an order (see Ord. XXIII. r. 1), or the company will set down the matter for trial. By Ord. XXVII. r. 13, if no reply is delivered the pleadings are to be deemed to be closed at the expiration of the period for delivery of it, and all the material statements of fact in the defence are deemed to have been denied and put in issue.

The time for delivering a reply, if ordered, is usually specified in the order and if no time is specified therein, it is ten days from delivery of the defence or the last of the defences, unless the time is extended (see Ord. XXIII. r. 1). If a reply is given, it must be delivered to the plaintiff company, and must be given within the time specified in the order.

Form 696

Reply whether it clones the pleadings or not; but where no order for a reply has been made, notice of trial can only be given "on the expiration of four days after the defence or the last of the defences shall have been delivered, or at any time after the issues of fact are ready for trial." (Ord. XXXVI. r. 1 (July, 1903).)

Where the defence is, that the defendant was induced to take the shares by misrepresentation, the defence should be modelled accordingly, and a counterclaim should be added, claiming to have the defendant's name removed from the register of members of the plaintiff company. (See *infra*, Form 698, p. 1370.) In this latter case the reply and defence to counterclaim will be of more elaborate nature.

The plaintiff in the action requires leave to deliver his "Reply and Defence to Counterclaim" (Ann. Pr., notes to Ord. XXIII.), but a third person, not originally a party to the action, but made a defendant to the counterclaim, may deliver his defence to the counterclaim without leave. *Ibid*.

The defence of set-off is available in an action for calls by a company which is a going concern; but if such a company sues a shareholder for a call, and he sets up a defence of set-off, and before judgment is obtained a winding-up of the company commences, the defence of set-off in the action does not prevent the application of the ordinary rule that the debt owing by the company to the shareholder cannot be set-off in proceedings in the winding-up to obtain payment of the call. *Hiram Maxim Lamp Co.*, (1903) 1 Ch. 70 (Byrne, J.).

And the liquidator can, in settling the shareholder on the list of contributories, apply for a balance-order, and will have to discontinue the action. *Ibid*.

A set-off of debts cannot be allowed where both are not presently payable or there has been a change in the person entitled to receive payment of one or other of the debts. Thus, in *Ex p. The Peak Hill Gunfield, Limited* (a Debtor), (1900) 1 K. B. 430 (Ct. A.), where a company petitioned for the bankruptcy of one of its debenture stockholders, and it was held that the set-off was prevented by the appointment of a receiver for another creditor of the debtor's interest in the stock before the petition was disposed of, and by resolution of the stock holders postponing the time for redemption of the stock, and later on the bankruptcy order being made whereby the trustees in bankruptcy of the debtor became entitled in the place of the receiver.

Form 697

In the High Ct. &c. as above.

Defence to
action for
calls.
Specially
indorsed with

(By Original Action)

and

Between the sd A. B.

Plaintiff

and

The Coy, Limited, E. F., G., and H.

Defendants

(By Counterclaim.)

Defence and Counterclaim.

Defence.

The dft says that

1. He denies that he is a member of the plt coy or the holder of the sd shares or any of them.

2. He denies that the sd calls were made validly or at all, or that he had notice thereof, or that he ever became bound to pay the alleged calls or any pt thereof or any interest thereon

3. Alternatively he was induced to take the shares by certain misrepresentations and concealments in the prospectus inviting him to take the sd shares, and in a report made by L. & M. referred to in the sd prospectus. **Form 697.**

1. Particulars of the misrepresentations and concealments:

The prospectus stated that, &c., that, &c., that, &c.

The whole of the above statements were untrue.

The dft refers to the sd prospectus and report.

Further, in the alternative the dft agreed to subscribe for the shares upon the condition that 20,000 should be subscribed before the plt coy went to allotment. This condition was never fulfilled.

Counterclaim.

And by way of counterclaim the dft says that

6. He repeats the allegations in paragraphs 3 and 4 of the defence, and further says that, at the time of the issue of the sd prospectus, the dfts E., F., G. and H. were promoters of the plt coy, and each of them authorized the issue of the sd prospectus, and the plt by counterclaim relies on the provisions of the Directors' Liability Act, 1890 (Consolidation Act, 1908, s. 84). He also further says that the sd misrepresentations and concealments were made fraudulently by the sd dfts by counterclaim, and also that the sd dfts by counterclaim had no reasonable ground for believing that Messrs. L. & M. were competent to make their sd report.

7. By reason of the plt by counterclaim having taken the sd shares on the faith of the sd prospectus and report, which shares are wholly valueless, he has become liable, if he be held liable, to pay the plt coy their claim in this action, and has lost the moneys pd or to be pd by him for the sd shares.

The plt by counterclaim claims against all the dfts

- (1) Rescission of the contract (if any) to take shares
- (2) Rectification of the register by striking off the dft's name as the holder of the shares in the plt coy
- (3) Repayment of all moneys pd by the dft, and
- (4) Against the dfts E., F., G. and H. damages, and an indemnity against his liability (if any) to the plt coy in this action and in respect of any further calls

If the shareholder is a trustee for another person, the latter is bound to indemnify the former against calls, and may be made a party to the action by a third party notice. See *Hardoch v. Bellius*, (1901) A. C. 118; *Stevenson v. Wilson*, (1907) P. C. 44.

Form 698

Defence and Counterclaim

Another.

Defence.

1. The dft denies that he is the holder or registered holder of any shares in the plt coy, or that any right of action has accrued to the plt coy, or that any interest is payable, or that any call has been made upon any shares held by the dft.

2. If the dft is entered on the register of members of the plt coy, he says that he is entered without sufficient cause, and that his name should be removed from such register for the reasons following:

3. The dft by two certain underwriting letters requested the W. B. Coy, Limtd (herein called the promoters), to admit him as an underwriter of 2,120 shares in the plt coy upon the footing of and subject to the conditions printed at the back of the sd two letters, and handed to the promoters cheques amounting to 200*l*. By the 5th of the sd conditions it was declared that the underwriters were to be relieved altogether unless at least 45,000 of the sd shares were underwritten before the prospectus was issued to the public.

4. In fact 45,000 of the sd shares were not underwritten before the prospectus was issued to the public, but the promoters none the less and without any authority from the dft, applied to the plt coy for 2,120 shares in the plt coy, and pd over to the plt coy the sd cheques amounting to 200*l*.

5. The plt coy purported to make an allotment to the dft of the sd 2,120 shares, although they knew and had notice of the terms of the dft's letter of underwriting, and knew that 45,000 of the sd shares had not been underwritten.

6. The plt coy falsely by its prospectus pretended that 45,000 shares or the whole of the capital then offered for subscription was underwritten.

7. The dft, believing that the whole of the sd 45,000 shares had been underwritten, pd to the plt coy £ — on receiving notice of the allotment of the sd 2,120 shares.

8. As soon as the dft learned that in fact the sd 45,000 had not been underwritten he repudiated the sd allotment.

Counterclaim

9. The dft repeats paragraphs 2 to 8 of his defence, and counterclaims —

1. Repayment of the sd sums of 200*l*. and £ — , with interest.
2. Rectification of the register of members of the plt coy by striking out his name.

As to striking out a defence for being frivolous and vexatious, and an abuse of process, see *Remington v. Scholer*, (1897) 2 Ch. 1, and Ann. Pr., notes to Ord. XXV, r. 4.

Reply

[As to obtaining leave to deliver a reply, see *verba* note to Form 696]

As to the defence:

1. The plts contend that paragraphs 2 to 8 in fact are his bare defence in law to this action

2. Save in so far as the same contains admissions, the plts join issue with the dft on the whole of his defence

Reply to a defence to action for allotment of money, as on special endorsed writ

As to the counterclaim:

3. As to paragraph 3 of the defence, the plts admit that the dft made two underwriting applicons to the X. Coy. Limtd (called in the sd applicons the contractors), requesting them to admit him as an underwriter in the plt coy at a commission to be pd to him by the contractors for such underwriting of 10 p.c. in cash, and 10 p.c. in fully pd shares, and upon the footing and subject to the conditions printed at the back of such applicons

4. As to paragraph 4 of the defence, the plts say that it is untrue that a number less than 45,000 of the shares in the sd coy were underwritten before the sd prospectus was issued to the public

5. The plts further deny that the sd applicon to them to allot the sd shares was made without the authority of the dft. The sd shares were duly allotted to the dft, and the dft subsequently pd the amount due from him then upon allotment

6. As to paragraph 5 of the defence, the plts admit that they had notice of the terms of the dft's sd underwriting applicons; but deny that they knew that 45,000 of the sd shares had not been underwritten. As a fact (as hitherto in paragraph 3 stated), the whole of the sd 45,000 shares were underwritten.

7. As to paragraph 6 of the defence, the plts deny that in their sd prospectus it was ever pretended that 45,000 shares or the whole of the capital then offered for subscription were underwritten, or that the dft ever was induced to apply, and did apply, to underwrite any shares by any statement in the sd prospectus. If such statement had in fact appeared in the sd prospectus, the same would have been true

8. As to paragraph 7 of the defence, the plts admit that the dft duly pd to them the sd sum of 337*l.* 10*s.* due upon allotment of the sd 2,120 shares on or about the 25th September, 1899. Save as aforesaid they deny each and every allegation in the sd paragraph contained

9. As to paragraph 8 of the defence, the plts say that at 45,000 shares had not in fact been underwritten (which they do not admit). They deny that the dft, as soon as he learned the sd fact, repudiated the sd allotment, and say that he at all times acquiesced in the same. The plts further say that if the dft did not know that the sd 45,000 shares had been underwritten, he had at the time when he pd the sd

Form 688. sum of 337*l.* 10*s.*, and at all times until the middle of November, when he first raised any question of liability, full opportunity of ascertaining, and could have ascertained, if all the *sd* 45,000 shares had in fact been underwritten, and that he is precluded by delay and laches from seeking the relief which he now claims.

10. The *dft* after the allotment of the *sd* shares applied to the X. Coy. Limtd. *afsd* for the *sd* commission in cash and fully *pd* share due to him from them under his *sd* two letters of underwriting herein before referred to, and was *pd* by and received from them the sum of 225*l.* in cash and 225 fully *pd* shares in respect *thof*. The *dft* has retained and still retains the *sd* cash and shares while seeking in this action relief from liability in respect of those 2,120 shares for the underwriting of which the *sd* commission was earned by and *pd* to him as *afsd*.

11. Since the issue of the writ in this action the *dft* has commenced and is prosecuting an action in the King's Bench Division of the High Ct against the X. Coy. Limtd, *afsd*, claiming damages for breach of contract. The *dft* has based his *sd* action upon his liability as registered holder of the *sd* 2,120 shares, and as being legally indebted to the *plts* in respect of the call sued for in the present action, as well as future calls to be made by the *plts* on the *sd* shares.

Form 689.

A. B., *plt*; The A. Coy. Limtd, *dfcs*.

Misstatements
prospectus

Claim to
rescind
contract to
take shares

1. In the month of Nov., 1900, the *plt* applied for and was allotted by the directors of the *dft* coy (herein called "the coy") 200 *l.* shares in the capital of the coy, and the *plt* has *pd* to the coy the sum of 15*s.* per share in respect *thof*.

2. The *plt* applied to the coy for an allotment of the *sd* shares in response to the prospectus published by the coy, and in reliance on the truth of the representations contained therein. Such prospectus contained divers false representations of material facts, of which the following are the particulars:

- (a) The prospectus stated that the owners of the mining rights mentd therein had *pd* 10,000*l.* for the right to mine upon the N estate therein mentd, whereas, in fact, they had not made any such payment
- (b) The prospectus stated that after an expenditure of several thousand pounds in making borings on the estate, the gutter containing auriferous drift, which had retained enormous profits to the mines situate in the neighbourhood, was struck, whereas, in fact, the gutter had not been struck.
- (c) The prospectus stated that the mining rights were held on lease from the Government for fifty years from the 1st February, 1900, at 6*d.* per acre, whereas, in fact, no such lease had been granted.

3. The plt first had reason to believe that the representations aforesaid were false towards the end of April, 1901, and on the 7th of May, 1901, he wrote to the coy, repudiating his shares, and demanding repayment of the amount pd by him thereon. The coy has declined to comply with this demand.

Form 600

4. According to the terms of the prospectus aforesaid, the balance, namely, 5s. per share on the sd shares, became payable in the month of May, 1901, but the plt has not pd this balance, and the coy threaten to sue him for the amount.

5. Had the plt been aware of the falsity of the representations aforesaid, he would not have applied for or taken shares in the capital of the coy.

The plaintiff claims:

- (1) To have the contract to take the shares aforesaid rescinded, and to have his name removed from the register of members of the coy.
- (2) Repayment of the amount pd by him to the coy with interest at 5 p.c.p.a.
- (3) An injunction to restrain the coy from taking any proceedings against him in respect of the 5s. per share still remaining unpaid.
- 4) Further or other relief and the costs of the action

The commencement of an action claiming rescission as above is a final election by the alleged shareholder to rescind, and is not neutralized by acts which before the action would have destroyed the right to rescind, such as acting as a member. *Pomlin's case*, (1898) 1 Ch. 104, *supra*, p. 201.

In cases of rescission the main points to be borne in mind are that it must be alleged and proved that the representations on which the action is based were made by or on behalf of the company; that they were as to material facts; that they were incorrect; that they were made with the object of inducing the plaintiff to take shares; and that he took shares relying on them, and that he sought his remedy with all due promptitude, the latter point being of the greatest importance, because the plaintiff's name being on the register of members may have induced others to alter their position (see pp. 183, 184, 197).

As to actions for damages by a purchaser of shares in the market (as distinguished from an allottee) on the faith of fraudulent statements in prospectuses, see *Andrews v. Mockford*, (1896) 1 Q. B. 372. A defendant may, before delivering a counterclaim, move for an injunction if both he and the plaintiff are suing upon the same contract. *Collison v. Warren*, (1901) 1 Ch. 312.

Parties as above

Defence

Delivered, &c.

1. The dft coy (hereafter called "the coy") does not admit any of the allegations in paragraph 2 of the statement of claim, and in particular does not admit that the plt applied for an allotment of the sd shares in response to the prospectus published by the coy, or in reliance on

Form 700

Defence to
action for
rescission

Form 700

the truth of the representations contained therein; and the coy denies that the sd prospectus contained divers or any false representations of material facts, or any false representation whatever.

2 The coy does not admit that the sd alleged statements in the sd prospectus are accurately set out in paragraph 2 of the statement of claim, but if and so far as that paragraph does accurately set out such statements, the same are all true, and, in particular, it is the fact that the owners of the mining rights mentd therein had pd 10,000*l.*, or thereabouts, for the right to mine upon the N territory therein mentd; and it is the fact that the gutter referred to in sub-sect. (b) of the sd paragraph had been reached; and it is the fact that the mining rights of the coy are held on lease from the Government for fifty years from the 1st February, 1900, at 6*d.* per acre

This is the line of defence if the company can substantiate the statements in the sd prospectus, but often the directors cannot, and then, of course, the line of defence must entirely depend on the peculiar facts. The following is an instance.

2 If, which the coy does not admit, the sd prospectus contains any such statement as is alleged in sub-sect. (a) of paragraph 2 of the statement of claim, such statement is in fact correct. The owners therein referred to did, in conson of the right to mine therein mentd, hand over ppty which had been valued at 10,000*l.*, and which has since been sold for more than 10,000*l.*

2a. If, which the coy does not admit, the sd prospectus contains any such statement as is alleged in sub-sect. (b) of paragraph 2 of the statement of claim, such statement is substantially true, for even if, which the coy does not admit, the gutter struck was not the gutter in the sd sub-sect. referred to, such gutter was even richer, and capable of producing a still larger percentage of gold.

2b. If, which the coy does not admit, the sd prospectus contained any such statement as is alleged in sub-sect. (c) of paragraph 2 of the statement of claim, such statement was substantially accurate at the time it was made. Although no lease had actually been granted, the Government of the State of — had agreed to grant a lease on the terms in the sd sub-sect. mentd, and the lease was subsequently granted upon terms substantially as favourable.

If, which the coy denies, any of the sd representations were in fact false, the coy does not admit that the plt first had reason to believe that they were false towards the end of April, 1901. Some months prior to the month of April, 1901, the plt was well aware of the true facts of the case, and with such knowledge he abstained from repudiating his sd contract to take the sd 200 shares. Moreover, at a general meeting of the coy, held in the month of May, 1901, the plt, with such knowledge, voted as a member of the coy in respect of the sd shares. Accordingly, if such contract was originally

credible, the dft has affirmed it, and is estopped by laches and **Form 700**
acquiescence from now avoiding it.

1. If, which the coy denies, any of the sd representations were in fact false, the coy does not admit that the same or any of them were representations of material facts, and the coy denies that the plt relied on any of the sd representations when he applied for his sd shares, or that he would not have applied for the same had he known the true facts.

There will then follow a counterclaim for the balance of 5s. a share, which will be in the Form 697, with the necessary modifications. The plaintiff's defence to the counterclaim will practically be a repetition of the material allegations in the statement of claim. The above defence may also, in a proper case, contain an allegation that the plaintiff made independent inquiries with a view to showing that he did not rely wholly or at all on the prospectus, but unless there is some substantial ground for such a case it is not much use putting in general allegations of this kind, as particulars will have to be given.

1. &c., on hearing of an application on the part of the dft coy for **Form 701**
an account in writing of further and better particulars of the alleged misrepresentations and concealments referred to in paragraph 3 of the defence and paragraph 5 of the defendants' counterclaim with Summons & further particulars respect to the following points:

1. Particulars of which of the statements therein referred to are untrue, and which are misleading.

2. Particulars of the dates, parties, and contents of the contracts between the — Coy, Limtd, and the vendors of the various shares, and particulars of the date and contents of the contract between — Syndicate and Messrs. L. & M.

3. Particulars of the agreement referred to in paragraph 4 of the defence as to whether such agreement was verbal or in writing, and when, where and between whom such agreement was made.

And that unless such particulars be delivered in four days, the dfts be precluded from giving evidence in support thereof at the trial, and that the plts have twenty-one days after delivery of the sd particulars in which to deliver their reply to defence and defence and counterclaim.

Dated, &c.

As to an order for further and better particulars, see Ord. XIX. r. 7, and notes thereto in Ann. Pr. If needed be the application can be made before defence. *Bank v. Gurnantun*, 28 C. D. 123.

A B, plt: The S. Coy, Limtd. dfts.]

Form 702.

1. The dft coy (hence called "the coy") was incorporated on, &c., **Form 701**
1901, under the Cos Acts, 1862 to 1900, as a coy limtd by shares, and having a nominal capital of 100,000/- divided into 20,000 shares of



Form 702. 5*l.* each. One of the objects for which the coy was established was as stated by its memdum of assen, to purchase, &c.

2. On the — day of —, 1901, the coy issued a prospectus to the public inviting applicons for the shares in the capital of the coy on each of which 10*s.* was to be pd on applicon, and 1*l.* 10*c.* on the allotment thof. The sd prospectus contained misrepresentations of which the following are the parlars:

3. [State them.]

4. The sd prospectus omitted to state the following material facts, &c.

5. The plt received a copy of the sd prospectus, and on the faith thof, and induced by and relying on the statements and representations therein contained, and misled and induced by the omission to state the material facts afsd, subscribed for sixty shares in the coy of 5*l.* each, which shares were allotted to him, and in respect of which he has pd to the coy 120*l.*

6. The plt had no reason to doubt the accuracy and fairness of the sd prospectus until the — day of —, 1901, when he read an article in the *G — C —*, stating, in effect, that, &c. Upon reading that article the plt immediately made inquiries through his solor, and on or about the — day of — discovered the misrepresentations afsd.

7. Immediately after such discovery the plt's solor, acting by his directions, gave notice to the coy repudiating the shares afsd, and demanding repayment of the sd moneys. The coy declined to comply with this demand, and denied the plt's right to repudiate.

The plaintiff claims:

1. A declaration that he was induced to apply for and take the sd sixty shares of 5*l.* each in the capital of the coy by misrepresentation and non-disclosure of material facts.
2. Rescission of the contract by the plt with the coy to take the sd sixty shares, and the rectification of its register of members by the removal of the name of the plt therefrom.
3. Repayment to the plt by the coy of the sd sum of 120*l.* pd by him in respect of the sd shares, and also interest thereon as to the sums of 30*l.* and 90*l.* forming the same, at the rate of 5*l.* p.c.p.a. from the respive times when the sd sums were pd by the plt.
4. An injunction to restrain the coy from making or attempting to enforce, by action or otherwise, any call in respect of the sd sixty shares or any of them.

The defence to this will be very much on the lines of the last defence, except that the material facts alleged to have been omitted will be dealt with and their materiality denied.

Between A. B. Plaintiff,
and

Form 703.

The . . . Coy, Limited, A., B., and C. . . . Defendants.

Another,
under sect. 81
of the Act of
1908

1. The dft coy (huftr called "the coy") was incorporated in the year 1907, under the Cos Acts, 1862 to 1900, for the purpose of, &c

2. The dfts, A. B., and C., were, at the dates of the preparation and issue of the prospectus huftr mentd, and are, the directors of the coy.

3. In the month of January, 1909, the dfts, A., B., and C., advertised and issued to the public a prospectus relating to the coy, and inviting persons to subscribe for shares therein.

4. The sd prospectus contained several untrue statements, of which the following are the parlars:

(a) The sd prospectus stated, &c., whereas it was the fact that, &c.

(b) The sd prospectus stated, &c., whereas, &c.

(c), (d), &c., &c.

5. Prior to the issue of the sd prospectus, a contract in writing, dated the . . . day of . . . , was made between P. and Q. The sd contract provided, &c. The sd contract was a material contract within the meaning of sect. 81 of the Cos (Consolidation) Act, 1908, and was not entered into in the ordinary course of business carried on, or intended to be carried on, by the coy.

6. The sd P. was, when the sd prospectus was issued, a promoter of the coy, and the sd contract was material to persons who contemplated subscribing for shares in the coy. The sd prospectus did not specify the date of and parties to the sd contract, and the plt had no notice thof.

7. The untrue statements afsd were made by the dfts A., B., and C. fraudulently, and the sd dfts issued the sd prospectus with knowledge and cognizance of the said contract.

8. The plt received a copy of the sd prospectus, and on the faith thof, and induced by and relying on the statements and representations therein contained as afsd, and misled and induced by the omission to specify therein the date of and parties to the sd contract, he subscribed for 1,000 shares of 1L. each in the capital of the coy, which shares were allotted to him, and he has pd to the coy 500L. in respect of such shares, and has in consequence sustained serious damage.

9. The shares in the dft coy are not, and never were, of any value.

The plt claims [as in last Form]

5. As against the dfts A., B., and C., damages for the breach of statutory duty in omitting to specify in the sd prospectus the date of and parties to the sd contract

For form of claim under the now repealed sect. 38 of the Companies Act, 1907, for non-disclosing of contracts, see the 7th ed. of this work, p. 1040, and *infra*, Form 706.

Form 704

DEFENCE

Defence to
Form 703.

of the Defendants, A., B., and C.

1. These dfts do not admit any of the allegations in paragraph 3 of the statement of claim.

2. (See paragraph 2 of Form 700.)

3. If, which the dfts do not admit, any such contract as is alleged in paragraph 5 of the statement of claim was ever made, these dfts do not admit that the same is sufficiently or accurately set out in paragraph 5 of the statement of claim.

4. These dfts do not admit any of the allegations in paragraph 6 of the statement of claim, and in particular they do not admit that the sd P. was, when the sd prospectus was issued, or ever, a promoter of the dft coy, or that the sd alleged contract was material to persons who contemplated subscribing for its shares in the coy. At the time when the plt applied for his sd shares, he was well aware of the sd alleged contract, and of the particulars thof.

5. If, which these dfts do not admit, any of the sd statements in the sd prospectus were untrue, such statements were not made by them fraudulently, but were made by them in good faith, and after the most careful investigation, and in the full belief that they were perfectly true and accurate. These dfts do not admit that at the date of the issue of the sd prospectus they were cognizant of the sd contract. If there has been a non-compliance with any statutory duty imposed on the dfts, such non-compliance arose from an honest mistake of fact on the pt of them and every of them, as they were informed by, &c. [*State particulars.*]

6. (Deny paragraph 8.)

7. The shares in the dft coy are, and always have been, of their full nominal value, and particularly in the month of —, after the plt had ascertained the true facts of the case, and become aware of the existence of the sd contract, he could have disposed of his shares at a premium.

One or more of the directors may, of course, have some special ground of defence (see Companies (Consolidation) Act, 1908, s. 84 (1) (i) (ii) (iii)), as that their names were improperly inserted in the prospectus, or that they were not responsible for its issue; and if there was more than one prospectus, and one had a reference to the contract, it may be shown that the plaintiff applied on such one.

For form of defence to action under sect. 38 of the Companies Act, 1867, see the 7th ed. of this work, p. 1040, and *infra*, Form 707.

As to the liability of one defendant to pay all the plaintiff's costs, see *Kelly's Directories v. Gavin*, (1901) 2 Ch. 763; and Ann. Pr. notes to Ord. LXV. r. 1 (apportionment of costs). And as to ordering an unsuccessful defendant to pay a successful defendant's costs, see *Sanderson v. Blyth Theatres Co.*, (1903) 2 K. B. 533; *Bullock v. London G. O. Co.*, (1907) 1 K. B. 264; *Mullen v. L. C. Co.*, 51 Sol. J. 82.

Plt. A. B. Dfts. A., B., C., D., and E.]

Form 705.

1. The Coy. Limtd (hntfr called "the coy."), was incorporated in the year —, for the purposes of, &c.

Sect. 84 of
Act of 1908.
(Directors'
liability.)

2. The dfts. A., B., and C., were, when the prospectus hntfr mentd was issued, directors of the coy.

3. In the month of —, 19—, the dfts issued a prospectus inviting persons to subscribe for shares in the capital of the coy. The sd prospectus contained untrue statements, of which the following are the particulars:— [*Set them out.*]

4. Each of the sd statements was a material statement.

5. The plt received a copy of the sd prospectus, and he subscribed for — shares in the coy on the faith of that prospectus, and he has pd to the coy £— in respect of such shares.

6. On the — day of — an order was made by this Honourable Ct that the coy should be wound up under the provisions of the Cos Acts, 1862 to 1907.

7. Subsequently to such order the plt. for the first time, discovered the untruth of the statements afd.

8. The dft D. was, at the time when the sd prospectus was issued, a promoter of the coy, and he took part in the preparation of such prospectus.

9. The dft E. authorized the issue of the sd prospectus.

10. The shares in the coy are not, and never were, of any value, and the plt has sustained damage by reason of the sd untrue statements.

The plt claims:

- (1.) A declaration that the dfts are liable to pay to the plt compensation for the loss sustained by him by reason of the untrue statements afd.
2. Judgment against the dfts severally for the payment of such compensation.
- (3.) Further or other relief, and the costs of the action.

The defence to such an action will no doubt deny or not admit the facts alleged, and further, will allege that, if the statements were made, they were made by the defendants in the belief that they were true, and that they had reasonable grounds for such belief. In such case they must state particulars of the grounds of their belief. *Alman v. Oppert*, (1901) 2 Q. B. 576. See further, as to the various defences open, *supra*, p. 194.

[Plt. G.; Dft. S.]

Form 706.

1. R. S., Limtd, was incorporated in the year 1896 for the purpose of *inter alia*, as stated in the prospectus hntfr referred to, acquiring as a going concern, and developing and working the old-established and well-known business of a wholesale and — and Government

Action under
sect. 38 of the
Companies
Act, 1867,
and under
Directors'

Form 706.

Liability
Act, 1890,
now sect. 84
of the Com-
panies (Con-
solidation)
Act, 1908.

contractor, carried on by the dft, together with certain freehold and leasehold premises therein mentioned.

2. By an agreement dated 28 September, 1896, and made between the dft of the one pt and C. of the other pt (after reciting *inter alia* that a coy was about to be formed under the Companies Acts, 1862 to 1890, having for its objects, amongst other things, the acquisition and working of the sd business and the whole of the defendant's interest therein, and that the capital of the coy was to be such sum as the sd C., in his discretion, should think sufficient), the sd business and freehold and leasehold premises, and certain chattels and effects therein mentd were agreed to be sold by the dft to the sd C. for the sum of 8,280*l.*, and by clause 10 of the sd agreement the dft agreed on being called upon so to do by the sd C., to enter into an agreement with the sd, then intended, coy to act as managing director thof for the term of five years from any period of the year 1896, at a salary of 300*l.* p.a.

3. By an agreement dated 6 November, 1896, and made between F (who was a clerk in the employ of, and the nominee of the sd C.) on the one pt and the sd R. S., Limtd, of the other pt, the sd business and freehold and leasehold premises, chattels and effects, were agreed to be sold by the sd F. to the coy for the sum of 23,000*l.*

4. On 6 January, 1899, the sd coy was voluntarily wound up, and J. was appointed liqr thof. [*Order appointing joint liquidator.*]

5. On 3 June, 1899, the liqr of the coy sold to the dft the sd business, and freehold and leasehold premises, and chattels and effects, for the sum of 1,096*l.* 6*s.* 7*d.*

6. The dft was, when the prospectus hnftr mentd was issued, the managing director of the sd coy. The other directors thof were P., H., and M. The sd C. became a director of the sd coy on 17 November, 1896.

7. The sd coy issued the sd prospectus inviting persons to subscribe for shares in the sd coy. The sd prospectus contained untrue statements, of which the following are particulars:—(1), (2), (3).

8. Each of the sd statements was a material statement.

9. The sd prospectus, whilst setting out a certificate of the sd J., showing the average net profit for the last four years was 3,200*l.* 12*s.* 9*d.*, and alleging that for many years past the establishment at the sd freehold and leasehold premises had carried on a most lucrative business, omitted to state the following facts which were within the knowledge of the dft and were material:—(a), (b), (c), (d), (e).

10. The omission from the sd prospectus of these facts rendered the statements in the prospectus false and misleading, and the omission from the sd prospectus of all mention of the sd contract of 28 September, 1896, made the sd prospectus fraudulent as against the plt under sect. 38 of the Companies Act, 1867.

11. The plt had no notice of any of the afd facts and agreement of

28 September, 1896, when he applied for and was allotted shares in the sd coy. **Form 706.**

12. The plt received a copy of the sd prospectus, and he subscribed for 50 ordinary shares in the sd coy on the faith of the sd prospectus, and he has paid to the sd coy 50l. in respect of the sd shares.

13. The shares in the sd coy are not of any value, and the plt has sustained damage by reason of the sd untrue statements and omissions.

14. The plt relies on the provisions of the Directors' Liability Act, 1890, and also upon sect. 38 of the Companies Act, 1867.

15. The plt further says that the misrepresentations and omissions were made by the dft wilfully, and as to the representations with knowledge of their falsity.

The plt's claim is to have:

1. Damages.
2. A declaration that the dft is liable to pay to the plt compensation for the loss sustained by him by reason of the afd untrue statements and omissions.
3. Judgment against the dft for payment of such compensation.
4. Costs of the action.

1. The dft does not admit that the purpose for which R. S., Limtd. was incorporated is correctly stated in paragraph 1 of the statement of claim and craves leave to refer to the prospectus of the sd coy when produced. **Form 707.**

Defence to the above.

2. The dft does not admit that the agreements referred to in paragraphs 2 and 3 of the statement of claim are fully or correctly set out therein and craves leave to refer to the sd agreements when produced.

3. The sale by the dft to the sd C. referred to in paragraph 2 of the statement of claim was an absolute sale and was not dependent or conditional upon the sd coy being formed.

4. The price for which the sd business and freehold and leasehold premises and chattels and effects were sold by the sd liqrs is not correctly stated in paragraph 5 of the statement of claim.

5. The prospectus of the sd coy did not contain untrue statements as alleged in paragraph 7 of the statement of claim or at all. The statements set out in the particulars under the sd paragraph were not untrue.

6. The dft does not admit that there were any omissions in the sd prospectus as alleged in paragraph 9 of the statement of claim or that the sd omissions were within the knowledge of the dft or material, or that by any omission the statements in the prospectus were rendered false or misleading. The dft denies each and all of the allegations in clauses (a), (b), (c), (d), and (e) of the sd paragraph. Neither the dft nor the sd coy was under any duty or obligation to state in the sd prospectus any of the facts set out in clauses (a),

Form 707. (b), (c), (d), and (e) of the sd paragraph (if they were facts, which is not admitted).

7. The sd contract of 28 September, 1896, was not a contract within the provisions of sect. 38 of the Cos Act, 1867, and the omission from the sd prospectus of mention of the sd contract did not make the sd prospectus fraudulent as against the plt under sect. 38 of the Cos Act, 1867, or at all.

8. In the course of the liquidation of the sd coy the liqrs of the sd coy acting on behalf of the shareholders of the sd coy (of whom the plt was one) gave notice of motion in the High Court of Justice, Chancery Division, that it might be declared among other things that the present dft and the sd C. as promoters and directors of the sd coy were jointly and severally liable to contribute to the assets of the sd coy the sum of 13,792*l.* as compensation for their alleged misfeasances and breaches of trust in concealing from their co-directors the existence of the sd agreemt of 28 September, 1896.

9. Upon the hearing of the sd motion the sd motion was dismissed as against the present dft, and the Ct held that the dft was not in a fiduciary relationship to the sd coy on 28 September, 1896.

10. The dft will contend that in so far as the present action is based upon the omission of mention of the sd contract in the sd prospectus the plt is estopped by the sd judgment of the sd Chancery Ct.

11. The dft denies each and all of the allegations contained in paragraphs 11, 12, 13 and 15 of the statement of claim.

Form 708. [The --- Coy. v. A., B., and C.]

Action to
recover bribe
given to
directors.

1. The plt coy (hmftr called "the coy") is a coy limtd by shares incorporated, on the --- day of --, under the Cos Acts, 1862 to 1900, and the dfts were, from the date of such incorporation down to the --- day of ---, 19--, directors thof.

2. Shortly before the incorporation of the coy, which was then being promoted by D. and E. for the purpose of taking over from them certain mills and other ppty at ---, the sd D. and E. requested the dfts to become directors of the coy, and promised to transfer to each of them 100 fully pd-up 10*l.* shares therein if they consented to do so.

3. The dfts accepted this offer, and were accordingly, by the arts of asson of the coy, appointed to be the three first directors of the coy.

4. Shortly after the formation of the coy the dfts, acting as the directors thof. entered into an agreemt with the sd D. and E. for the purchase of the sd mills and other ppty on behalf of the coy. The consen for the sale was to be £-- in cash and --- pd-up shares in the coy of £-- each. The sd sale was carried into effect on or about the --- day of ---, when the sd cash was pd, and --- of the sd shares were allotted. The residue of the sd shares, namely, ---

shares, were, by the direction of the sd D. and E., and in pursuance of their promise aforesaid, allotted to the dfts equally between them **Form 708**

5. The dfts obtained their shares without the knowledge or consent of the coy, and in obtaining them they committed a breach of trust

The plt claims:

- (1.) A declaration that the dfts are jointly and severally liable to pay to the plt coy the maximum value, with interest, of the sd 200 shares in the capital of the coy.
- (2.) Judgment against the dfts, jointly and severally, for the payment of such maximum value, with interest
- (3.) Costs.

Parties as above.]

DEFENCE

Form 709

of A., B., and C.

Defence to
708.

1. The dfts do not admit any of the allegations in paragraph 2 of the statement of claim, and in parlar the dfts do not admit that the coy was promoted by D. and E., and they deny that shortly before the incorporation of the coy, or ever, the sd D. and E., or either of them, requested the dfts, or any of them, to become directors of the coy, or promised to transfer to each of them 100 or any fully pd-up 101 shares therein if they consented to do so.

2. The dfts were, by the arts of asson of the coy, appointed to be the first three directors thof, but, save as aforesaid, they deny each of the allegations in paragraph 3 of the statement of claim. They never received or accepted any such offer as is in the statement of claim alleged, nor were they appointed directors in consequence of any such offer and acceptance.

3. The dfts deny that the residue of the shares which were to be allotted to D. and E. under the contract of the - - -, namely, - - - shares, were by the direction of the sd D. and E., and in pursuance of any such promise as is alleged, allotted to the dfts equally between them, or at all. The dfts have purchased and acquired certain shares from the said D. and E., but they pd the full market price for them. The agreement for the sd purchase was made in the month of - - -, 19-- , and there was not any prior agreemt or understanding to the effect that any such shares should be sold to the dfts.

4. The dfts acquired their shares under the circumstances above mentd, and they deny that in obtaining them they committed a breach of trust.

Of course, if the directors did receive the shares by way of gift, the defence may be open to them that the articles authorized the transaction, or that a general meeting has sanctioned it, or that an independent board, or all the

Form 709. members, had knowledge of the facts more than six years before action brought. See *British Seamless Paper Box Co.*, 17 C. D. 467, criticised in *Re Darby, Ex parte Brougham*. (1911) 1 K. H. 95, and other cases cited, *supra*, pp. 135, 136.

For forms of pleadings in actions by holders of debentures and debenture stock, see Part III., 10th ed., Chapter LVI.

Form 710. Plt, A. B. (on behalf of himself and all other the holders of shares in The B. Coy. Limtd); dfts, A., B., and C., and The B. Coy, Limtd, and The L. P. & D. Coy, Limtd.]

Ultra vires
contract:
injunction.

1. The B. Coy, Limtd (hnftr called "The B. Coy"), is a coy incorporated under the Cos Acts, 1862 to 1900. It was registered in the year —.

2. The dfts, A., B., and C. were, at the date of the contract hnftr mentd, and now are, the directors of The B. Coy.

3. The objects for which The B. Coy was established are set forth in its memdum of assen as follows, &c.

4. On the — day of —, the dfts, A., B., and C., purporting to act as directors of The B. Coy, and in its name, and on its behalf, entered into a contract in writing, bearing date the — day of —, with The L. P. & D. Coy, Limtd (hnftr called "The L. Coy"). The sd contract provided, &c. And the dfts, A., B., and C., affixed the common seal of The B. Coy to one pt of such contract, and handed over the same to The L. Coy.

5. Pursuant to the sd contract the sd A., B., and C. have already pd to The L. Coy the sum of £ — out of the moneys of The B. Coy.

6. The sd contract was, and is, beyond the powers of The B. Coy, and was made in violation of the conditions contained in that coy's memdum of assen.

7. The dfts, A., B., and C., and The L. Coy, threaten, and intend, to carry the sd contract into effect.

8. The plt is the registered holder of — shares in the capital of The B. Coy of £ — each. There are numerous other holders of shares in The B. Coy.

The plt claims:—

- (1.) For a declaration that the sd contract is beyond the powers of The B. Coy and void, and to have the same delivered up to be cancelled.
- (2.) For an injunction to restrain the dfts, A., B., and C., and The L. Coy, from carrying the sd contract into effect, or further acting thereon.
- (3.) Judgment against the dfts, A., B., and C., and The L. Coy, for the repayment to The B. Coy of the moneys of that coy already pd to The L. Coy, pursuant to the sd contract, with interest.
- (4.) Other relief and costs.

Parties as above.]

Form 711.

DEFENCE

Defence to
710

of A., B., and C., and The B. Coy.

1. These dfts do not admit that the memdum of assen of The B. Coy is sufficiently or accurately set out in paragraph 3 of the statement of claim, and refer to the same when produced.

2. These dfts do not admit any of the allegations in paragraph 4 of the statement of claim. The contract in the sd paragraph referred to is not therein sufficiently or accurately set out, and these dfts refer to the same when produced.

3. These dfts do not admit any of the allegations in paragraph 5 of the statement of claim.

4. These dfts do not admit that the sd contract was, or is, beyond the powers of the B. Coy, or that it was made in violation of the conditions contained in that coy's memdum of assen. Such contract is a proper and beneficial contract for the sd coy to enter into, and is authorized by the terms of its memdum of assen. Such contract was approved by a general meeting of The B. Coy, at which the plt was present, and at that time the plt raised no objection thereto.

A., on behalf of shareholders, plt; and the Coy and B., C., D., E., and F., dfts.] **Form 712.**

Action for
ultra vires
purchase of
shares.

1. The J. K. Coy, Limtd, was incorporated under the Cos Acts, 1862 to 1890, as a coy limtd by shares, on the — of —, 1891. The objects for which the coy was established were, &c. The capital of the coy was 100,000L., divided into 10,000 shares of 10L. each. Arts of assen were filed with the memdum. 8,000 shares in the coy have been issued, all of which are fully pd.

2. In the year 1894 the dfts, B., C., and D., were directors of the coy. In that year those directors expended 6,000L., moneys of the coy, in the purchase of shares in the coy from W., the dft F., and others.

3. In the year 1897 the dfts B., C., E. were the directors of the coy. In that year those directors spent 1,000L., moneys of the coy, in the purchase of shares in the coy from the sd dft Sylvester.

4. *Another purchase.]*

5. *Another purchase.]*

6. All the shares so purchased as afd were transferred to the coy. In the return made to the Registrar of Joint Stock Cos down to the — of —, the coy is returned as holding — of its own shares.

7. All the sd purchases were reductions of the capital of the coy, and were *ultra vires*, and the directors making them are jointly and severally liable to replace the moneys expended by them resply.

Form 712. 8. The plt is the holder of 30 shares in the coy. No dividends have been pd thereon since —.

The plt therefore claims:

- (1.) A declaration that the above-named dfts —, —, —, and —, are jointly and severally liable to replace the sum of 6,000l., with interest thereon at the rate of 5 p.c.p.a. from the date when the same was expended
- (2.) (3.) (4.) *Other like declarations.*
- (5.) Judgment against the sd dfts for payment to the dft coy of the amounts found due in accordance with the foregoing declarations
- (6.) Damages.
- (7.) Costs.

[For pleadings in debenture action, see Part III. of this work.]

JUDGMENTS AND ORDERS.

CHAPTER XX

INTRODUCTORY NOTES.

Breaches of trust by directors.	Presents to directors
Dismissal of action with relief on counter-claim.	Receiver and manager
Dividends out of capital.	Rectification of register
Extending time for registration of mortgagor on charges under sect. 96 of the Companies (Consolidation) Act, 1908.	Restraining winding-up of bankruptcy proceedings
Forceclosure.	Restraining improper use of same
Forfeiture of shares.	Security for costs.
Injunctions against directors.	Setting aside sales to company
	Trade-marks
	<i>Ultra vires</i> acts.

Rectification of Register of Members.

A COMPANY'S register of members is a public document, which all persons dealing with the company are entitled to inspect, and on which they are invited to rely as showing its share capital paid and unpaid (*supra*, pp. 71, 72). It is therefore of the first importance that the register should correctly represent the actual membership of the company, and should be revised so as to show all changes in such membership as speedily as possible. Sect. 35 of the Companies Act, 1862, which provided a machinery for this purpose, that is, the rectification of a company's register in a summary way, is now replaced by sect. 32 of the Act of 1908. This section runs as follows:

32.—(1) If—

- (a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or
- (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,

the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The application may be made, as respects companies registered in England or Ireland, by motion in the High Court, or by application to a judge of the High Court sitting in chambers, or by application to the judge of the

Power of
Court to
rectify
register

Court exercising the stannaries jurisdiction in the case of companies subject to that jurisdiction, and, as respects companies registered in Scotland, by summary petition to the Court of Session, or in such other manner as the said Courts may respectively direct; and the Court may either refuse the application, or may order rectification of the register, and payment by the company of any damages sustained by any party aggrieved.

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register.

(4) In the case of a company required by this Act to send a list of its members to the registrar of companies, the Court, when making an order for rectification of the register, shall by its order direct notice of the rectification to be given to the registrar.

This summary jurisdiction on motion or summons conferred by sect. 32 is exercisable, it will be seen, in two classes of cases:

1. When the name of a person is without sufficient cause entered in or omitted from the register.
2. Where default is made, or unnecessary delay takes place, in entering on the register the fact of any person having ceased to be a member of the company.

The jurisdiction to rectify in any of the cases mentioned in sect. 32 is exercisable as well after as before winding-up, whether voluntary or otherwise; and where there is a winding-up the power has been held not limited by sect. 98 of the Act of 1862 (now sect. 163 of the Act of 1908) to rectification in order to settle the list of contributories. *Oakes v. Turquand*, L. R. 2 H. L. 325; *Sussex Brick Co.*, (1904) 1 Ch. 598. But after a winding-up order a person whose name is on the register cannot obtain relief on the ground that the contract under which he took the shares was voidable by him, unless he shows that he avoided it before the winding-up commenced, and, if necessary, took legal proceedings to enforce the avoidance. *Oakes v. Turquand*, *supra*.

After a winding-up order the Court, on settling the list of contributories, is, by sect. 163 of 1908, given power to rectify the register, but the liquidator cannot rectify without the special leave of the Court. Sect. 173 of the Act of 1908.

In a voluntary winding-up the liquidator may alter the register on sanctioning transfers of shares made after the commencement of the winding-up. Sects. 131, 133 (7) of 1862; *Taylor, Phillips & Rickard's case*, (1897) 1 Ch. 298. If there is no winding-up pending, the application should be made to one of the ordinary judges of the Chancery Division (if it is made in that Division) and not to the winding-up judge. *British Columbian Exploitation and Gold Estates*, W. N. (1899) 32.

The secretary of a company has no power to strike a name off the register of members. *Wheatcroft's case*, 29 L. T. 326.

The following are some of the cases in which orders have been made:-

1. Where the applicant was induced to take the shares by misrepresentation in the prospectus. *Stewart's case*, 1 Ch. 574; *Smith's case*, 2 Ch. 604. See also *Ex parte Kintrea*, 5 Ch. 95; *London and Staffordshire Co.*, 24 C. D. 149; *Anderson's case*, 17 C. D. 373.
2. Where the company improperly neglected or refused to register a transfer. *Stranton Iron Co.*, 16 Eq. 559. Although winding-up has commenced before the application to rectify is made. *Sussex Brick Co.*, *supra*.
3. Where shares had been issued under a contract to issue fully paid-up shares, and the contract had not been filed pursuant to sect. 25 of the Act of 1867. See *infra*, p. 1394, and Form 718, *infra*.
4. Where shares have been improperly forfeited (see Form 716), or where the register has been improperly altered with a view to asserting the company's lien. *Ystalyfera Gas Co.*, W. N. (1887) 30.
5. Where a transfer in favour of a mortgagee has been registered by mistake (see *Pullbrook v. Richmond Co.*, 9 C. D. 610); or where the company have omitted to register a transfer. *Manchester and Oldham Bank*, 54 L. J. C. 926; see also *Violet Consolidated, &c. Co.*, *supra*.
6. Where the company, acting on a forged transfer, removed a name. *Bahia and San Francisco Railway Co.*, L. R. 3 Q. B. 584.
7. Where there was a dispute between a vendor and purchaser of shares. *Ex parte Shaw*, 2 Q. B. Div. 463.
8. Where the applicant was registered as the holder of shares which had been irregularly allotted to him. *Homer District Gold Mines*, 39 C. D. 546; *Portuguese Consolidated Copper Mines*, 42 C. Div. 160.
9. When the signatory of an underwriting letter not constituting a contract had been placed on the register. *Consort, &c. Co.* (1897) 1 Ch. 575.
10. Where a shareholder who had made an *ultra vires* surrender of his shares to the coy claimed to have his name reinstated. *Bellerby v. Rowland and Marwood's Steamship Co.*, (1902) 2 Ch. 14, C. A.

There was at one time some difference of opinion as to the extent of the jurisdiction conferred by sect. 35. See *Ex parte Sargent* 17 Eq. 273; and *Ex parte Shaw*, *ubi supra*. But the true view apparently is that, although persons are not entitled to an order *et*

debito justitia, the jurisdiction is unlimited, with a discretion in the Court in the circumstances of each case. *Kimberley North Block Diamond Mining Co.*, W. N. (1888) p. 126, C. A.; 59 L. T. 579; *Sussex Brick Co.*, (1904) 1 Ch. 598, C. A. See, too, *Ward and Henry's case*, 2 Ch. 431; *Askew's case*, 9 Ch. 664; *Stewart's case*, 1 Ch. 575.

As between a member and the company, the Court will rarely decline to act under the section. *Ex parte Parker*, 2 Ch. 685; *Ex parte Penney*, 8 Ch. 446; *Stranton Iron Co.*, 16 Eq. 559. But the Court under the repealed section had to be satisfied of the justice of the case. "The Court may . . . if satisfied of the justice of the case, make an order." See the observations of Lord Macnaghten in *Trevor v. Whitworth*, 12 App. Cas. 409, 440, and of Vaughan Williams, L. J., in *Sussex Brick Co.*, *supra*.

With reference to this discretion, the following passage from the judgment of Kekewich, J., is in point:

"The power of rectifying the register given by the 35th section of the Act of 1862 is discretionary in this sense, that the Court properly can only exercise it if satisfied of the justice of the case; and on many applications the Court has declined to exercise this power on the ground that it would not be fair to do so, or, to put it more technically, that the applicant has not established any equity to disturb the existing state of things. And in considering this, the Court has always had regard to the lapse of time and to any facts and circumstances indicating acquiescence in the existing state of things by those on whose behalf the application is made to disturb it. The applications have been generally made by official liquidators seeking to establish liability for calls, but obviously the like considerations must apply to applications by those who seek to be restored to the privilege of shareholders." *Bellerby v. Rowland and Marwood's Steamship Co.*, (1901) 2 Ch. 265, 273.

The words "if satisfied of the justice of the case" do not appear in sect. 32 of the new Act, but the Court still has a discretion by virtue of the word "may."

Whether in any particular case it is desirable to apply under this section, or to bring an action, must depend on the circumstances. In a simple case, where an immediate rectification is essential, it may be desirable to apply under the section; but if the case is at all complicated (*e.g.*, where the applicant seeks to enforce rescission of his contract to take shares on the ground of misrepresentation and witnesses may have to be examined, and a little delay will not much matter), an action should be brought. *Re Kimberley North Block Diamond Co.*, 59 L. T. 579; *Ruby Consolidated Mining Co.*, 43 L. J. Ch. 633. Under the present practice, a question can be tried in a much more satisfactory manner in an action than upon a motion or summons. In any case, it is not the practice in the Chancery Division to take such applications on ordinary motion days; they are commonly placed in the list of non-witness actions: see Form 717.

An application under sect. 32 should be intitled "In the Matter

of the Act of 1908 and of the company." It should be made by motion (*Duffin v. Merriam, &c. Co.*, W. N. (1890) 116) or originating summons.

If the application is made in the Chancery Division, the judge should be balloted for. *Re Dowson*, W. N. (1889) 222. And see *Legal and General Investment Co.*, W. N. (1901) 72.

The register should be rectified, in the case of a removal, by striking through the name with pen and ink (not scratching it out with a penknife), and adding, "By order of the High Court of Justice, dated, &c., this name has been erased," the abstract to be signed by the secretary. *Iron Shipbuilding Co.*, 34 Beav. 597.

Upon an examination of witnesses before an examiner for the purposes of a motion under the above section, the applicant's witnesses are first to be cross-examined. *Doré Gallery*, W. N. (1890) p. 62.

Whether the company is being wound up or not, the Court may fix a particular date— even a past date —as from which the alteration is to become operative—*nunc pro tunc*—subject to any conditions necessary to protect the rights of third persons. *Sussex Brick Co.*, (1904) 1 Ch. 598.

The order to rectify does not invalidate notices to registered members of a meeting to pass resolutions for voluntary winding-up. *Ibid.*

As to drawing up the order where an undertaking to stamp unstamped documents has not been complied with, see *Coolgardie Goldfields*, (1900) 1 Ch. 475.

The effect of an order for rectification, by striking out a name, is the same as if the name had never been put on. *Pulbrook v. Richmond Mining Co.*, 9 Ch. D. 615.

Damages can only be given where the Court rectifies the register, not where the applicant claims damages under the estoppel doctrine, in *Bahia Rail. Co.*, L. R. 3 Q. B. 584; *Ottos Kopje Diamond Mines*, 41 W. R. 258.

PRECEDENTS.

Form 713.Usual order
to rectify

Upon motion, &c. for L., &c., This Court doth order that the register of shareholders of the coy be rectified by striking out the name of the sd L. as a shareholder of the coy; and order that the coy do pay to the sd L. his costs of this applicon, to be taxed by the taxing master; and order that notice of this order be given to the Registrar of [Joint Stock] Cos by serving a copy of this order upon the sd Registrar, or leaving the same with a clerk at the office of the sd Registrar, and at the same time producing this order duly passed and entered. *Bryn Alyn, &c. Co.*, M. R., 25 Jan. 1878 A. 186

It has been usual to frame an order to rectify in general terms as above without saying who is to rectify; but in *L. L. Syndicate, Limited*, W. N. (1901) 164, Kekewich, J. (the company's officials having resigned), ordered the company to rectify the register, and on its default made an order (under R. S. C. Ord. XLII. r. 30) empowering the applicant to rectify.

The following is an example of a notice of motion:

Form 714.Notice of
motion to
rectify
register

In the High Court of Justice,
Chancery Division.

Mr. Justice —.

In the Matter of the Companies (Consolidation) Act, 1908, s. 32,
and

In the Matter of the — Company, Limited.

Take notice that this Honourable Court will be moved before his Lordship Mr. Justice —, on — day next, the — day of —, 19—, at the sitting of the Court, or so soon thereafter as counsel can be heard, by counsel on behalf of N. of —, that the register of members of the above-named company may be rectified by removing the name of the applicant therefrom as the holder of 2,000 shares therein [on the ground of misrepresentations in and suppression of material facts from the prospectus of the said company], and that the said company may be ordered to repay to the applicant the sum of 700/., the amount paid by him in respect of the said shares, with interest thereon at 5 per cent. per annum from the date of payment, and also the costs of and occasioned by this application, or that such other order may be made as to the Court may seem just.

Dated this — day of —.

Yours, &c.,

To the — Company,)
Limited.)

Solicitors for the Applicant.

This notice must be actually served on the company, in accordance with sect. 116 of the Act of 1908: *supra*, p. 1340. Notice on the company's solicitors, where the company does not appear, is not sufficient. *Denver United Breweries*, W. N. (1890) 143; 63 L. T. 96.

For order to rectify register; notice to be given to Registrar; company to pay costs of application; inquiry to be made what damages the applicant has incurred by reason of his name having been put upon such register beyond the costs before directed to be taxed; company to pay to applicant what shall be certified to be due in respect of such damages, see *New Quebrada Co., Pontifer's case*, 15 W. R. 955; *Pemberton*, 659.

Whenever any order has been made rectifying the register, in the case of a company hereby required to send a list of its members to the Registrar, the Court shall, by its order, direct that notice of such rectification be given to the Registrar. Companies Act, 1908, s. 32 (4).

Interest on any sums that have been paid in respect of the shares will be allowed at 4 per cent. per annum. *Metropolitan Coal Consumers' Co., Wainwright's case*, W. N. (1890) p. 3.

Upon motion on 15th Nov., 1899, made unto this Court by counsel, and upon hearing counsel for the L. & N. Bank, Limtd. and upon reading the affidavit of, &c., and upon hearing the evidence of the several persons named in the schedule hto on their examination taken orally before this Court, and upon the production of the several exhibits produced to such persons set out in the second column of such schedule opposite to the names of such persons resply, this Ct did order that the sd motion should stand for judgment, and the same standing in the paper for judgment this -- day of -- accordingly, this Ct doth order that the register of members of the L. & N. Bank, Limtd. be rectified by removing the name of the sd J. therefrom as the holder of --- shares therein, and it is ordered that the L. & N. Bank, Limtd. do repay to the applicant £---, the amount pd by him in respect of the sd shares, with interest thon at 4 p.c.p.a. from the --- day of --- until payment, and also do pay to the sd J. his costs of and ocasioned by this action, such costs to be taxed by the taxing master, and that notice of this order be given to the Registrar of [Companies] by serving an office copy of this order upon the sd Registrar, or leaving the same with a clerk at the office of the sd Registrar, and at the same time producing the duplicate copy of this order duly passed and entered. Schedule. Names of witnesses: exhibits. *The London & Northern Bank, Limtd*, Cozens-Hardy, J., 17 Nov., 1899, B. 3850.

Form 714.**Form 715**

Order rectifying register of members.

Upon the applicon of R., H., E., and S., shareholders of coy, which, &c. [adjournment into M]. and upon hearing, &c., and reading, &c., let the register of members of sd coy be rectified by inserting the names of the applicants as shareholders in the sd coy for the number of shares, and with the several amounts pd up thon, specified in the schedule hto, such shares having been wrongfully dealt with

Form 716

Rectification where invalid forfeiture.

Form 716. by the sd coy as having been forfeited; and let coy pay to the applicants the costs of this applicon and consequent thon, to be taxed, &c.; and let notice of this order be given to the Registrar of Joint Stock Cos [Registrar of Cos].

THE SCHEDULE ABOVE REFERRED TO.

1. R., as the holder of twenty shares, eight of which are fully pd up, and the remaining twelve of which, numbered — to — inclusive, are pd up to the extent of 17s. 6d. per share.
2. H., as the holder of five shares, numbered, &c., pd up to the extent of 1s. 6d. per share.
3. E., as, &c.
4. S., as, &c.

Hexham Mining Co., Hall. V.-C., 4th March, 1876. A. 624.

Form 717. Upon motion this day made unto this Ct by counsel for W., of — , that the register of members of the above-named coy might be rectified, &c., and upon reading an afft, &c., order that the sd motion be placed in the list of non-witness actions for hearing, and order that it be referred to one of the examiners of the Ct to take the cross-examination of witnesses who have made or shall make affts in this matter. And the sd W. is to be at liberty to file another afft in reply, and the sd coy, if advised, is to be at liberty to file another afft in answer. North, J., 29th May, 1891, *American, &c. Co.*, A. 806.

Form 718. Upon motion, &c., for A., B., and C., declare that the names of the sd A., B., and C. were improperly entered on the register of members of the sd coy in respect of 3,300 shares in the coy, Nos. 1 to 3,300, before any sufficient agreemt in respect of such shares was filed with the Registrar of Joint Stock Cos, pursuant to sect. 25 of the Cos Act, 1867. And let, &c.

Where contract not filed under sect. 25 of Act of 1867.

And it is ordered that the register be rectified by striking out such names as holders of the following shares in the coy, that is to say, the sd A., in respect of 2,800 shares, Nos. 1 to 2,800, &c.

And order that after the agreemt of the 27th April, 1888 (being the sd exhibit marked D., adopting agreemts under which the sd shares were agreed to be issued), has been filed with the Registrar of [Joint Stock] Cos, the sd coy do allot or issue to the sd A., B., and C. resply, fully pd up shares of the same nominal value and number as they now resply hold as afsd in exchange for the certificates of the like shares now held by them. *Hadfields Steel Co., Chitty, J., 3rd June, 1892, A. 880.*

When paid-up shares had been agreed to be issued for a consideration other than cash, and by mistake the agreement had not been filed in accordance with

the now repealed sect. 25 of 1867, the Court in some cases rectified the register to the intent that the agreement might be filed, and the shares re-issued. See further, *infra*, pp. 1420, 1421.

Form 718.

Although the above and the following forms actually order the agreement to be filed, it would seem that there is not in fact any jurisdiction to make such an order except by consent. The jurisdiction is merely to rectify the register, and give damages. *Maynards, Limited*, (1898) 1 Ch. 515. Since the decision in *Trevor v. Whitworth*, 12 App. Cas. 409, it seems doubtful how far any relief ought to be granted in such cases; and, at any rate, if there has been any considerable lapse of time, it will be proper to provide for the payment of creditors, who may possibly have given credit to the company on the faith of the shares in question having been issued on the footing that they shall be paid up in cash. See *Darlington Forge Co.*, 34 C. D. 522; *Broad Street Bldg. Co.*, W. N. (1887) 149; *Nottingham Brewery Co.*, 4 T. L. R. 429. In the case last mentioned, North, J., made the order on the terms that, before it was passed, evidence should be produced that all creditors for 300*l.* or upwards had been paid.

And where notice of motion was served and, before the hearing, a winding-up order was made on a petition presented after service of this notice, Vaughan Williams, J., only made the order to rectify on the terms that due provision should be made for all debts incurred between the dates of the issue of shares and the notice of motion. *Preservation Syndicate*, (1895) 2 Ch. 768.

Upon motion, &c., for M., of —, and W., the tree in liquidation of M., &c. [rectifying register by cancelling M.'s name]. And let an agreement be forthwith drawn up and executed, embodying the agreement in relation to the purchase of the business of sd M. contained in the original resolutions dated 31st October, 1872, in accordance with which the sd coy was formed; and let the agreement when so executed be forthwith filed with the Registrar of [Joint Stock] Cos; and let new [*sic*] shares of the sd coy be then forthwith issued in the name of the sd M. by the sd coy in pursuance of the sd agreement, and delivered [*sic*] to the sd W. Give notice to Registrar. No order as to costs. *Union Manufacturing Co.*, Jessel, J. R., 19th June, 1878, B. 1289. See also *South African Saltpetre*, North, J., 24th July, 1897.

Form 719.

Another.

This action coming on for trial on the 5th, 6th, 7th, and 9th days of —, 1900, and this day before this Ct, in the presence of counsel for the plt and for the dfts, and upon hearing the writ issued on the — day of —, and the pleadings delivered in this action read, and the evidence of the several persons named in the schedule hto on their examination taken orally before this Ct, and upon production to such persons of the several exhibits set opposite their respective names in the second column of such schedule, and hearing what was alleged by counsel for the plt and for the dfts, this Ct doth order and adjudge that the contract for the purchase by the plt of — shares in the dft coy in the pleadings mentd be rescinded; And order that the register of members of the dft coy be rectified by removing therefrom the name of the plt as the holder of — shares of 1*l.*

Form 720.

Order rescinding contract to purchase shares from company.

Form 720.

each therein. And order that the dfts, The Globe, &c. and T., do forthwith pay to the plt £---, being the sum of £---, together with interest thereon at the rate of 4 p.c.p.a. from the date of payment of the applicon money and allotment resply for the sd shares. And order that the dfts, The Globe, &c. and T., do pay to the plt F. his costs in this action, to be taxed by the taxing master. And it is ordered that notice of this judgment be given to the Registrar of [Joint Stock] Cos by serving an office copy of this judgment upon the sd Registrar or by leaving the same with the clerk at the office of the sd Registrar. Schedule. *Foster v. The Globe Venture Syndicate, Limtd. and T. Farwell, J.*, 10th April, 1900. A. 1900, folio 1406.

Form 721.**Another.**

This action coming on for trial on the 23rd, 24th, 25th, and 26th February, 1891, and this day before this Ct in the presence of counsel for the plt and for the dfts, and upon hearing the pleadings in this action read and four leases, dated 31st December, 1888, and assignments thof resply, dated 30th November, 1889, to the dfts, produced by L. on his subpoena, and the evidence of the several persons named, &c. [*as in preceding Form*]:

Declare that the plt is entld to have the contract entered into by him to take 400 shares in the dfts' capital in the pleadings mentd set aside in respect of the misrepresentations contained in the prospectus of the sd coy, and doth order and adjudge the same accordingly [and rectify register] and order dfts to pay to the plt the sum of 150*l.* (being the total of 7*s.* 6*d.* per share pd on the sd shares), together with interest thereon at the rate of 5*l.* p.c.p.a. by plt's consent from the 13th November, 1889 (the date of the writ which was subsequent to the date when such amount was pd), until payment. Tax plt's costs of this action, and also tax the dfts their costs of the orders dated resply 26th February, 1890, and 6th November, 1890, and the taxing master is to set off or deduct the dfts' sd costs and also the sum of 1*l.* being the costs of the plt's summons dated 13th January, 1890, which were to be the dfts' costs in any event, from the amount of the plt's taxed costs, and certify the balance due to the sd plt.

And order the dfts to pay to the sd plt the balance certified by the taxing master to be due to him as afsd. *Itomer, J., Cronbach v. Uranium Mines, Limtd.* 27th February, 1891. A. 329.

Form 722.**Test action order.**

Upon the applicon of the plts in all three actions, and upon hearing the solors for the applicants and for the dfts in all three actions, and upon reading the writ of summons in the third-mentd action and the order dated, &c., made in the first two actions, and the plts and dfts by their solors consenting to this order, and E., the plt in the

third action of, &c., by his solors undertaking that the first and second above actions of, &c., shall be treated as test actions, and shall decide his rights in his sd action unless the judge at or after the trial should for any reason personal to the plt in the sd two test actions otherwise order, and the sd plt E. by his solors also undertaking to be responsible for any costs that may be awarded to the dfts therein or in the sd test actions, and the dfts in all the above-mentd actions by their solors undertaking to abide by the finding (if any) of the Ct in either of the sd test actions on the issues of misrepresentation. It is by consent ordered that the time for delivering a statement of claim or taking any other proceeding in the third above-named action of, &c., be enlarged until fourteen days after judgment shall have been given in the sd test actions or until further order, and order that if at any time it shall appear to the judge that for any reason the sd test actions cannot properly be treated as test actions the dfts or the sd plt E. be at liberty to apply for an order that the sd action of *E. v. Passburg, &c.*, shall be proceeded with for that purpose, and order that the costs of this applicon be costs in the sd test actions. *Potter v. Passburg Grains Syndicate*, North, J., 19 January, 1891; and for order substituting another test action, see order of Romer, J., for North, J., in same action and in other actions, 10 Aug., 1891.

Form 722.

See *Amos v. Chadwick*, 4 C. D. 869; *Beckett v. Lord Burg*, 5 C. P. D. 339; Dan. Ch. Pr. 7th ed. 1610; Seton, 6th ed. 833.

Setting aside Sales to Company.

Declare that the sale to the plt coy of the concession of 8 May, 1869, in the pleadings mentd, was fraudulent, and ought to be set aside, and order and decree the same accordingly. Declare that H. and the estates in liquidation and sequestration of the dfts B. and P. L. & Son, as a coy, and C. L., &c., the only partners of the sd coy, as individuals in the pleadings mentd, are jointly and severally liable to make good to the plt coy the sum of 65,000*l.*, so pd for the purchase of the sd concession, together with interest thereon at the rate of 4 p.c.p.a. from 31 May, 1871, and the costs of this suit. Declare that the dfts E. and K. are jointly and severally liable to make good to the plt coy the sd purchase-money to the extent of 15,000*l.*, improperly pd to the sd dfts as in the pleadings mentd, together with interest on the sd sum of 15,000*l.* at rate afsd from 31 May, 1871, and the costs of this suit. And dft H. not electing to take an account of the profits (if any) made by the plt coy from the working of the Island of A. V. since 31 May, 1871; let dft H., on or before 1 June, 1876, pay to the plt coy 65,000*l.*, together with interest at 4 p.c.p.a. from 31 May, 1871, to the time of payment. Liberty for coy to prove against estates of the dft B. under the

Form 723.

Judgment
setting aside
sale of con-
cession and
ordering
repayment.

Form 723. liquidation proceedings initiated by him, and also under the sequestrated estates of P. L. & Son as a coy, and C. L. & Co., as individuals for the sd 65,000*l.* and interest at 4 p.c.p.a. from 31 May, 1871, up to the dates of the liquidation and sequestration resp'y, and for the costs of this suit. And let dfts E. and K., on or before 1 June, 1876, pay to the plt coy sd sum of 15,000*l.*, with interest, &c., to the day of payment. Declare that the persons paying the sd 65,000*l.* and interest, and plt's costs of suit, as afsd, shall be ent'd to the benefit of the letters patent granted, &c., and of the document or concession, &c. And plt coy shall at the expense of such persons paying as afsd, deal with sd letters patent and concession as sd person shall reasonably require, or, in case of difference, as the Ct shall direct. And declare that any sum which shall be pd to the plt coy by the dfts E. and K., or either of them, on account of the 15,000*l.* and interest, shall be t'n in satisfaction *pro tanto* of the 65,000*l.* and interest payable by the dft H., and provable, &c., and that any sum or sums over and above 50,000*l.*, with interest, &c., which shall be pd to plt coy by dft H., and the estates of, &c., shall be taken in satisfaction *pro tanto* of the 15,000*l.* and interest. Dfts to pay costs of suit. Dismiss bill as against L. without costs. And plt coy having arranged to pay the dft R. 150*l.* for the costs of suit, dismiss bill as against him. Liberty to apply. *Phosphate Sewage Co. v. Hartmont, Malins, V.-C., 22 Mar., 1876, B. 481.*

In the above case, the promoters had formed the company, and sold it to a concession which they knew to be already forfeited; the real ownership was concealed; the persons who agreed to buy on the company's behalf received a secret bonus of 15,000*l.*; the directors were nominees of the promoters, and the prospectus contained serious misrepresentations. Upon discovery of the facts, a bill was filed by the company against the promoters, including the owners of the concession, the members of a provisional committee, the solicitors, secretary, and others, and a decree was made as above and was affirmed on appeal. See report in 5 C. Div. 394.

In another leading case, *New Sombbrero Phosphate Co. v. Erlanger* (5 C. Div. 73; 3 App. Cas. 1218), the promoters sold a property to the company without disclosing the fact that they were getting double what they had paid, and without disclosing the real ownership; the directors were nominees of the promoters, and the prospectus contained misrepresentations. Upon discovering the facts, a bill was filed, and, on appeal, a decree was made as below mentioned. An appeal to the House of Lords was dismissed with costs.

The decree of the Court of Appeal declared that the contract ought to be set aside, and decreed the same; declared that the defendants were liable to repay the purchase-money, and were liable for the shares issued in part payment; ordered them to pay the purchase-money, with interest; gave liberty to prove for amount against estates of bankrupt defendants; directed inquiries as to which of the shares still belonged to defendants, and of proceeds of sale of those sold; directed a transfer of the former, and payment of such proceeds; gave liberty to prove against estates of bankrupt defendants for such proceeds; declared that company entitled to be paid the purchase-money and said proceeds out of estate of deceased defendant; declared defendants and estates of bankrupt and deceased liable for costs of suit, and directed payment, &c.; directed

accounts of profits, if any, made by company in working the island; ordered company, upon payment of the purchase-money, &c., to deliver up island, and pay over such profits, if any; directed inquiries as to estate of deceased defendant; adjourned further consideration; dismissed bill, with costs, as against D. & W. Seton, 6th ed. p. 2328, where the decree will be found more fully set out.

The case was explained and distinguished in *Solomon v. Solomon & Co.*, (1897) A. C. 22, the case of a private company. See *supra*, pp. 940-945.

Form 723.

This action coming on for trial against the dfts W. M. and M. on the 25th and 26th April, 1882, &c., and counsel for the plts this day also moving for judgment on the default of the dfts S. and G. in delivering a defence, and upon hearing the pleadings, &c., order that the contract dated 2nd April, 1879, in the pleadings mentd, be set aside, and declare that all shares received by any of the dfts, other than the dft S. as part of the consen for the sale agreed upon by the sd contract which have not been sold, but have been retained by them or any of them, or by any persons in trust for them or any of them, ought to be surrendered to the coy, and order and adjudge the same accordingly. And declare that the dfts, other than the dft S., are jointly and severally liable to pay the plt coy the amount of the purchase-money pd by them under the contract, together with interest at the rate of 4 p.c.p.a. from the date of the respive payments, and also to pay to the plts the nominal value of all shares which were allotted to the sd dfts or any of them under the sd contract, and which they have sold, together with interest thereon at 4 p.c.p.a. from the dates when such shares were sold. And let an account be taken of what is due from the dfts, other than the dft S., to the plts, having regard to the afsd declarations. And order the dfts W. M., G. and M., within one month after the date of the chief clerk's certificate, to pay to the plt coy what shall be certified to be due to them on such account. And order them to pay to the plt coy their costs of this action, to be taxed. And declare that the plt coy are entld to a lien on all the interest of the dfts in the ppty comprised in such contract for the ppal moneys and interest payable under this judgment and order, and for the costs of this action. Liberty to plts to apply to enforce such lien as they may be advised. *Plympton Mining Co. v. Wilkins and others*, Kay, J., 27 April, 1882, B. 942.

Form 724.

Contract for sale of mine set aside.

In the above case a mine had been purchased from the liquidator of a company for 1,000*l.*, and resold shortly afterwards to a new company, promoted by the purchasers, for 4,500*l.*, payable part in cash and part in shares. Due disclosure was not made, and the directors were not independent. Kay, J., was of opinion that the defendants, except S., the nominal purchaser, against whom no relief was claimed, were promoters and partners in carrying out an inequitable, and therefore fraudulent, scheme; that the directors, who were mere nominees of the defendants, had no opportunity of forming a separate judgment

Form 724.

as to the propriety of carrying out the contract entered into by the defendants; that the defendants, as promoters, stood in a fiduciary position to the company; that the increased price was exorbitant; that the plaintiff company was not disentitled on the ground of delay, because the knowledge of the transaction complained of was improperly kept back; and accordingly judgment as above was entered. See *W. N.* (1882) 66.

As to lien where contract rescinded, see *Abramson Ironworks v. Wickens*, 1 Ch. 101; *Mycock v. Bratton*, 13 C. D. 345; *Adams v. Newbigging*, 13 App. Cas. 308.

For orders in *Baynall v. Carlton*, see 6 C. D. 371, and 4th edit. of this work, pp. 531, 532; Reg. Lib. (25th April, 1877) A. 869, and (8th August, 1877) A. 2742; also *Emma Co. v. Grant*, 11 C. D. 941; 17 C. D. 122; A. 921 (26th February, 1879); and *Grant v. Gold Explorers, &c. Syndicate*, (1900) 1 Q. B. 233, deciding that a purchaser is entitled to rescind where the vendor bribes his the purchaser's agent, and *Harrington v. Victoria Dock Co.*, 3 Q. B. D. 519.

Form 725.

Setting aside contract for sale and conveyance where liquidator sold to company in which he was largely interested.

This action coming on for trial on the, &c., &c., this Ct doth declare that the contract dated, &c., in the pleadings mentd ought to be set aside and cancelled, and doth order and direct that the same be set aside and cancelled accordingly, and doth declare that the conveyance dated, &c., and all other assurances, if any, executed in pursuance of the sd contract ought also to be set aside and cancelled; relief as to other ppty acquired in right of preceding ppty, and by virtue of ownership thof; directions that dfts at their own expense resply assure and procure assurances of the properties to the plt coy freed from incumbrances, and to deliver possession; injunction to restrain dfts from dealing with the ppty except as afsd; accounts directed of sums received by plt coy from dfts under the contract and interest thon, and of profits made by dfts, and as to sums expended by dfts in permanent improvements, &c., with interest, and various directions as to working out the accounts, and liberty for coy to set off against any money due from them to the dfts any moneys which plts may be called on to pay at l may pay in respect of incumbrances created, &c.; declaration as to marshalling as against dft bank; costs to be taxed and pd by dfts). *Silkstone and Haigh Moor Coal Co., Limtd v. Edey, The Silkstone and, &c. Railways, Limtd, and a Bank*, Stirling, J., 8 Nov., 1899. A. 1343.

As to the above case, see report of application to vary minutes in (1900) 1 Ch. 167. It was a case in which the liquidators of a company had sold the undertaking of the company to a new company, in which Edey, one of the liquidators, was largely interested. It is well settled that a trustee cannot sell to himself or be interested in the purchase. *Parker v. McKenna*, 10 Ch. 118; *Tate v. Williamson*, 2 Ch. 55; *Bray v. Ford*, (1896) A. C. 50; *Boston Co. v. Ansell*, 39 Ch. D. 339; *Mayor of Salford v. Lever*, (1891) 1 Q. B. 188; *Panama and South Pacific Co. v. India Rubber Co.*, 10 Ch. 515; *Delven v. Gray*, (1902) 2 Ch. 606; Seton, 2333.

Presents, &c. to Directors.

Minute of judgment: This Ct doth order and adjudge that the dft G. do, within one calendar month after service of this order, pay to the plts, the Nant-y-Glo, &c. Coy, the sum of 1,000*l.*, being 80*l.* per share on each of the fifty shares so transferred to him as in the pleadings mentd, together with interest thereon at the rate of 4 p.c.p.a. from 8 Sept., 1871, the date of such transfer. Dft G. to pay the costs of the action. *Nant-y-Glo and Blaena Ironworks Co. v. Grave*, Bacon, V.-C., 19 March, 1878; Reg. Lib. 1878, B. 573. See Report, 12 C. D. 738.

Form 726

Director
ordered to
pay value of
shares.

In this case the defendant G. became a director at the request of the promoters, and he accepted from them a present of fifty fully paid-up shares of 100*l.* each. It was admitted that at the time they were transferred to him, or shortly afterwards, they were worth 80*l.* per share. They subsequently fell to 1*l.* per share. The company claimed a declaration that G. was a trustee for the company of the shares, or of the value thereof, at the election of the company, and judgment was given as above. See also the somewhat similar case of *Drum Slate Quarry Co., McLean's case*, 55 L. J. Ch. 36, in which McLean, who had during the whole of its existence been a director of the Drum Slate Quarry Company, which was then in liquidation, and had received from the promoters a present of 1,000*l.* to buy shares, was, on the application of the liquidator under sect. 165 of the Companies Act of 1862 (now sect. 215, Companies Act, 1908), ordered to account for the shares at the value at which they were when he received the present, with interest at 5 per cent.

In the case of *Fitzroy Bessemer Steel &c. Co.*, 50 L. T. 144, before Kay, J., where no dividends had ever been received, a promoter and director who obtained shares improperly, though ordered to account for the value of the shares, was not, under the circumstances, ordered to pay interest.

See also orders in Part II., Chapter XLIV., against directors under sect. 165 of the Companies Act of 1862, and the substituted sect. 10 of the Companies (Winding-up) Act, 1890, now itself replaced by sect. 215 of the Companies Act, 1908, and *supra*, p. 733.

As to an application by liquidator that the Court would direct a prosecution of a director under sect. 167 of the Companies Act, 1862, and order the costs to be paid out of the assets, see *Charles Denham & Co.*, 32 W. R. 920; 53 L. J. Ch. 113; 51 L. T. 570; *Re Euphras Fuel and Gas Co.*, W. N. (1875) 10; *Northern Counties Bank*, 31 W. R. 546; and *London and Globe Finance Co.*, (1903) 1 Ch. 728. In the last case, Buckley, J., considered very carefully on what principles the power to order a prosecution was to be exercised, and the test he finally adopted was what would a good citizen feel to be his duty in such a case—if to prosecute, then a prosecution ought to be directed by the Court, even against the wishes of the person entitled to the assets. And see Part II., Chapter XLV., as to prosecutions.

This action and counterclaim coming on, &c., this Ct doth order and adjudge that the dft M. do, within seven days after service of this judgment, pay to the plts, the Consolidated, &c., Limtd, the sum of £— to his hands as a director of the plt coy, and the plts to recover against the dft their costs of this action and of such counterclaim to be

Form 727.

Order for
directors to
pay over
moneys to
company.

Form 727. taxed, and plts to be given liberty to apply generally. *The Consolidated and Finance Co., Limtd v. Albert Martyn*, Buckley, J., 27 Jan., 1900, A. 715.

Directors' Breaches of Trust.

Form 728. Declare that the applicon of the sums in the bills mentd, namely, &c., amounting to £—, in the purchase of shares in the sd coy constituted a breach of trust and misapplication of the moneys of the sd coy, and that the dfts, Lord F. [and others], are jointly and severally liable to make good and repay to the sd coy such sums of £— and £—, and that the dft Finch is separately and also jointly with the other dfts liable to make good and repay to the sd coy the sd sum of £—, and that dft Finch is also separately liable to make good and repay sd sum of £— to sd coy. And order that sd Lord F., &c., do, on or before 30th June next, pay sd several sums for which they are resply jointly and severally liable as afd, and interest thereon at the rate of 4 p.c.p.a. from the date of this decree up to the time of payment to the sd coy accordingly. Dfts to pay plt's costs of suit. *Land Credit Co. v. Lord Fermoy*, Romilly, M. R., 24 Mar., 1869, B. 1232. See the report 8 Eq. 7; 5 Ch. 763. The decree was varied as to one of the directors on appeal.

Directors
ordered to
make good
breach of
trust.

Directors are responsible for loss resulting from an improper application of the assets of the company. See *supra*, pp. 712, 715. But they are not liable, if acting within the limits of their authority, and in good faith, for loss resulting from an error of judgment. *Tarquand v. Marshall*, 4 Ch. 376; *Overend, Gurney & Co. v. Gibb*, L. R. 5 H. L. 480.

It is a breach of trust for directors to accept their qualification shares from the promoter on the terms of holding such shares in trust for him, and executing blank transfers to him so as to enable the promoter to disqualify the directors at any moment if he chooses. *London and South Western Canal Co.*, (1911) 1 Ch. 341.

And the Court has now power under sect. 279 of the Companies (Consolidation) Act, 1908, to relieve a director from liability in cases where "he has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust." As to the meaning of these words, see *National Trustee Co. v. Australasia v. General Finance Co.*, (1905) A. C. 373; *Smith v. Thompson*, L. J. Ch. 411; *Re Turner, Barker v. Ivimey*, (1897) 1 Ch. 536; *Re Second East Dulwich 745th Starr Bowkett Bldg. Society*, 68 L. J. Ch. 196; *Re Grindey, Clews v. Grindey*, (1898) 2 Ch. 593; *Perrin v. Bellamy*, (1899) 1 Ch. 797; and *Lord de Clifford*, (1900) 2 Ch. 707.

As to the liability of directors *inter se* in respect of breach of trust, and their rights in regard to contribution, see Form 729, *infra*, and Part II., Chap. XLIV.

As to how far directors are trustees, see *Wilson v. Lord Bury*, 5 Q. B. Div. 519; *British Seamless Co.*, 17 C. Div. 471; *Russell v. Wakefield Waterworks Co.*, 20 Eq. 473; *Lands Allotment Co.*, (1894) 1 Ch. 655; and cases, *supra*, p. 711.

Dismiss the bill as against the dft. (G., without costs. Declare that the directors of the plt coy had no power or authority to take or accept the 3,000 and the 500 shares in Barned's Banking Coy in the pleadings mentd on behalf of the plt coy, or to give to the dfts. W., H., M., H., H., and W., and the late dft, W., or any of them, such or any of such letters of guarantee or indemnity in respect of the afsd shares, or any of them, as are in the pleadings mentd.

Form 729.

Another.

Declare that the plt coy is not under any liability upon the afsd letters of guarantee or indemnity, or by reason of the undertakings contained therein respdy. Declare that the appropriation and payment out of the funds of the plt coy of the three several sums of 10,000*l.*, 5,000*l.*, and 15,000*l.* (specifying the dates), in respect of the afsd shares, was a breach of trust; and that the dfts, B., H., &c., and the late dfts, D. (the younger), and White, and R. (now a bankrupt), became jointly and severally liable to make good such breach of trust by refunding to the plt coy the total amount of the afsd principal moneys respdy, with interest thon respdy at the rate of 4 p.c.p.a. Declare that the dfts B., &c., and the several estates of the deceased dfts, D. (the younger), and White, and the estate in bankruptcy of R., are jointly and severally liable to refund to the plt coy the sd amount of principal and interest, and the costs of the suit; but as to the estates of the deceased dfts, Dent (the younger) and White, only in a just course of administration; and as to the estate of the bankrupt R., only by way of proof under his bankruptcy. Order on dfts, B., &c., for payment of £--- (being the computed amount of principal and interest, less the sum of 875*l.*, being the amount which, by the pleadings, appears to have been carried in the books of the coy on the 27th Feb. and 1st March, 1866, to the credit of interest on the creditor investment account, as having arisen from dividends on the afsd shares) to the off liqr within fourteen days after service of the decree, and of the sd sum of 875*l.* into Court to the credit of the cause "The Share Account." Liberty to apply as to such fund. Dfts, B., &c., to pay plts' costs. Leave to plts to apply in the administrations and bankruptcy. Liberty to apply. *Joint Stock Discount Co. v. Brown, James, V.-C.*, 5 July, 1869, 8 Eq. 376.

For order in action for contribution between directors who had committed a breach of trust, see *Ashurst v. Mason*, 20 Eq. 225; Seton, 6th ed. 2138; *Ramskill v. Edwards*, 31 C. D. 100; *Jackson v. Dickinson*, (1903) 1 Ch. 947; *Re Englefield Colliery Co.*, 8 Ch. D. 388; *Re Anglo-French Society*, 21 Ch. D. 501. See also R. S. C. Ord. XVI. r. 5, and An. Pr. Notes to the Order, and sect. 84 (4) of the Companies (Consolidation) Act, 1908.

This action coming on for trial before this Court, &c., this Court doth adjudge and declare that the dfts, W. C. L. and W. R., are liable to pay to the plts the sum of £--- in the amended statement of claim mentd. and it is ordered that the following inquiry be made:—An

Form 730.

Order against promoters to refund illegal profit.

Form 730. inquiry what is the amount of the profits received by each of them the dfts, S. W. and M. H., as promoters of the plt coy, and this Court doth declare that the sd dfts, S. W. and M. H., are severally liable to pay to the plts what shall be certified to be the amount of such profits; and the plts are to be at liberty to apply as to their costs of this action as against the dfts, S. W. and M. H., after the master shall have made his certificate and the result of such inquiry and taxation of costs and [provision for payment]; and it is ordered that upon the dfts, W. C. L. and W. R., giving security to the satisfaction of the master for the sd sum of £—— no proceedings be taken to enforce this judgment as to the sd sum pending the appeal, the sd dfts undertaking to appeal from so much of this judgment as makes them liable in respect of the sd sum. *The Claremont Cycle Manufacturing Coy Limtd v. Lloyd and others*, Stirling, J., 15 Nov., 1900, A. 4135.

As to the liabilities of promoters, see further, *supra*, p. 121 *et seq.*

Forfeiture of Shares.

Form 731.

Restraining
threatened
forfeitures.

Upon motion for plt and upon hearing counsel for the dfts, and upon reading, &c. And the plt by his counsel undertaking to abide by any order this Ct may think fit to make as to damages in case this Ct shall hereafter be of opinion that the dfts shall have sustained any, by reason of this order, which the plt ought to pay. Order that the dfts, the Yuruari Coy, Limtd, H. W., H. N., and H. S., and their agents, be restrained until judgment in this action, or further order, from taking proceedings as against the plt under the notice of 5th February, 1891, to enforce the call of 6d. per share, of which the dfts required payment on the 5th March, 1891, and from forfeiting the plt's 4,600 shares for non-payment of such call until due notice has been given of such call, and until such notices shall have expired, and from acting as against the plt in any way upon the notices, bearing date the 5th day of February, 1891, and the 6th day of March, 1891, signed respectively by order of the board: —, secretary. *Brunker v. Yuruari Co. and others*, North, J., 13 March, 1891, A. 430.

A purchaser of forfeited shares may be debarred by the articles of association from voting while calls are unpaid. *Rault Gold Mining Co. v. Wainwright*, (1901) 1 Ch. 184; and p. 708, *supra*.

Form 732.

Injunction
restraining
forfeiture of
shares.

Undertaking as to damages. Let an injunction be awarded to restrain dft coy and the dfts C. M., and J., the directors thof, from striking out or erasing the name of the plt from the register of the members of the dft coy, and from selling, re-allotting, or otherwise disposing of the plt's shares therein, numbered, &c. inclusive, which by a resolution of the directors of the dft coy of the — day of —

are purported to be forfeited, or any of them, or otherwise acting upon the afd resolution until judgment in this action, or until further order. *Goulton v. London, &c. Co.*, Malins, V.-C., 7th June, 1877, A. 1180; Seton, 1656. See report of case, W. N. (1880) 141. See also *Johnson v. Lytle's Iron Agency*, 28 March, 1877, A. 691; 5 C. Div. 687.

Form 732.

Upon motion for judgment, &c. by counsel for the plt for such order as upon the admissions of fact in the statement of defence he is entld to, and upon hearing counsel for the dfts, and upon reading the pleadings in this action. Declare that the resolution of the Board of directors of the dft coy of the 26th February, 1877, in the statement of claim particularly mentd, which declares or purports to declare the share of the plt in the sd coy to be forfeited, is invalid and void. And let a perpetual injunction be awarded against the dft coy, restraining the sd coy, and the directors, and officers, and agents thof, from removing the name of the plt from the register of members of the dft coy, and from selling, re-allotting, or otherwise disposing of the sd shares which the sd resolution purports to forfeit as afd, or any of them, or otherwise acting upon the sd resolution. Let dft coy pay to plt his costs of the action, to be taxed, &c., in case the parties differ: and the Ct not requiring any trial of this action other than the sd motion. Liberty to apply. *Goulton v. London Architectural Brick Co. and C. N. & J.*, 1877, G. 89; Malins, V.-C., 5th July, 1877, A. 1364.

Form 733

Judgment
granting per-
petual injunc-
tion against
forfeiture.

Injunctions against Directors (Improper Exclusion, &c.).

Upon motion for an injunction, &c. This Court doth order and adjudge that a perpetual injunction be awarded against the dfts, except the dft coy and E. P., to restrain them from restraining or in any way interfering with the plt acting or attending as a director of the dft coy; and let the dfts M. and S. pay to the plt his costs of this action, including his costs of this motion, such costs to be taxed, &c.; and let all further proceedings in this action, except for the purpose of carrying out this order, be stayed. *Pulbrook v. Richmond, &c. Co. and its Directors*, M. R., 6th August, 1878, B. 1831. See 9 C. D. 610.

Form 734

Injunction
to restrain
exclusion of
director.

It will be observed that the company was not restrained, and accordingly the plaintiff was subsequently removed from office by a general meeting. In *Bainbridge v. Smith*, 41 C. D. 475, an injunction was granted against the directors, but afterwards a general meeting resolved that they did not desire the excluded director to act, and the Court thereupon dissolved the injunction. See also *Munster v. Cammell Co.*, 21 C. Div. 183; *Harben v. Phillips*, 23 C. Div. 15; *Browne v. La Trinidad*, 37 C. Div. 1; *Kyshe v. Alturas Gold Co.*, 36 W. R.

Form 734. 496. Compare *The Queen v. Government Stock Co.*, 3 Q. B. D. 442, with *Evans v. Hearts of Oak Society*, 12 Jur. N. S. 163; *Rez v. London Assurance Co.*, 5 B. & Ald. 899; *Sutton v. English and Colonial Produce Co.*, (1902) 2 Ch. 502.

As to restraining directors from acting unfairly in making calls, see *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56; *Norman v. Mitchell*, 19 Beav. 279; *Logan v. Canclarp*, 13 Beav. 22; and pp. 654, 655, *supra*.

Form 735. Usual undertaking. Let the dfts. Elworthy Brothers & Co., Ltd., and their secretary and agents, be restrained from holding or allowing to be held, the annual general meeting of the dft coy on the — day of —, and from summoning, or allowing to be summoned or held, any meeting of the dft coy until after the — day of —, or until further order. *Cannon v. Trask*. Bacon, V.-C., 29 July, 1875. A. 140; Seton, 266; 20 Eq. 669.

Order
restraining
directors from
holding meet-
ing at im-
proper period.

Form 736. Upon motion for an injunction, &c., by counsel for the plts, and upon the applicon of coy, by Messrs. U., adjourned from Chambers, &c. Let an injunction be awarded to restrain the dfts until the hearing of the action, or further order, from entering or causing to be entered, or suffering to remain entered in the minute book or books of proceedings of the plt coy, or otherwise to be or remain recorded in any book of the sd coy, any entry that or to the effect that the amendment in the indorsement on the writ of summons in this action mentd was carried, or that the second resolution in the sd indorsement mentd was not carried, and from acting contrary to or in any manner inconsistent with the instructions contained in the sd second resolution, until some other resolution to the contrary shall be duly passed by a general meeting of the plt coy: and order that the dfts or any of them who shall, at the further or any other adjournment of the meeting in the sd indorsement mentd, or at any other meeting of the plt coy, preside as chairman, be restrained in like manner from disregarding or neglecting the votes of any duly registered member of the sd coy otherwise duly qualified to vote on the ground that such registered member is a trustee for or nominee of another member, and generally from rejecting the votes or any of the votes which any registered member is entld to give under the arts of asson of the plt coy: and let the sd applicon so adjourned from Chambers as afsd stand over until the trial of the action or until further order. *Pender v. Lushington*, M. R., 2 March, 1877, B. 357.

Restraining
directors from
improperly
rejecting
votes.

In the above action, the plaintiff sued "on behalf of himself and all other the shareholders of the Direct, &c. Co., who voted against the amendment to the first resolution and in favour of the second resolution in the indorsement on the writ of summons in this action respectively mentioned." The case is reported in 6 C. D. 70. See, also, *Harben v. Phillips*, 23 C. Div. 15; *Macdougall v. Gardiner*, 1 Ch. D. 11; *Imperial Hydropathic Co. v. Hampson*, 23 Ch. D. 1.

Upon motion, &c. This Ct doth order that the dfts be restrained until the trial of this action or until further order from acting upon an alleged resolution of the shareholders of dft coy purporting to have been passed at an extraordinary general meeting of the dft coy held on the of and from holding the confirmatory meeting called for the day of . *Poisson v. Thomas*. North, J., 7 March, 1895.

Form 737.

Restraining confirmation of irregular resolution.

Upon motion, &c. This Ct doth order that the dfts, their officers and agents, be restrained until judgment or further order from acting upon or giving effect to the resolutions passed at the extraordinary general meeting of the shareholders in the dft coy on 18 April, 1893, or treating the sd resolutions as having been validly carried, and that the dfts do pay to the plt his costs occasioned by this motion, such costs to be taxed by the taxing master. *Simpson* on behalf of himself and all other the shareholders of the dft coy who are opposed to the resolutions proposed at a general meeting of the dft coy held on 18 May, 1893) v. *The Palace Theatre, Limtd. and others*, North, J., 11 May, 1893, affirmed on appeal 17 May, 1893. Reported in 69 L. T. 70.

Form 738.

Order on appeal from restraining order. Costs only to be paid.

Ultra Vires Acts (Preference Shares, Dividends out of Capital, &c.).

Declare that the arrangement in the bill mentd come to between the directors of the coy and the directors of bank, for an amalgamation of the two coys on the terms in bill mentd, was beyond the powers of the directors of the coy and was not authorized by the arts of asson thof, and that such arrangement is not binding on the plt nor on any members of the coy. Declare that the resolutions of 12 A 5, in the bill mentd, were not within the powers of a general or other meeting of coy, and were not authorized by the memdum or arts of asson of coy, nor by the Cos Act, 1862. and that the same are not binding on the plt or on any other dissentient members of the sd coy, and decree the same accordingly. Let an injunction be awarded to restrain the dft coy, and the dfts (G., &c., the directors, and the dft E., the off liqr of coy, and the dft bank and B., &c., the directors thof, from carrying the sd proposed arrangement into effect. An injunction to restrain off liqr from handing over to bank the assets of coy or any part thof in pursuance of sd arrangement or of any other arrangement to the same or similar effect. Declare that dft bank are to stand as creditors against the estate of the coy in respect of any advances or payments which they have made in liquidation of any debts or liabilities of the

Form 739.

Amalgamation declared ultra vires and restrained.

Form 739. coy, and to a lien upon all the assets of coy comprised in schedules A., B., and C. of the deed of covenant, dated, &c., in bill mentd. for the amount of such advances, with interest on such of them as bear interest. Liberty to bank to go in under the winding-up order of coy, and prove for any claim they can establish against the assets of coy under sd last-mentd declaration [and declaration omitted on appeal; taxation and payment of costs. Liberty to apply. *Clinch v. Financial Corporation*, Wood, V.-C., 28 February, 1868. A. 649; 5 Eq. 450; 4 Ch. 117.

For some particulars of this case, see *infra*, "Amalgamation" (Chap. XXII.).

Form 740.

Sale of assets
declared *ultra*
vires and
restrained.

Declare that the sd agreement, dated, &c., is invalid, and the resolutions for carrying the same into effect in the [bill] mentd are *ultra vires* and illegal. Let the dfts T. S., &c. (the directors), repay to the dft A. the sum of £--- pd to them as in the [bill] mentd under the sd agreement, but without interest. And let an injunction be awarded to restrain the dft coy, T. S., &c., from carrying the sd agreement, dated, &c., into effect, and to restrain the dfts from assigning the patent, ppty, and assets of the coy (as in the bill mentd), or any of them, to the dft A., or to any other person on his behalf. Dfts, T. S., &c., to pay plt his costs of suit, to be taxed, &c. *Bird v. Bird's Patent Deodorising. &c. Co.*, Bacon, V.-C., 28 Jan., 1874. A. 222; affirmed 7 Mar. 1874. A. 621. See 9 Ch. 358; Seton, 266.

Form 741.

Order
restraining
issue of
preference
shares.

Declare that it is *ultra vires* of the dfts, the *Argentine Tramways Co., Limtd*, to issue new preferred shares to rank in priority to or equally with the original preferred shares of the coy either in exchange for deferred shares or otherwise. Let an injunction be awarded against the dfts, Lord A. P., &c., the directors of the sd coy, to restrain the dfts from issuing any such new preferred shares in the coy, either in exchange for deferred shares or otherwise. And let the dfts pay to the plt his costs of this action, including therein his costs of the sd motion, such costs to be taxed by the taxing master *Harper v. Paget*, M. R., 16 Mar., 1876, A. 599.

For further proceedings of the company, see *Griffith v. Paget*, 5 C. D. 891; 6 C. D. 511.

Where directors abuse their powers by issuing or threatening to issue shares in order to obtain control in voting power, they may be restrained by injunction. *Fraser v. Whalley*, 2 H. & M. 10; *Punt v. Symons*, (1903) 2 Ch. 506. But an interim injunction will not be granted unless the case is clearly made out. *Abbotsford Hotel v. Kingham*, 102 L. T. 108 (C. A.).

Declare that the plts resp'y and the other holders of preference stock in the coy on whose behalf they resp'y sue, are entld to be pd dividends out of the profits realized by the coy on the preference stock held by them resp'y, from 30 June, 1856, according to the amount of the dividends which the several classes of preference stock resp'y carry, before any payment in respect of dividends or otherwise is made to any of the holders of original ordinary stock, A. stock, and B. stock, in the sd coy, or any of such stocks out of such profits. And let a perpetual injunction be awarded to restrain the dft coy from declaring any dividend on the original ordinary stock, A. stock, and B. stock in the sd coy, or any of such stocks or any pt thof resp'y, without regard to the rights of the plts resp'y, and the other holders of preference stock on whose behalf they resp'y sue, to be pd in priority the full amount of the dividends payable upon or in respect of the preference stock held by them resp'y, to be computed from 30 June, 1856, and from making, or causing to be made, any payment for dividend or otherwise to any of the holders of the original ordinary stock, A. stock, and B. stock, in the sd coy, or any of such stocks, without first paying or providing for the payment to the plts resp'y, and those on whose behalf they sue, of the full amount of the dividends payable upon or in respect of the preference stock held by them resp'y, to be computed from 30 June, 1856. *Henry v. Great Northern Railway Co.*, Wood. V.-C., 24 Aug., 1857, A. 1602. Affirmed on appeal.

Form 742.

Rights of preference stock-holders declared and infringements restrained

As to preference shares, see *supra*, pp. 575, 812

Upon motion for an injunction this day made unto this Ct by counsel for the plts, and upon hearing counsel for the dfts, and upon reading the writ of summons issued in this action on, &c., an affd of, &c.. This Ct doth appoint the dft, S., to represent for the purposes of this motion all the ordinary shareholders of the dft coy, and the plts and the dfts by their counsel resp'y agreeing to treat this motion as a motion for judgment, this Ct doth declare that the rights of the founders' shares specified in the memorandum of assen of the dft coy attached and became operative on, &c., up to which date the sd balance-sheet was made up, and that the holders of each founders' share shall thereupon become entld in respect of each such share to one 800th of such pt of the amount therein mentd as the balance of the profit and loss account as is applicable for dividend and all other sums hereafter applicable for dividend, and refer to taxing master to tax the costs of the plts and of the dfts, other than dft coy, of this action, and order dft coy to pay such costs when taxed. *London and Continental Investment Corporation of Western Australia, Limtd* issuing on behalf of themselves and all other the holders of founders'

Form 743.

Declaration as to rights of founders' shares.

- Form 743.** shares in the dft coy except those who are dfts) v. *The West Australian Mines Development Syndicate, Limtd and others* Stirling, J., 30 Oct., 1896, B. 3885.

Dividends out of Capital.

- Form 744.** Upon motion, &c., for the plts, &c. Let an injunction be awarded to restrain the dfts, the directors of dft coy, from paying interest upon any amounts pd up upon any of the shares in the sd coy, or any money by way of interest or dividend upon or in respect of any such shares until the sd coy has received profits legally applicable to the payment of such interest or dividends until the hearing or further order. *Macdougall v. Jersey, &c. Co.,* Wood, V.-C., 25 July, 1864, B. 2045. See *supra*, pp. 857 *et seq*.
- Payment of dividend out of capital restrained.

- Form 745.** Upon motion, &c., by counsel for the plt, and upon hearing counsel for the dfts, and upon reading the writ, &c., and [usual undertaking]. Let an injunction be awarded to restrain the dfts, G. &c. [the directors] and the dft coy, until judgment in this action, or until further order, from making any payment by way of dividends on the ordinary shares of the dft coy. And dfts to be at liberty to apply to dissolve the sd injunction as they may be advised. *Darison v. Gillies, M. R.*, 14 Mar., 1879, A. 1118.
- Payment of dividends out of capital.

See *supra*, p. 859.

In the above case the plaintiff sued on behalf of himself and all other the shareholders of the London Tramways Company, Limited. See a note of the case in 16 C. D. 317, n. A shareholder who accepts and keeps the dividend disentitles himself to maintain such an action: see *Towers v. African Tin Co.*, (1904) 1 Ch. 558, *supra*, p. 868.

- Form 746.** Upon motion, &c., for the plt, that the dft coy might be restrained from acting upon, or carrying into effect, a resolution passed by a majority of the board of directors of the dft coy on the 24th March, 1892, and from placing the profit or any pt thof realized by the dft coy, by carrying into effect a certain agreemt, dated, &c., and made, &c., to profit and loss account, or from dealing with or distributing the same, or any pt thof, as if it were income of the coy; and upon hearing counsel for the dft coy, and upon reading an afft of —, filed the — of —, 1892, and the exhibits therein referred to, and the afft of —, filed the — of —, 1892, and counsel for the plt, and dft coy consenting to treat this motion as a motion for judgment, and this Ct being of opinion that the resolution referred to in the notice of motion was not *ultra vires* of the directors, and that they were justified in carrying to profit and loss account
- Injunction refused.

the sum mentd in the sd resolution, and dealing with it in accordance with the arts or assen of the dft coy, doth order that this action do stand dismissed out of this Ct. *Lubbock v. British Bank of South America, Limtd*, Chittv. J., 1 April, 1892, reported in (1892) 2 Ch. 198.

Form 746.

Upon motion, &c.: Let an injunction be awarded to restrain the dft society, H. &c. [the directors], from carrying into effect the resolution mentd in the statement of claim for purchasing with money belonging to the dft society any shares of the dft society, or from purchasing or taking any steps for purchasing any such shares with money belonging to the dft society, until the hearing of this cause or until further order. *Hope v. International Financial Society*, Bacon, V.-C., 9 Nov., 1876, A. 1820.

Form 747.

Order
restraining
company
from pur-
chasing its
own shares

See report of this case in 4 C. Div. 327. See also *Trean v. Whitworth*, 12 App. Cas. 409; and *Bellerby v. Rowland & Macnood's S.S. Co.*, (1902) 2 Ch. 14 as to illegality of such a purchase, and *supra*, pp. 749-751.

Restraining Winding-up and Bankruptcy Proceedings.

Upon motion by counsel for the plts., &c.: Let an injunction be awarded to restrain the dft K. and his agents from presenting any petition under the Cos Acts, 1862 and 1867, to wind up the plt coy, or taking any other proceedings to obtain a winding-up order thof until the trial of this action or until further order. *John Brown & Co., Limtd v. Keeble*, Malins, V.-C., 13 Nov., 1879, A. 2119; *Cercle Restaurant v. Loreny*, 18 C. D. 557.

Form 748.

Order
restraining
presentation
of winding-up
petitions.

If a creditor of a company, whose debt is *bona fide* disputed, attempts to enforce payment by threatening to present a winding-up petition, he will be restrained at the suit of the company, as in the above case. An action, not a winding-up petition, is the proper mode of proceeding in such a case. See, also, *Cadiz Waterworks Co. v. Barnett*, 19 Eq. 182; *Liverpool Household Stores Association v. Smith*, 37 Ch. D. 170; and *Niger Merchants v. Capper* (M. R.), 18 C. D. 557, n.; 25 W. R. 365. In the case last mentioned, the writ was indorsed with a claim, "For an account of the defendant's transactions as agent of the plaintiff company under an agreement, dated, &c., and for an injunction to restrain the defendant from presenting a winding-up petition." Damages for defamation may also be recovered. *Quartz Hill Gold Mining Co. v. Eare* (No. 1), 11 Q. B. D. 674; and (No. 2), 50 L. T. 274.

Where a petition has already been presented to the High Court by the creditor, there is no jurisdiction now to restrain. Sect. 21 (5) of the Judicature Act, 1873. But application can under that section be made in the winding-up by motion to dismiss the petition. *Gold Hill Mines*, 23 C. Div. 210. Compare *supra*, 23 W. R. 286. And a demurrable winding-up petition, and the proceedings under it, can, if used as a means of pressure, be stayed as an abuse of process. *A. Company*, (1894) 2 Ch. 343. Not only can proceedings in this country be restrained, but proceedings abroad, as illustrated in the following order:

Staying
proceedings.

Form 749. Upon motion, &c.: Let the dfts Lord Monson [*and others*] be restrained from taking, prosecuting, or proceeding with any proceedings now pending in France for the purpose of making or declaring the plt coy bankrupt, or any other action, suit, or proceeding in France or elsewhere, to make the coy bankrupt or to have it declared judicially insolvent, and from taking proceedings to recover any judgment against the plt coy, or from taking any other proceedings whatsoever against the plt coy in respect of the debts claimed against the sd coy in respect of which the sum of 7,720*l.* has been pd into Ct as mentd in the afft filed in support of the applicon on which the sd order of 19 June, 1877, was made, until Friday, 22 June, 1877. Residue of motion to stand over till 28 June, 1877. *Paris Skating Rink Co. v. Lord Monson*, Bacon, V.-C., 21 June, 1877, B. 1110.

Order
restraining
bankruptcy
proceedings
against
company in
France

The order of 19 June was an interim injunction to the like effect over Friday 22 June, the plaintiffs paying money into Court. "And this order being urged is to be acted on without being printed." Bacon, V.-C., 19 June, 1877, B. 107.

Form 750 Upon motion upon an injunction, &c., this Ct doth order that the dfts and the Northern, &c., Limtd, their directors, servants, and agents, be restrained during the continuance of the letters patent numbered, &c., in the sd writ mentd, from infringing the sd letters patent in the sd writ mentd granted to W., of which the plts are owners, by manufacturing or selling pneumatic tyres upon the same construction as those described in the specification of the said letters patent, or only colourably differing therefrom, and it is ordered that the dfts do deliver up to the plts all tyres and parts of tyres made in infringement of the sd letters patent, and it is ordered that the following inquiry be made:

Injunction
against
infringement
of patent

1. An inquiry what damages have been sustained by the plts by reason of the dfts' infringement of the sd letters patent, and it is ordered that the sd dfts do pay to the plts all the costs of this action up to and including this judgment, to be taxed by the taxing master; the costs of the sd inquiry are reserved, and the parties are at liberty to apply. *Byrne, J., Dunlop Pneumatic Tyre Co., Limtd v. Northern Pneumatic Tyre Syndicate, Limtd*, 6 April, 1900, A. 1490.

Restraining Improper Use of Name.

Form 751 Upon motion for injunction, &c., and the plt and the dft by their counsel respy consenting that this motion shall be treated as a motion for judgment:

Order
restraining
use of name.

This Ct doth order and adjudge that the dfts be perpetually restrained from trading under their present title, and from and after Thursday, 21st July, 1896, be perpetually restrained from in an

manner using the term "Dunlop" as pt of the title of the dft coy, or from using any other title calculated to deceive the public or to lead the public in any way to believe the dft coy is in any way connected with the plt coy, and tax costs and order dfts to pay). *Dunlop Pneumatic Tyre Co., Limtd v. Dunlop Truffault Cycle and Tube Manufacturing Co., Limtd*, Chitty, J., 21 May, 1896; *La Société, &c Panhard v. Panhard, &c., Limtd.* (1901) 2 Ch. 513; and *supra*, p. 150.

Form 751

Other Miscellaneous Examples of Injunctions.

This action coming on this day for trial, &c., this Ct doth order that the dft J. S., his servants and agents, be perpetually restrained from running, letting out, or in any manner using or causing or permitting to be used for the conveyance of passengers, the omnibus in the pleadings mentd, distinguished by and registered at the Metropolitan Police Office, Public Carriage Branch, under the number —, or any omnibus bearing the omnibus numbers — and —, so long as they remain painted, stamped, printed or written, as at present, or having painted, stamped, printed or written thereon any names, words, panels or devices painted, stamped, printed, written or arranged thereon in such manner as to form or be a colourable imitation of the names, words, panels, and devices painted, stamped, printed, written or arranged on omnibuses of the plts, or so painted, altered, decorated, contrived and prepared as to represent or to lead to the belief that such omnibuses are omnibuses belonging to the plts. Operation of restraint suspended until the 20th June, 1900, or in the event of the dfts giving notice of appeal on or before, &c., until the sd appeal has been disposed of; refer to taxing master to tax the plt's costs, &c., and order to pay and liberty to apply. *London General Omnibus Co., Limtd v. Lavell*, Farwell, J., 20 March, 1900. B. 1033

Form 752.

Perpetual
injunction
against
running
omnibus

This action coming on for trial before this Ct, &c., this Ct doth order that the dft the Era Omnibus Asson, their servants and agents, be perpetually restrained from running, or in any measure using or causing to be used, any omnibus for the conveyance of passengers having affixed thereto a flag without clearly distinguishing the omnibuses of the dfts from the omnibuses of the plts, and dfts to pay plts' costs of action, to be taxed. *The London Road Car Co., Limtd v. The Era Omnibus Asson*, Cozens-Hardy, J., 27 April, 1899. B. 1478.

Form 753.

Another

Upon motion, &c., to be treated as trial of action, this Ct doth order that the dft coy, their officers, servants and agents, be perpetually restrained from selling, offering for sale, or passing off goods not of the manufacture or merchandise of the plt as and for

Form 754.

Perpetual
injunction.
Infringement

Form 754. the goods of the plt, and particularly from offering for sale, selling or passing off any machines not manufactured as sold by the plt under or in connection with the name "Invieta," and from infringing the plt's registered trade mark "Invieta," No. —, and from issuing any existing catalogues without obliterating the word "Invieta" therefrom, and from printing or publishing any further catalogues containing any illustrations copied or only colourably altered from the plt's illustrations appearing in the plt's catalogues, and order dft to deliver up to plt all blocks and electrotypes in the dft's possession or power from which the illustrations of an Invieta and side clamp machines appearing in dft's catalogues have been printed or produced, and order dfts to pay plt's costs of action, to be taxed. *L. Lumley & Co., Limtd v. Parnell & Sons, Limtd.* Kekowich, J. 23 March, 1900, B. 1112

Form 754a. Upon a motion, &c., and the plt's by their counsel usual undertaking as to damages, order that the dft H., his servants, agents and workmen, be restrained until after Friday, the 6th day of November, 1896, from in any manner communicating or offering or purporting to communicate to any person or persons, or advertising or offering for sale or selling or purporting to sell to any person or persons, or otherwise disclosing plt's trade secret relating to the manufacture of cement referred to in a letter dated, &c., and written and signed by the dft, and by him addressed to and received by N., or any other trade secret belonging to the plt's; and plt's are to be at liberty to serve a notice of motion for injunction for Friday, the 6th day of November, 1896, together with a writ upon the dft. *Houses Cement, &c. Co. v. Hodgkinson.* North, J., 2 November 1896.

An employee may generally be restrained from revealing trade secrets. See *supra*, p. 442.

Form 755. Upon the motion, &c., this Ct doth order and adjudge that the dfts, their servants, workmen, and agents, be perpetually restrained from trespassing upon the plt's premises, —, in the County of Essex, and from erecting or permitting to be erected over the sd premises, telephone wires or other obstructions; and it is ordered that the dfts do remove or pull down such telephone wires or other obstructions as have already been erected over the sd premises, and it is ordered that the dfts do pay to the plt the sum of 40s damages, and also the costs of this action, to be taxed. *Wood v. National Telephone Co., Limtd.* Stirling, J., 24 October, 1900, B. 3503.

Upon motion this day, &c., and the plts by their counsel undertaking to abide by any order as to damages in case this Ct should hereafter be of opinion that the dft has sustained any by reason of this order which the plts ought to pay, this Ct doth order that the dfts be restrained until after judgment in this action, or further order, from publishing, issuing, and circulating any paper under the heading "List of Contributors," on pages 86 and 87 in the newspaper *Money Maker* for the day of , or any other statement or advertisement representing that the plt coy is now in liquidation. *The London and Northern Bank, Limtd v. George Newman & Sons Limtd*, North, J., 8 Dec., 1899, B. 2946

Form 756

Injunction
against pub-
lishing libel
on bank

This action coming on for trial, &c., this Ct doth order and adjudge that the dfts, the M. R. Coy, Limtd, be perpetually restrained from selling the property subject to the agreement of the, &c., in the statement of claim mentd, to any person or coy without having first offered such property to the plts at a cash price, being the same cash price as some person or persons or coy shall have then in good faith offered to give for such property, and restrain dfts from pleading and carrying out agreement of, &c., in the pleadings mentd, unless and until the dfts, the M. R. Coy, Limtd, shall have first offered to sell to the plts the whole of the sd property at such a price as aforesaid and the taxation of costs and payment. *The Manchester Ship Canal Co. v. The Manchester Racecourse Co., Limtd, and Trafford Park Estates, Limtd*, Farwell, J., 30 May, 1900, B. 3463

Form 757

Injunction
against breach
of covenant
giving option

Upon motion for an injunction this day made unto this Ct by counsel for the plt, and upon hearing counsel for the dfts, and upon reading the writ of summons, &c., and the respondents by their counsel undertaking to refrain until the trial of this action or further order from calling for, enforcing, or effecting a transfer of all or any of 73 ordinary shares in the dft coy of £ each, of which B., the above-mentd bankrupt, is the registered holder, at a price not greater than the par value of such shares, or at any other price than the actual market value of such shares, or from otherwise treating as valid, as against the plt, Arts. 50 to 58 inclusive, and any other of the dft coy's arts of asson which purport to give the dft coy the right, upon the bankruptcy of a shareholder of the dft coy, to require the transfer of all or any share held by such shareholder at a price not greater than the par value of such shares, or at any price less than the actual market value of such shares, and the plt by his counsel undertaking to abide by any order this Ct may make as to damages in case this Ct shall hereafter be of opinion that the dfts have sustained any by reason of their sd undertaking which the plt ought to pay, and

Form 758

Interim order
restraining
company from
enforcing
regulation as
to transfer of
bankrupt's
shares

Form 758. both parties consenting to this order; and this Ct doth order that the plt, and also the dfts by their secretary, do, on or before, &c., make and file a full and sufficient afft stating whether the sd plt and the dfts resp'y have or have had in his and their possession or power resp'y any, and, if any, what, documents relating to the matters in question in this action, and accounting for the same, and for production and inspection and production and examination of witnesses. *vc. The Trustee of the Property of John Ebenezer Borland (A Bankrupt) v. Steele Bros. & Co., Limtd, Stirling, J., 30 March, 1900, A. 1473.*

The injunction was discharged at the hearing. Reported (1901) 1 Ch. 279, *pro*, p. 949.

Security for Costs.

Form 759.

Order for
plaintiff com-
pany to give
security

Upon motion by way of appeal, &c. Order that the plts, the coy, do procure some sufficient person on their behalf to give security according to the course of the Ct by bond [to the Clerk of Records and Writs] in the penalty of 150*l.*, conditioned to answer costs in case any costs shall be awarded to be pd by the plts, and in the meantime the plts are not, as against the dfts, to take any further proceedings in this action. And plts to pay dfts' costs of and occasioned by this motion, to be taxed, &c. And costs of app'con in Ct below to be costs in the action. And dft coy to be at liberty to apply hereafter for further security, as dft coy may be advised. *Northampton Coal, &c. Co. v. Midland Wagon Co., Ct. of App., 16 Jan. 1878, B. 78. See the report, 7 C. Div. 500; and Pure Spirit Co. v. Fowler, 25 Q. B. D. 235.*

Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, it may, if it appears by any credible testimony that there is reason to believe that if the defendant is successful the assets of the company will be insufficient to pay his costs, be required to give security for costs. Sect. 278 of the Companies Act, 1908, replacing sect. 89 of the Act of 1862. For cases on the repealed section, see *City of Moscow Gas Co. v. International Financial Soc.*, 7 Ch. 225; *Freehold Land Co. v. Spargo*, W. N. 1868) 94; *Lydney Co. v. Bird*, 23 C. D. 358; *Dominion Brewery v. Foster*, 77 L. T. 507; and Forms, *infra*.

Where the plaintiff company was in voluntary liquidation, Jessel, M. R., in the Court of Appeal, was of opinion that the fact afforded *prima facie* evidence that the assets would be insufficient.

Where a limited company is the sole appellant from a winding-up order made on the ground of its insolvency it will, as a rule, be ordered to give security for costs. *Photographic Co., Artists' Supply Assoc.*, 23 C. Div. 370; *Diamond Fuel Co.*, 13 Ch. D. 400.

When a company succeeds in an action, and an appeal is brought, the company is not a plaintiff or pursuer within the section. *Star Fire and Burglary Insurance Co. v. Davidson*, 4 F. 997 (Court of Session).

FORMS.

Additional plaintiffs will not be added at the instance of defendants in an action brought on behalf of a class in order that defendants may have the ability of the other plaintiffs for costs. *De Hart v. Sterckson*, 1 Q. B. D. 13.

A plaintiff company resident out of the jurisdiction must give security for costs, unless it has real estate in England. It showing personal property is enough. *Kilkenny Ry. Co. v. Feilden*, 6 Ex. 84; *Limerick Ry. Co. v. Limer*, 4 Bing. 394. And a foreign company, though only defendant to an action, if it makes a cross-claim in the nature of an independent action, must give security. *New Fennie Compagnie v. General Accident Corp.*, (1911) 2 K. B. 619.

Form 759.

Upon the applicon by summons dated, &c., of the dft, and upon hearing the solors for the applicant and plts, and upon reading the writ issued the, &c., and the pleadings in the action, it is ordered that the plts do procure some sufficient person or persons on their behalf to give security by bond to the dft in the penalty of 50*l*. conditioned to answer the costs in case any shall be awarded to be pd by the plts to the dft; but the plt is to be at liberty instead of giving such security by bond to make the payment into Ct mentd in the schedule hto, and until such security is given, and notice thof given to the solors for the dft, the plts are not to take any further proceedings in this action against the dft; and it is ordered that the costs of the applicant and the adjournment of this applicon to the judge in chambers be borne by the plts or any of them. Lodgment schedule. *Music and Arts Corporation v. Duncan*, North. J., 4 Dec. 1899, A. 1367.

Form 760.

Order for plaintiff company to furnish security for costs.

Upon the applicon of the dfts A. and B., and upon hearing, &c., it is ordered that the sd plt coy do give security according to the course of the Ct to the dfts A. and B., in the penalty of 1,000*l*., to answer costs in case any costs shall be awarded to be pd by the sd plt coy, and in the meantime the sd plt coy are not to take any further proceedings in this action. *West Indian, &c. Co. v. Callendar*, Collins, J., 19 August, 1891, B. 1179.

Form 761.

Another, more modern.

Upon the applicon of the dft, &c. By consent, order that the plts do, on or before 24th March, 1879, pay into the Union Bank of London, Chancery Lane Branch, in the joint names of K. and B. [solors of plts and dft], the sum of 200*l*. as security for the costs of the dft in this action in case any should be awarded to him. And order that in default of the plts making such payment within the time afsd, this action do stand dismissed out of this Ct without further order, with costs to be taxed by the taxing master and pd by the plts to the dft S. And costs of applicon to be costs in action. *South Durham Co. v. Shaw*, Hall, V.-C., 1 March, 1879, B. 374.

Form 762.

Another. Fund to be paid into a bank.

Dismissal of Action with Relief on Counterclaim.**Form 763.**

Order
dismissing.

This action and counterclaim coming on for trial, &c. [action dismissed with costs]. And upon the counterclaim this Ct doth order and adjudge that the policy of assurance in the pleadings mentd, dated &c., numbered ———, of the dft society is void and ought to be delivered up to be cancelled, and doth order and adjudge the same accordingly. And it is ordered that the plt do within four days after service in the judgment deliver the sd policy to the dft society, and the plt to pay to the dfts their costs of this action and counterclaim to be taxed *Honour v. Equitable Life Assurance Society of the United States*. Buckley, J. 8 March, 1900, A. 775.

Reported in (1900) 1 Ch. 852.

Foreclosure**Form 764.**

Order of
foreclosure
of ordinary
mortgage.

Upon the applicon of the plts by originating summons, dated, &c. and upon hearing the solors for the plts and for the dfts, &c., &c., it is ordered that an account be taken of what is due to the plts under and by virtue of the indenture of mortgage, dated, &c., in the originating summons mentd, and that the costs in this action be taxed by the taxing master, and in taking such account what (if anything) shall have been pd into Ct by the receiver of the rents and profits obtained in the management of the business carried on upon the premises comprised in the sd indenture of mortgage, and also such sum (if any) as the plts shall submit to be charged in respect of gross profits in the hands of such receiver and manager at the date of the master's certificate, or to come to his hands prior to the order for foreclosure absolute, are to be deducted, and the balance due to the plts is to be certified; and it is ordered that upon the dfts or any of them paying such balance to the plts within six months from the date of the master's certificate, at such time and place as shall be thereby appointed, the plts shall assure the premises comprised in the sd indenture of mortgage, dated, &c., free and clear from all incumbrances made by them or by any person or persons claiming by or through or under them, and deliver upon oath if required all deeds and writings in their custody and power relating thereto to the dfts, or to such other persons as shall be entitled to the sd mortgaged hereditaments, or as he or they shall direct, such assurances to be settled by the judge in case the parties differ, and in case the dfts or any of them shall so redeem the plts, the dfts or dft so redeeming the plts are or is to be at liberty to apply, and on such applicon it is not to be incumbent upon the dfts or dft so applying to give the plts notice thof; and this order is without prejudice to any question as to the rights or interest of the dfts as

between themselves in or to the sd mortgaged premises, but in default of such payment as aforesaid by the time as aforesaid, it is ordered that the dfts The —, Limtd, &c., &c., do forthwith stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, or to the sd mortgaged premises. *Worthington Limtd v. Cross and others*, North, J., 21 November, 1899, A. 1358

Form 764

Receiver and Manager.

Upon motion this day made unto this Ct by counsel of the plt, and upon hearing, &c., and the plt by his counsel undertaking to be answerable for all sums which the receiver here appointed shall receive or become liable to pay until he shall have given security, this Ct doth by consent hereby appoint — of —, receiver and manager of all the undertaking of the —, and to receive 10 per cent. of the gross receipts arising from the performances in London of the play called the "Casino Girl," now being played at the Shaftesbury Theatre payable to the dft coy under the agreement of, &c., and the sd N. is to act at once as such receiver, but is not to act as such receiver after the — day of — without the leave of the judge at chambers, and it is ordered that the dfts do deliver over to such receiver and manager all books, leases and papers, and documents relating to the sd ppty, and N. forthwith to give security as such receiver according to the course of the Ct, and N. as such receiver to pass accounts and pay balance to be certified as payable by him as the judge shall direct. *Down* (on behalf of himself and all other shareholders in the dft coy, L. & L.) and *L. Casino, Limtd, and H. L.* (by an order dated 20 July, 1900), Farwell, J., 14 Dec. 1900, A. 4481

Form 765

Appointment
of receiver
and manager
of the —

A receiver and manager appointed by the Court can look only to the assets in the control of the Court for his indemnity for expenses properly incurred. He is not entitled to be indemnified personally by the parties at whose instance or with whose consent he was appointed. *Recher v. Goodall*, (1911) 1 Ch. 135. The Court will not appoint a receiver *ex parte*, except under extraordinary circumstances. *Re Campbell Brothers*, (1911) 1 Ch. 731 (C. A.). See further, Part III.

Trade Marks.

In the High Ct of Justice.

Chancery Division.

Mr. Justice North.

In the Matter of the Registered Trade Marks, Nos — and —, of
A. B. & Sons, Limtd,
and

In the Matter of the Patents, Designs, and Trade Marks Acts, 1883
1888.

Upon motion, &c., by counsel for A. B. & Sons, Limtd, and upon hearing counsel for the Comptroller-General of Patents, Designs, and

Form 766

Liberty to
add word
"Limited"
to old trade
marks

Form 766. Trade Marks, and upon reading an afft of —, filed, &c, the certificate, dated, &c., of the registration of the sd coy as the proprietor of the above-mentd trade marks: This Ct doth order that the sd A. B. & Sons, Limtd, be at liberty to add to each of the sd registered trade marks the word "Limited" after or immediately beneath the words "A. B. & Sons" appearing upon such trade marks resply. And it is ordered that the sd A. B. & Sons, Limtd, do pay to the sd Comptroller his costs of this applicon, to be taxed by the taxing master. *John Oakley & Sons, Limtd.* North. J., 26 Aug. 1893

The notice of motion in the above case was "that leave may be given to add to each of the above-mentioned trade marks the word 'Limited,' or some abbreviation thereof, after or immediately beneath the words 'and Sons' appearing upon such trade marks respectively, or that such further or other order may be made in the premises as to the Court shall seem fit," and it was addressed to the Comptroller-General of Patents, Designs, and Trade Marks.

Title.

Form 767. WHEREAS the several persons and firms, whose names, addresses, and descriptions appear resply in Columns 2, 3, and 4 of the Table annexed hto, applied for, and (subject to the option reserved to Brutton & Burney, Limtd, as hnftr mentd) became entitled to allotment of preference shares in Brutton & Burney, Limtd, and the number of shares so applied for are set forth in Column 1 of the sd Table; AND WHEREAS such several persons and firm pd in cash to Brutton & Burney, Limtd, the full sum of 10*l.* upon each of the shares so applied for by them resply: AND WHEREAS the sd several persons and firms in applying for such shares had agreed with Brutton & Burney, Limtd, that Brutton & Burney, Limtd, should be at liberty to issue and allot to Burney's New Cross Brewery Coy, Limtd, as fully pd the shares so applied for, in consideration of Burney's New Cross Brewery Coy, Limtd, allotting to them, the sd several persons and firms, a like number of second preference shares of Burney's New Cross Brewery Coy, Limtd, to be issued as fully pd, and corresponding in number with the number of shares in Brutton & Burney, Limtd, to which the sd several persons and firms resply became entld as afsd; AND WHEREAS Brutton & Burney, Limtd, exercised such option, and Burney's New Cross Brewery Coy, Limtd, agreed to give effect to the exercise thof; Now BE IT REMEMBERED that accordingly, and for the consons appearing in the premises, the second preference shares in Burney's New Cross Brewery Coy, Limtd, identified by the distinctive numbers set out in Column 5 of the sd Table, were issued and allotted as fully pd to the sd several persons and firms whose names, addresses, and descriptions appear resply in Columns 2, 3, and 4 of the sd Table, and the preference shares in Brutton & Burney, Limtd, identified by the distinctive

Memorandum
approved by
the Court of
Appeal in
*Brutton v.
Burney*,
1901 1 Ch.
643.

numbers set out in Column 6 of the sd Tables, were allotted as **Form 767** fully pd to Burney's New Cross Brewery Coy, Limtd. Then followed the Table referred to. *Brutton & Burney, Limtd* (1901) 1 Ch 643.

By the Companies Act, 1898 (61 & 62 Vict. c. 26), the Court was given power to extend the time for registering a contract under sect. 25 of the Companies Act, 1867. That section provided that "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." There were many cases of omission to file such contracts, and accordingly the Act of 1898 provided amongst other things that "whenever before or after the commencement of this Act any shares in the capital of any company under the Companies Acts, 1862 and 1890, credited as fully or partly paid up shall have been or may be issued for a consideration other than cash, and at or before the issue of such shares no contract or no sufficient contract is filed with the Registrar of Joint Stock Companies in compliance with sect. 25 of the Companies Act, 1867, the company or any person interested in such shares or any of them may apply to the Court for relief, and the Court if satisfied that the omission to file a contract or sufficient contract was accidental or due to inadvertence, or that for any reason it is just and equitable to grant relief, may make an order for the filing with the registrar of a sufficient contract in writing and directing that on such contract being filed within a specified period it shall, in relation to such shares, operate as if it had been duly filed with the registrar aforesaid before the issue of such shares." Frequent recourse was had to the Act of 1898 between 2nd August, 1898, when it came into operation, and 1st January, 1901, but by sect. 33 of the Companies Act, 1900, which came into operation on that day, sect. 25 of the Act of 1867 was repealed, and it was enacted that no proceedings under sect. 25 of the Act of 1867 should be commenced after the commencement of the Act of 1900. This repeal was, however, by virtue of sect. 38 of the Interpretation Act, 1883, not to affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment repealed. The Act of 1908 has not touched the matter, and in the result there are still cases in which it is or may be necessary to apply to the Court for relief under the Act of 1898 (see *Brutton v. Burney*, (1901) 1 Ch. 637), for the Act of 1900 in repealing sect. 25 does not make shares which by virtue of sect. 25 of the Act of 1867 are unpaid, paid-up shares. Nevertheless proceedings under the Act of 1898 are now extremely rare. The cases on the subject and the form of application and orders will be found in the 9th edition of this work. pp. 1257-1263.

Orders extending Time for Registering Mortgages or Charges under sect. 96 of the Companies Act, 1908.

The provisions of the Act of 1908, ss. 93-102 (replacing sects. 14-18 of the Act of 1900), as to registration of certain kinds of mortgages and charges, are referred to above at p. 616. As appears from sect. 93 of the Act, there set out, the registration has to be effected within twenty-one days after the creation of the mortgage or charge, but by sect. 96 power is given to extend the time for registration as follows:

"A judge of the High Court, on being satisfied that the omission to register a mortgage or charge within the time hereinbefore required, or that the omission, Act of 1908

or misstatement of any particular with respect to any such mortgage or charge was accidental or due to inadvertence, or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the judge just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified."

Cases for
extension
allowable

Thus, where there has been an omission to register within the prescribed time the Court has power to extend the time in a number of alternative cases, namely

- (a) Where the omission to register was accidental; or
- (b) Where the omission to register was due to inadvertence; or
- (c) Where the omission to register was due to other sufficient cause; or
- (d) Where the omission to register is not of a nature to prejudice the position of creditors or shareholders of the company; or
- (e) Where on other grounds it is just and equitable to extend the time.

And each of these cases, it is to be noted, is independent as a ground for relief.

The power to rectify is therefore much wider than the power given by sect. 11 of the Bills of Sale Act, 1878, for there the judge is only empowered where the omission to register or misstatement is "accidental or due to inadvertence."

Accident.
inadvertence.

The words "accidental or due to inadvertence" in sub-sect. 1 of the Act are to have their ordinary meaning.

The definition of the word "accident" in Johnson's dictionary is "that which happens, unforeseen, casualty, chance"; and in Richardson's dictionary, "that which falls or happens or occurs to, generally with a sub-condition of something unforeseen, unexpected, unfortunate, unnecessary, without design, contrivance, or intention."

The definition in Johnson's dictionary of "inadvertence" is "carelessness, negligence, inattention"; and in Richardson's dictionary, "inattention, uncautiousness, carelessness, negligence, improvidence."

Thus it appears that "inadvertence" is a much wider word than "accident," and inadvertence has been held to have occurred (1) where, the contract having been sent to the company's solicitor to be stamped and filed, there was delay at Somerset House in adjudicating the amount, and the directors in ignorance of this, and assuming the contract to have been filed, allotted the shares. *Luck & Gunn, Limited*, Kekewich, J., 70 L. T. 722; *Cambria Daily Leader Co.*, Stirling, J., Aug. 1899, not reported. (2) Where the parties were ignorant of the provisions of the Act of 1867. *Jackson & Co.*, (1899) 1 Ch. 348. (3) Forgetfulness of such provisions due to worry and pressure of business. *Tomlin & Co. v. Fisher's case*, 15 T. L. R. 132; W. N. (1899) 35.

Where a secured creditor proved for his debt, swearing he had no security, and voted at a meeting of creditors in respect of the whole debt, but it was all done in the bona fide belief that there was no security, it was held that this was inadvertence. *Re Safety Explosives, Limited*, (1904) 1 Ch. 226.

Although the words "or that for any reason it is just and equitable to grant relief" go far beyond "accidental or due to inadvertence," they impose on the applicant who relies on them the obligation of proving "that he has acted with due caution and conscientiousness, and that he has done nothing to disentitle him to relief at the cost of the other innocent persons." Per Wright, J., *Roxburgh & Pegg*, (1899) 1 Ch. 210.

An example of "some other sufficient cause" is where legal advice has been given (incorrectly) that registration under the Act is unnecessary. *N. Abraham & Sons*, (1902) 1 Ch. 695.

Many orders for rectification have been made under this section, and in most cases the order is made on the ground of accident or inadvertence. In making the order the Court is exercising a judicial discretion (*supra*, p. 1421), and accordingly requires evidence of the facts on which the application for relief is grounded, and this evidence is generally given by affidavit.

In one of the earlier cases (*Booth Cold Storage*, W. N. (1901) 54), in which an extension order was granted in respect of an accidental omission to register, the applicant, beside proving the accident, showed that there was no winding-up and that no creditor had recovered judgment against the company. This evidence was given on the assumption that the Court would follow the rule which had been adopted in regard to bills of sale (*Parsons*, (1893) 2 Q. B. 122; *Crewe v. Cummings* (1888), 21 Q. B. D. 420), viz., that the Court should not make an order for extension "so as to defeat a title actually vested in a person who has acted with perfect *bona fides*," *e.g.*, rights of a trustee in bankruptcy or of an execution creditor.

As to
creditors.

But Buckley, J., in *Juplin Brewery Co.*, (1892) 2 Ch. 79, carried the matter much further, for he laid down a general rule that an order under sect. 15 of the Act of 1906 (now sect. 96 of the Act of 1908), should always contain words to the following effect: "But that this order be without prejudice to the rights of parties acquired prior to the time when such [mortgage or charge] shall be actually registered," except when there is some good ground to the contrary, as where the circumstances are such that the creditors cannot be prejudiced.

Orders made
without
prejudice to
absentees.

In laying down this general rule, the learned judge stated that he was adopting the practice established in judges' chambers for years, according to which applications for extending the time for the registration of bills of sale were granted as of course and without notice, "for the reason that by the insertion of these words the rights of absent parties are not affected."

Whether this practice is consistent with the settled rules which have been laid down as to the exercise of judicial discretion may be doubted; but the judges of the Chancery Division have generally adopted the rule, though its operation has been restricted as below mentioned.

In *I. C. Johnson & Co.*, (1902) 2 Ch. 101, the case of *Juplin Brewery Co.* was considered in the Court of Appeal. Directors of a company had resolved in 1899 to raise 85,000*l.* on debentures, which were secured on property included in a covering deed and by a charge on all the property of the company (including its uncalled capital) for the time being as a floating charge, and were stated to form one series ranking *pari passu*. Some of the series were issued before the Act came into operation, but 327 of the remaining debentures were issued after that date, and were not registered. The holders of these debentures and the company applied for an extension order, and Kekewich, J., extended the time, but added to the order the qualification introduced by *Juplin Brewery Co.*

The Court of Appeal substituted for the qualification imposed, the following proviso: "Provided always that this order is to be without prejudice to any rights (other than rights in respect of debentures of the said series) which may have been or may be acquired against the holders of the said debentures set forth in the schedule to this order prior to the time when the last-mentioned debentures shall be actually registered. And it is hereby declared that, except so far, if at all, as may be necessary for giving effect to the proviso aforesaid, such proviso shall not interfere with the rights of equality amongst themselves attached to all the debentures of the said series, but so that in the event of the debentures in the said schedule being avoided as against parties having

any such rights as are preserved by the said proviso, none of the holders of the debentures of the said series, other than the holders of the debentures set forth in the said schedule, shall by reason of such avoidance be required to accept any less share of the assets comprised in his security than he would have taken if there had been no such avoidance."

Thus, the Court of Appeal in effect held that the *Joplin* proviso went too far, and that the rights to be protected were rights acquired against the debenture holders.

The matter was further considered in a subsequent case, *Ehrmann Bros.* (1906) 2 Ch. 697, and it was in that case held by the Court of Appeal that the proviso is merely designed to protect rights acquired against the property of the company—as by charge, execution, lien, or other security—in the interval between the expiration of the twenty-one days for registering and the extended time allowed by the order. It is not meant to protect, and does not protect, the existing unsecured creditors of the company, unless they have obtained some such security.

Where, within the time allowed by the extension order, an extraordinary resolution for winding-up was passed, Buckley, J., held that the rights of the general body of creditors under the winding-up were protected by the saving words (*Joplin* form), and that the debenture holders were not as against the unsecured creditors. *Anglo-Oriental Carpet Manufacturing Co.*, (1903) 1 Ch. 914. In the course of his judgment, Buckley, J., said: "When the order of the Court of Appeal"—in *Johnson & Co.*—"is looked at, it will be found that the words they used seem to have exactly the same effect as those which I used in *In re Joplin Brewery Co.* . . . I cannot . . . derive from *In re I. C. Johnson & Co.* any assistance as to the classes of creditors who ought to be protected by the order in such a case as the present. However, assuming that the more restricted meaning is to be given to the words, and that those words cover only the rights of creditors by whom or on whose behalf some proceeding has been taken against the property of the company, I hold that the rights of the general body of the creditors at the commencement of the liquidation are within the terms of the order, because on the winding-up commencing every creditor had a right to say, 'So much per cent. of the assets belongs to me in due course of liquidation.'"

Where the company has power to exchange and vary its debentures, and the debentures have been sealed only and not delivered, new debentures may be issued instead of an extension order being applied for. *Bowen v. Defries & Co.*, (1904) 1 Ch. 37.

An application under sect. 15 [now sect. 96 of 1908] should be made either by originating motion or by originating summons, and in the former case it must be assigned to some judge (if in the Chancery Division) by ballot in the usual way. *Legal and General Investment Co.*, W. N. (1901) 72.

Form 768. In the High Court of Justice.

Notice of
motion to
extend time
for registra-
tion of
mortgage or
charge

Chancery Division
Name of Judge.

In the Matter of —, Limtd.
and

In the Matter of the Cos (Consolidation) Act, 1908. s. 96

TAKE NOTICE that this Honble Ct will be moved, on — day, the
— day of —, at the sitting of the Ct. or as soon thereafter as

counsel can be heard, by counsel on the part of —, of —, for an order that the time for the registration in manner required by the Cos (Consolidation) Act, 1908. **Form 768.**

Here state particulars, e.g.]

of a trust deed to secure debentures dated the — day of —, and made between the above-named coy of the one part, and — and — as trustees of the other part, for securing £— debenture stock of the sd coy.

Or,

of a series of 1,000 debentures of the above-named coy, each for 100/ and interest, and containing a charge by way of floating security on the undertaking of the coy.

Or,

of an agreement dated the — day of —, and made between the above-named coy of the one part, and —, Limtd, of the other part, creating a charge on the uncalled capital of the coy.

be extended until after the expiration of fourteen days from the date of the order to be made hereon, or that such further or other order may be made in the premises as the Ct may deem expedient

Dated, &c.

If the application is to be made by originating summons, it will commence, **As to originating summons** if not made by the company, thus: "Let the above-named company, whose registered office is at —, within eight days after the service of this summons on it, exclusive of the day of such service, cause an appearance to be entered for it to this summons upon the application of —, of —, for an order," &c. And at the foot there should be the usual notice: "The respondent may appear hereto by entering appearance either personally or by solicitor at the Central Office, Royal Courts of Justice, London. Note.—If the respondent does not enter appearance within the time and at the place above mentioned, such order will be made and proceedings taken as the judge may think just and expedient." If the application is *ex parte*, e.g., where it is made by the company, it will run thus:

"Let all parties attend at the chambers of the judge, Room No. —, Royal Courts of Justice, Strand, London, at the time specified in the margin, on the hearing of, &c.

"Dated

"This summons was taken out by, &c."

The summons can be heard by the judge in chambers or adjourned into Court, and in some cases application by summons is the preferable mode. A considerable number of orders have been taken on summons.

Form 769. Upon motion this day made unto this Ct by counsel for the above-named coy and The — Insurance Coy, Limited, the trustees appointed by an indenture dated the 11 Jan. 1901, for securing a series of debentures to the amount of 10,000*l.* issued by the first-named coy. and upon reading the respive affs, &c., both filed 28 Feb. 1901, and the exhibit therein referred to.

Order extending time.

The Ct being satisfied that the omission to register the mortgage or charge contained in the sd deed and debentures within the time required by the Cos Act, 1900, was accidental, doth, pursuant to the 15th section of the sd Act, order that the time for registration of the sd mortgage or charge be extended until Saturday, 9 March, 1901, and an office copy of this order is to be left with the Registrar of Joint Stock Cos. *Boottle Cold Storage Co.*, Farwell, J., 1 March, 1901

Form 770. Upon motion this day made unto this Ct by counsel for the above-named coy and T., of —, and S., of —, and upon reading an aff of M., filed 19 July, 1901, and the exhibits therein referred to.

Extension of time under sect. 15 of Act of 1900 [now sect. 96 of 1908].

This Ct being satisfied that the omission to register the trust deed for securing debentures charged upon the property and undertaking of the sd coy dated the 18 May, 1901, and made between the sd coy of the one part and the sd T. and S. of the other part, within the time required by the Cos Act, 1900, is not of a nature to prejudice the position of creditors or shareholders of the above-named coy. doth, pursuant to sect. 15 of the sd Act, order that the time for the registration of the sd deed be extended for a period of ten days from the date of this order. *Tingri Tea Co.*, Byrne, J., 19 July, 1901.

APPEALS TO HOUSE OF LORDS.

CHAPTER XXI.

APPEAL TO THE HOUSE OF LORDS.

As to practice and procedure on appeals to the House of Lords, see *Practice and procedure*
Annual Practice, 1912, p. 952 *et seq.*

Every appeal is to be by way of petition, and the following is a specimen:—

IN THE HOUSE OF LORDS.

To the Right Honourable the House of Lords.

The humble petition of appeal of The A. B. Corporation, Limited, whose registered office is situate at —, in the City of London.

Your petitioner humbly prays that the matter of the order set forth in the schedule hereto may be reviewed before His Majesty the King in his Court of Parliament, and that the said order may be reversed, varied, or altered, or that the petitioner may have such other relief in the premises as to His Majesty the King in his Court of Parliament may seem meet, and that J. K., mentioned in the schedule to the appeal, may be ordered to lodge such printed case as he may be advised and the circumstances of the cause may require in answer to this appeal, and that service of such order on the solicitors in the cause of the said respondent may be deemed good service.

L. M.

N. O.

Signatures of Counsel.

SCHEDULE.

From His Majesty's Court of Appeal (England).

In a certain cause wherein J. K. was plaintiff, and the A. B. Corporation, Limited, was defendant.

Order
appealed
from.

The order of His Majesty's Court of Appeal dated the 5th day of April, 1909, appealed from is in the words following, namely:—

1909 B. No. 5200. The A. B. Corporation, Limited,
Tuesday, — day of —, 1909. Defendant.

In the Court of Appeal, between J. K., on behalf of himself and all other shareholders of the A. B. Corporation, Limited, Plaintiff.

Upon motion by way of appeal from the order dated the — day of —, 1909, this day made unto this Court by counsel for the plaintiff, and upon hearing counsel for the defendant, and upon reading the said order, and the plaintiff and the defendant before counsel consenting to treat this motion as a motion for judgment, this Court doth discharge the said order, and doth order that the defendant, the A. B. Corporation, Limited, be perpetually restrained from allotting, &c., and from otherwise acting upon or carrying into effect such part of the resolution of the defendant corporation in the writ of summons mentioned purporting to authorize such allotment. And it is ordered that the defendant, the A. B. Corporation, Limited, do pay to the plaintiff his costs of the action of and occasioned by the said appeal, such costs to be taxed by the taxing master.

L. M.
N. O.

IN THE HOUSE OF LORDS.

On appeal from His Majesty's Court of Appeal (England).

Between the A. B. Corporation, Limited, Appellant,
and
J. K., Respondent.

Appellant's
case

Case for the Appellant.

1. This is an appeal from an order dated the — day of — of the Court of Appeal (England) reversing the judgment dated the — day of — of Mr. Justice
2. The question to be determined on this appeal is whether or not it is *ultra vires* the appellant, the A. B. Corporation, Limited (hereinafter called "the corporation"), to allot, &c.
3. There is not in this case any dispute as to the facts, which may be briefly stated as follows:—

The company was incorporated on the — of — under the Companies (Consolidation) Act, 1908, as a company limited by shares.

The objects of the corporation as defined by its memorandum of association include the following, &c.

Of the articles of association of the company reference is made to those numbered —, —, and —.

Under article —, &c.

5. On or about January, 1906, the corporation, being in need of money for the purposes of its undertaking and business, borrowed, &c.

14. At an extraordinary general meeting of the corporation, held on the — day of —, the resolutions following were passed.

15. On the — day of — this action was commenced by the issue of a writ wherein the respondent J. K. was plaintiff and the appellant corporation was defendant.

By the said writ the plaintiff claimed a declaration that the allotment and issue of the said, &c. was and is *ultra vires* the corporation and is void, and an injunction against the company restraining it from issuing the said, &c.

The plaintiff gave notice of motion, dated, &c. for an injunction as asked for in the said writ.

16. The said motion came on and was heard on the — day of — before Mr. Justice —.

In the result the learned judge did not think fit to make any order upon the said motion. His Lordship in effect held:—

(1) That, &c.

(2) That, &c.

17. On the — day of —, 1909, plaintiff gave notice of appeal. The appeal came on for hearing on the — day of —, 1909, before the Master of the Rolls, Lord Justice —, and Lord Justice — with the result that the judgment of Mr. Justice — was reversed and the appeal allowed. It was held by the Master of the Rolls:—(1), &c. It was also held that it was not, &c. By consent the hearing of the motion was treated as the trial of the action, and by the order dated the — day of — the corporation was perpetually restrained from allotting, &c.

18. The appellant humbly submits that the said order of the Court of Appeal of the — of — ought to be reversed, and the said order of Mr. Justice — of the — day of — restored, for the following amongst other reasons:—

Prayer of
petition.

(1) Because, &c.

(2) Because, &c.

(3) Because, &c.

Grounds of
appeal.

L. M.

N. O.

RECONSTRUCTION.

CHAPTER XXII.

INTRODUCTORY NOTES.

THE expression "reconstruction" is not a technical term; it is a popular phrase long in use, compendiously describing a well-known process. Reconstruction usually involves the transfer of the assets and liabilities of an existing company to a new company formed to take the place of the existing company, the conversion of the shareholders in the existing company into shareholders in the new company, and the dissolution of the old company, the result being that the new company and its assets and shareholders are substantially the old company in a new form. But it is not practicable to define reconstruction with any precision, seeing that the features very considerably vary, for example

- (a) The new company generally takes over all or nearly all the assets of the existing company, but sometimes substantial parts are omitted, and in almost all cases the uncalled capital, if any, on the shares in the existing company is excepted from the transfer.
- (b) The new company generally takes over all the debts and liabilities of the old company, but here again part of the debts and liabilities are occasionally omitted, and sometimes the whole or nearly the whole of them, provision being made for the satisfaction thereof out of assets excepted from the transfer.
- (c) The shareholders of the old company are always given the right to become members of the new company, but where the reconstruction is under sect. 192 of the Act of 1908 (replacing sect. 161 of the Companies Act, 1862), they have a right to dissent and be paid out in cash, and in such cases this right is not uncommonly exercised, to some extent at any rate. The shareholders, in addition to receiving shares, sometimes receive, in a reconstruction, debentures, debenture stock or other assets

- (d) The directors of the existing company usually become directors of the new company, but this is not always the case. Sometimes the opportunity is taken to change the directorate

In confirmation of the view that the term "reconstruction" has been used in the above sense the author may refer to the first edition of this work, published in 1877, in which reconstruction on the above lines was explained in detail, with the requisite forms and precedents given, and it need scarcely be said that the author was not then inventing either the process or the word, but was only describing a process then well known in the City of London and elsewhere, and giving to it the name it then usually bore.

How reconstruction distinguished from mere sale.

It has always been customary to differentiate "reconstruction" and a mere sale of the undertaking of a company out and out to another concern without any provision for the shareholders of the selling concern becoming shareholders in the purchasing concern. Reconstruction, again, has always been distinguished from amalgamation, which, as appears below (p. 1481), involves the transfer of the concern of an existing company to another existing concern not formed to take over the amalgamating concern. This distinction has been recognized more than once by the Courts. Thus, in *Hooper v. Western Counties Telephone Co.*, 68 L. T. 78, Chitty, J., had occasion to consider the meaning of the term "reconstruction" in a debenture. "What is included," said his Lordship, "in reconstruction by persons conversant with company law? There is one mode of reconstruction which may, perhaps, be said to be within the strict sense of the term, that is, when there is a winding-up order, an arrangement with creditors sanctioned by the Court under the Joint Stock Companies Arrangement Act, 1870, and a stay of the winding-up, upon which the old company having reconstructed itself according to the arrangement, would re-commence business and go on as the old company. That would certainly be reconstruction within the condition. The company would still continue to exist, but that, and that alone, would be too narrow a meaning to give to reconstruction here. The usual mode of reconstruction is where a company resolves to wind itself up, and proposes the formation of a new company which is to consist of the old shareholders, and to take over the old undertaking, the old shareholders receiving shares in the new company. In that case the old company ceases to exist in point of law, and there is in form a sale to the members of the new corporation. But the company is in substance, and may fairly be said to be reconstructed. It may, no doubt, be said that there is no power in such case to compel dissentient members to come in, but such a scheme is not put on foot until it has been ascertained practically that the old shareholders will come in. Mr. Palmer's well-known book was the first referred to, and it deals elaborately with reconstruction (5th ed. pp. 640, 660). He says the

term used is only applicable where a new company is started to take over the business of an old company, and he thinks it is essential to a scheme of reconstruction that a new company should be formed.

The same writer, in subsequently dealing with amalgamation, includes under that heading the case of a sale by a liquidating company of its assets to another existing company for shares in the latter company.

Reconstruction is mentioned in Mr. Buckley's book as sale and transfer of the assets to a new company, but that is obviously not intended to be exclusive. Lindley, L. J., in his treatise, says that reconstruction varies from amalgamation in that, as a rule, there is only one transferring company, and the company to which the property in question is transferred is practically the same company, with some alterations in its constitution. That appears to me to afford a clue to the meaning of the word, as used in a case like the present.

The present case is that of a comparatively small company joining a larger company. . . . The view I take is that the defendant company has not undergone reconstruction." In the same case his Lordship pointed out that the terms "reorganisation" or "reconstruction" are not words of art: they have no technical meaning in law.

South African Supply and Cold Storage Co., (1904) 2 Ch. 268. Buckley, J., had to consider the meaning of the term "reconstruction," as contrasted with the term "amalgamation." "What," said his Lordship, "does reconstruction mean? To my mind it means this: an undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling to an outsider, who shall carry it on, but in some altered form to continue the undertaking in such manner as the persons now carrying it on may substantially continue to carry it on. It involves, I think, that substantially the same business shall be carried on, and substantially the same persons shall carry it on; but it does not involve that all the assets shall pass to the new company, or that all the shareholders of the old company shall be shareholders in the new company. Substantially the business and the persons interested must be the same. Does it make any difference that the new company does or does not take over the liabilities? I think not. I think it is none the less a reconstruction because, from the assets taken over, some part is excepted, provided that substantially the business is taken, and it is immaterial whether the liabilities are taken over by the new company or are provided for by excepting from the scheme of reconstruction a sufficient amount to answer them. It is not, therefore, vital that the whole assets should be taken over, or that the liabilities should be taken over. You have to see whether substantially the same persons carry on the same business, and, if they do, I conceive it is a reconstruction."

There are at least five modes of reconstructing a company formed under the Companies (Consolidation) Act, 1908:—

1. By obtaining a private Act of Parliament reconstructing the company, with a new memorandum and articles of association, as in the case of the *Norwich Union Life Insurance Co.*, the *Commercial Union Assurance Co.*, &c.
2. By means of a sale sanctioned by the Court under sect. 120 of the Act (replacing the provisions of the Joint Stock Companies Arrangement Act, 1870). See further, *infra*, p. 1492, and Part II., Sect. IV.
3. By means of a voluntary winding-up and a proceeding under sect. 192 of the Act (replacing sect. 161 of the Act of 1862).
4. By means of an exchange of shares followed by a voluntary winding-up. *Infra*, p. 750.
5. By means of a sale of the undertaking before winding-up in consideration of shares in a new company, followed by a voluntary winding-up and distribution of such shares. But until the mischievous decision in *Bisgood v. Henderson's Transvaal Estates Co.* (1908) 1 Ch. 743 (see *infra*, p. 1454), has been overruled, this mode of reconstruction is not practically available.

Reconstruction under Sect. 192 of the Act of 1908.

In this chapter reconstruction under sect. 192 will be almost exclusively dealt with. That section provides as follows:—

Power of liquidator to accept shares, &c., as consideration for sale of property of company.

192.—(1) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company (in this section called the transferee company), the liquidator of the first-mentioned company (in this section called the transferor company) may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution at either of the meetings held for passing and confirming the same expresses his dissent therefrom in writing addressed to the liquidator, and left at the registered office of the company within seven days after the confirmation of the resolution, he may require the liquidator either to abstain

from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in manner provided by this section.

(4) If the liquidator elects to purchase the member's interest the purchase money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for winding up the company, or for appointing liquidators; but, if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court.

(6) For the purposes of an arbitration under this section the provisions of the Companies Clauses Consolidation Act, 1845, or, in the case of a winding-up in Scotland, the Companies Clauses Consolidation (Scotland) Act, 1845, with respect to the settlement of disputes by arbitration, shall be incorporated with this Act; and in the construction of those provisions this Act shall be deemed to be the special Act, and "the company" shall mean the transferor company, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, or, if there is more than one liquidator, then of any two or more of the liquidators.

A reconstruction under sect. 192, above, is a matter of ordinary occurrence, and may be resorted to with advantage in a variety of cases, of which the following are examples: Reconstructions common

A. Where the company desires to do something which, by its existing constitution, would be *ultra vires*, e.g.:— Examples

- (1) To engage in some business or obtain some powers not covered by the objects set forth in its memorandum of association, and it is considered that proceedings under sect. 9 of the Act (replacing the Companies (Memorandum of Association) Act, 1890) would be too expensive, or would involve too much delay, or would not be successful.
- (2) To obtain power to sell its undertaking, there being no power in the memorandum to do so. See *supra*, p. 510.
- (3) To issue preference shares having a priority over preference shares already issued which by the constitution have a first preference, or to alter the rights attached by the memorandum of association to several classes of shares respectively, and so fixed as to be unalterable without the sanction of the Court.

B. Where a company desires to carry into effect any arrangement which would amount to a reduction of capital without submitting to the stringent conditions prescribed by sects. 46-56 of the Act (replacing the Companies Acts, 1867 and 1877), upon a reduction of capital, e.g.:

- (1) To divide part of its paid-up capital, either in cash or *in specie*, among its members.

- (2) To reduce the liability on its shares which are only in part paid up.
- (3) To extinguish all further liability on such shares.
- (4) To return capital, but with power to call it up again
- (5) To cancel lost capital.
- (6) To pay off a member or members desiring to retire.

C. Where the company has exhausted its funds and is satisfied that the only or the best mode of raising further funds is to reconstruct and substitute partly paid-up shares for its fully paid-up shares.

Mode in which reconstruction effected.

The mode in which the reconstruction is carried into effect is as follows:—

In case A (1):

Case A.

Let it be supposed that the capital of the existing company is 100,000/.. divided into 10,000 shares of 10/.. each, that its object is to work a particular mine, and that it desires to have power to acquire and work other mines.

Preliminary steps.

The directors, having satisfied themselves that a reconstruction is expedient, will suggest it at a general meeting and procure a resolution in favour of it to be passed; or, as is sometimes done, they will issue a circular to the members or to the largest holders of shares seeking their approval of the plan, or informing them that the plan is under consideration.

New company.

If the plan is favourably received, the memorandum and articles of a new company will be prepared. The objects of such new company will be to acquire, take over and carry on the undertaking, property and liabilities of the old company, and to acquire and work any mines and mining rights, and such other objects as may be deemed expedient. The capital will be the same as that of the old company. The articles will authorize the directors to purchase and undertake all or any part of the property and liabilities of the old company upon the terms of an agreement therein referred to.

Probably by the articles all, or some, of the directors of the old company will be appointed directors of the new company.

The draft of the reconstruction agreement will, at the same time, be prepared. See Form 771.

Issue of notice.

Notice will then be issued by the directors of the old company convening an extraordinary meeting of that company to consider certain resolutions which will be set forth in the notice. See Form 774.

If the resolutions are passed by the requisite majority at the first meeting, a second one will be called to confirm them, so that they may become special resolutions.

And if they are duly confirmed, the new company will be at once incorporated, and the new company, and the liquidators of the old company, will execute the reconstruction agreement.

Special
resolution
Sale by
liquidators
Agreement

The agreement will provide for the transfer of all or substantially all the property of the old company to the new company, in consideration of the new company undertaking the debts and liabilities of the old company, paying the costs of winding it up, providing the funds necessary to purchase the interest of any dissentient members, and allotting to every assenting member of the old company one share in the new company in respect of each share held by him in the old company.

If the matter has been properly managed, the chances are that there will be but few dissentient members (if any). The funds to pay off the dissentients will be provided by the new company by borrowing or otherwise.

Dissentients

The property of the old company will in due course be made over to the new company, which will allot its shares as provided by the agreement.

Completion
of sale

The debts and liabilities of the old company (if it has any) will be got rid of as soon as possible. Many of the creditors will probably agree to accept the liability of the new instead of the old company. The rest will be paid.

Debts
satisfied

As soon as may be the liquidators hold the final meetings (sect. 195 of the Act), and make the proper return to the registrar (sect. 195 (3) of the Act), and at the expiration of three months therefrom (if the winding-up is not stayed by the Court) the old company is *ipso facto* dissolved.

Dissolution of
old company

Sect. 192, it will be observed, authorizes a sale sanctioned by a special resolution conferring "either a general authority on the liquidators, or an authority in respect of any particular arrangement." Sometimes a general authority is given; but in most cases it is limited to a sale on the terms of a particular agreement.

General or
particular
authority to
liquidators

Instead of a draft agreement, as above, it is not uncommon to have a provisional agreement made between one person on behalf of the old company and another on behalf of the intended new company. In such case the resolution will authorize the liquidators "to adopt" the agreement.

Provisional
agreement

Of course the arrangement must vary according to the circumstances of the company and the objects of the reconstruction.

Variations in
arrangement

Thus in cases A. (2) and (3), *supra*, p. 1435, care will be taken that the memorandum and articles of the new company contain the requisite provisions.

In case B. (1):—

Suppose that the shares in the old company are 20*l.* fully paid up, and that it is desired to return 10*l.*, the agreement will provide that the new company shall, in exchange for each share in the old company, allot one fully paid-up 10*l.* share in the new company, and pay the sum of 10*l.* in cash.

Or suppose that the object of the reconstruction is to divide *in specie* some assets of doubtful value, e.g., debentures of some other company. The new company will, as the consideration for the sale, agree to allot shares to the members of the old company, and to divide the debentures among them *pro ratâ*.

In case B. (2):—

Suppose the shares in the old company are 20*l.* with 10*l.* paid up, and it is desired to reduce the liability to 5*l.* In such case, one 15*l.* share in the new company, with 10*l.* credited as paid up, will be allotted in exchange for each share in the old company.

In case B. (3):

Suppose the shares in the old company to be 10*l.* with 7*l.* paid up, and that it is desired to extinguish all further liability. The object will be attained by allotting one fully paid-up 7*l.* share in the new company in exchange for each 10*l.* share in the old company.

In case B. (4):—

Suppose the shares in the old company are 10*l.* fully paid up, and that it is desired to return 5*l.* per share, but with power to call it up again. In such case the new company will allot one of its 10*l.* shares credited with 5*l.* paid up and also pay 5*l.* in cash, in respect of each 10*l.* share in the old company.

In case B. (5):—

Suppose the shares in the old company are 10*l.* fully paid up, and that 5*l.* per share has been lost. In such case the new company will allot one 5*l.* fully paid share in respect of each share in the old company.

In case B. (6):—

Suppose that some shareholders wish to withdraw their capital, and that the others wish to allow such withdrawal, an agreement can be made under which the former will in the reconstruction agree to take a specified amount in cash or shares in satisfaction.

In case C.:—

Suppose that the shares in the old company are 1*l.* fully paid up (say 100,000), and that it is considered that about 25,000*l.* working capital would suffice. In this case, the shares in the new company will be 1*l.* (100,000), with 15*s.* credited as paid up, and every member will have the option of getting one of these shares for every share in the old company held by him.

This (C.) is the commonest kind of reconstruction. The amount per share credited varies. Sometimes it is as much as 17*s.* 6*d.*, sometimes less, according to the requirements of the new company.

New company
commonly

In cases of reconstruction, the new company very commonly takes the name of the old one. This is permissible under sect. 8 (1) of the

Act. See *supra*, p. 450. Immediately after the special resolution to wind up, &c. has been passed by the old company, the liquidators sign the proper consent to the registration of the new company by the same name. *Supra*, p. 1090. The new company is registered by the old name the same or next day, the agreement is forthwith executed, and the new company commences business, thus avoiding any stoppage. Sometimes the name is slightly varied, and sometimes a perfectly different one is chosen for the new company.

taken the
old name

It will be observed that sect. 192 only authorizes a sale to a company. Hence a sale to an individual, who is to form a new company, and make such profit as he can out of the transaction, is not valid. *Bird v. Bird's Patent Sewage Co.*, 9 Ch. 358. See Form 740, *supra*.

Sale must be
to company.

But an agreement with some person purporting to act on behalf of an intended company, for a sale to him as such agent or to the company, may be valid (*Hester & Co.*, 44 L. J. (N. S.) Ch. 757).

Sect. 161 of the Act of 1862 did not require that the sale should be made to a company registered under the Act of 1862. The sale might be to any company, English or foreign. *Irrigation Co. of France, Ex parte Fox*, 6 Ch. 183. But it has been decided (*Thomas v. United Butter Cos. of France, Limited*, (1909) 2 Ch. 484) that under the corresponding section (sect. 192) of the new Act this cannot be done, for a foreign company is not a "company" as defined by sect. 285 of the Act. This oversight on the part of the Legislature involves a grave inconvenience which will have to be remedied.

Sale to
foreign
company

The sale and transfer to the new company need not be of the whole business, it may be of only a portion. *R. v. City and County Investment Co.*, 13 Ch. D. 481.

Sale of
portion.

It was held in *Clinch v. Financial Corporation*, 4 Ch. 120, that upon a sale under sect. 161, it was *ultra vires* to provide that if the assets sold should not produce a sum sufficient to pay up a specified amount on the shares to be allotted as part of the consideration, the liquidators of the selling company should make good the deficiency by making a call. But it is not easy to reconcile that construction of sect. 161 with subsequent cases. What the section contemplated was the sale of the company's "property," and it has been laid down in several cases that, in a winding-up, the uncalled capital is part of the property. *Webb v. Whiffin*, L. R. 5 H. L. 735; *Birch v. Cropper*, 14 App. Cas. 545. It is a statutory debt due to the company.

As to selling
uncalled
capital.

Why, then, could there not be a sale under sect. 161 (now sect. 192) of such property, or a provision for calling it up and handing over the proceeds? It has been held that such a provision is free from objection when the sale was under sects. 95 (now sect. 151) and 133 (now sect. 186), and the call is to be made in order to provide for payment of debts. *Bank of South Australia* (2), (1895) 1 Ch. 578. Moreover, it would seem from *New Zealand, &c. Co. v. Peacock*, (1894) 1 Q. B. 622, that a call may be made just before the winding-up, and that the capital thus called can then be included in the sale.

An agreement under the section may now—having regard to the

altered form of the underwriting commission section, sect. 89 (1) provide for underwriting. *Barrow v. Paringa Mines*, (1909) 2 Ch. 658.

Liquidators may be directed to adopt agreement.

An agreement adopted by the liquidators of a company pursuant to the *direction* of the company, given by virtue of sect. 161 (now sect. 192), has been held valid. *Southall v. British Mutual Life Assurance Society*, 11 Eq. 65; 6 Ch. 614.

Agreement may provide for allotment of shares to members directly.

The agreement may provide for the allotment of the shares, &c. being made *directly* to the members of the company being wound up (see *City and County Investment Co.*, 13 C. Div. 475; *Burdett-Coutts v. True Blue (Hannan's) Gold Mine*, (1899) 2 Ch. 616), or to the liquidator or his nominees to the intent that the shares may be distributed among the members. In such case the liquidator is entitled to object to an allotment to him instead of his nominees. *Dyett's case*, 43 L. T. 85; *National Standard Life Insurance Co.*, 1 T. L. R. 271.

May give option.

It may be framed so as to give to each member the *option* of coming in and claiming an allotment of his proportion of share in the new company. *Postlethwaite v. Port Philip Co.*, 43 C. D. 452.

Limit of time.

And it may limit a time within which that option must, if at all, be exercised. *S. C.*; *Burdett-Coutts v. True Blue, &c. Mine*, *supra*. It is no objection where a time is so limited that some members may, by illness or absence abroad or inadvertence, be prevented from dissenting or sending in claims in time. See case last mentioned. If no time is limited, the option must be exercised within a reasonable time. *S. C.* and *Weston v. New Guston Co.*, 60 L. T. 805; 64 H. L. 815; *Zucca v. Nacupai Co.*, 61 L. T. 176. What is a reasonable time for exercising the option must depend on the character of the property and on the circumstances; but where the property is of a speculative character (*e.g.*, a mine), and those who claim must pay or come under a liability to pay calls, the Court is very ready to exclude a claimant who does not come in promptly.

May empower liquidators to sell unclaimed shares.

If the option is exercised in due time, but the liquidator fails to allot the shares, and disposes of them elsewhere, the Court has no jurisdiction in the winding-up, even when under supervision, to award damages against the liquidator. *Hill's Waterfall, &c. Co.*, (1896) 1 Ch. 947. But in an action an allottee may be declared a trustee for the old shareholder. *Rooney v. Stanton*, 17 T. L. R. 272. The agreement may also provide, although it is not essential to make such a provision, that the shares not taken up pursuant to the option may be sold by the liquidator, and the proceeds held for the persons who could have claimed. *Postlethwaite v. Port Philip Co.*, 43 C. D. 452.

Sale for partly paid shares.

A sale under sect. 161 (now sect. 192) (or under a power in the memorandum), if the context or the articles do not confine the sale to one for fully-paid shares—*Mason v. Motor Traction Co.*, (1905) 1 Ch. 419) may be made in consideration of shares that are only in part credited as paid up. *City and County Investment Co.*, 12

C. Div. 475, *Imperial Mercantile Credit Association*, 12 Eq. 504; *Hester & Co.*, 44 L. J. (N. S.) Ch. 757; *Postlethwaite v. Port Philip Co.*, 43 C. D. 452. But in such case the liquidator should take care that the shares, if not fully paid up, are not allotted to him but direct to the shareholders, otherwise he may find himself involved in liabilities which he never contemplated. *Dyett's case*, 63 L. T. 85; *National Standard Life Assurance Co.*, 27 T. L. R. 27.

As to a sale under a power in the company's memorandum, see however, pp. 510, 511, *supra*, and pp. 1452 *et seq.*, *infra*.

No provision is made by the section as to the mode of distribution of the shares or other consideration received or receivable from the purchasing company, and in the absence of such a provision it has been held that the distribution must be in accordance with sect. 133 of the Act of 1862 (now sect. 186). *Griffith v. Paget*, 5 C. D. 894.

How shares to be distributed

That section provides that the property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto shall, *unless it is otherwise provided by the regulations of the company*, be distributed amongst the members of the company according to their rights and interests in the company, and the liquidator is empowered to make calls *inter alia* for the adjustment of the rights of the contributories amongst themselves, and is directed to pay the debts of the company and adjust the rights of the contributories among themselves.

What then are the rights in winding-up?

If all the shares are of one class, and the same amount is paid up thereon, the assets available will be distributed in proportion to the shares held; but if some shares are paid up to a greater extent than others, or if some have a preferential right as regards capital, the assets must be distributed in accordance with the general rules above referred to; and if in order to adjust the rights a call is necessary, it must be made, and in making such distribution the shares in the company must be treated as of their actual, not nominal, value.

The agreement may and sometimes does provide in general terms that the share consideration shall be allotted to the liquidator's nominees to the intent that the same may be distributed among the members in accordance with their rights and interests, or it may set forth what each member is entitled to claim; but in the latter case a member cannot, without his consent, be given less than his strict legal rights.

Thus, if there are preference and ordinary shares, both ranking equally in winding-up, it is not *prima facie* allowable to provide in the agreement that the former shall receive preference and the latter ordinary shares in the new company, for their right is to rank equally. *Griffith v. Paget*, 5 C. D. 894; 6 C. D. 514; followed by C. A. in *Simpson v. Palace Theatre* (1893), 69 L. T. 70.

To justify such a provision there must be a special clause in the

articles (see *supra*, p. 785), or special meetings of the class under a clause on the lines of that at p. 685, *supra*, or a scheme under sect. 120 of the Act.

How to
justify a
distribution
otherwise
than in
accordance
with rights

Nevertheless, even in the absence of such clauses, it may sometimes be possible to depart from the strict legal rights. Thus, suppose a company has 100 founders' shares of £1 each (worth in the market 500*l.* each), and 5,000 ordinary shares of £1 each, worth par. It is desired to reconstruct on the footing that the shares shall all be uniform, and that 500 shares in the new company shall be given for each founders' share in the old company. *Griffith v. Paget*, *supra*, forbids such an arrangement. But it may be effected thus: Form a new company with power to acquire the undertaking of the old company and any shares in the capital thereof. Let the new company enter into a provisional agreement for the acquisition of all the founders' shares on the terms desired, viz., 500 of its own for each founders' share, and then let the old company sell its undertaking to the new company, under sect. 192 (replacing sect. 161), on the footing of a share for share allotment, the new company undertaking as the beneficial owners of the founders' shares, to make no use in respect thereof. And see *Beeston Pneumatic Tyre Co.*, W. N. 1898, 31, distinguished in *North-West Argentine Railway*, (1900) 1 Ch. 882, 890, *infra*, p. 1443.

Another plan commonly adopted is, before the winding-up procedure and sign an agreement as to the mode of distribution. If the number of members is small, the agreement can be made between them and the company; if the number is large, it can be made between some one purporting to contract on behalf of all the shareholders of the one part and the company of the other part, and can be made conditional on its being ratified by all or some large proportion. See *infra*, p. 1474.

But even without such consent, a reconstruction agreement providing for distribution otherwise than in accordance with the legal rights of members is not absolutely *ultra vires*, and will be upheld if the Court is satisfied that all the shareholders have assented, and will not interfere. *Beeston Pneumatic Tyre Co.*, W. N. 1898, 31. On a question of legality a provision for distribution can be made from the agreement for sale. *Waller, London and Northern Corp.* (No. 1), (1898) 2 Ch. 469. But the evidence must be clear that the members *do* consent, and accordingly when an agreement for reconstruction provided for a distribution in general terms, and by the preliminary circular it appeared that a distribution other than in accordance with the legal rights was intended, the Court, in the absence of evidence of an unanimous assent, held that the liquidator was bound to disregard the circular, and divide in strict accordance with legal rights. *North-West Argentine Railway Co.*, (1900) 1 Ch. 882.

Action by
objecting
member

Where a reconstruction agreement provides for distribution otherwise than in accordance with the legal rights, an objecting member who desires to impeach it should bring an action and apply for an

annunciation, see *Clinch v. Finance and Corporation*, 1 Ch. 117, *supra*,
 rem 739. *Greith v. Paquet*, 5 C. 1, 824.

If the agreement is not open to objection, but the liquidator
 proposes to distribute otherwise than in accordance with legal rights,
 an objecting member can either bring an action or only in the
 winding-up for directions to the liquidator. *North-West Argentine*
Loan Co. (1890) 2 Ch. 832.

Dismissing members. By sect. 92 (3) (sect. 164 of the Act of 1862),
 members who dissent from the special resolution are allowed
 seven days from the confirmation of the resolution, i.e., the second
 meeting, within which they must give notice of dissent in writing.
 The notice must be given *in writing*. 1474

If of the highest importance for a person having a right to
 new company to be diligent in exercising such right. *P.*
Kay, J. Weston v. Westington Co., 60 L. T. 805. He will do
 himself to claim the new shares if he lies by to see whether it
 rise in value. *Ibid.* A fortiori if the company's property
 has no value, e.g., gold. *Zuccani v. Nacupai Gold A.*
 (1901) 1 T. 180.

When the time to give a limit of a fortnight. *Stirling*

to exercise the option more than two months

late. *Postlethwaite v. Port Philip Gold Co.*

If dissent should not merely express

require the liquidators either to abstain from carrying

non interest or to purchase the member's interest. *Bank of*
Kovington v. H. 13 C. D. 808.

It has been held that a notice of dissent served before the con-
 firmatory meeting may, if not withdrawn or returned, be a valid
 notice within the section. *London & Westminster Brick Co. v. N.*
 (1890) 3. But it is wiser to follow strictly the terms of the enactment.
 A liquidator has power in special cases to waive dissent
 within the seven days. *Bradley v. Rhodesia Co. (limited)* (1910
 2 Ch. 95).

If an objecting member fails to give such notice, he must either
 accept the benefit offered him by the reconstruction, i.e., he must
 become an assenting member, or else he entirely loses his beneficial
 interest in the old company; for although he will remain entitled to
 his shares in that company, yet they are shares in a mere husk or
 shell, for the whole of the assets of the old company are sold over
 to the new company.

It was at one time contended that if a member failed to
 express his dissent within the prescribed period he was bound to
 sale or arrangement, and was consequently under an obligation to
 accept any shares or other interest in the purchasing company which
 were thereby to be allotted to him; but this notion was exploded,
 and it is now settled that the provision in sect. 161 (repealed
 by sect. 192), that the sale shall be binding, merely means that a

dissentient member cannot impeach the sale. He must either assent or dissent in the prescribed manner, or simply lose his interest. *Lox's case*, 13 W. R. 883; *Higg's case*, 2 H. & M. 657; *Martin's case* 2 H. & M. 669; *For's case*, 6 Ch. 183; *Southall v. British Mutual Life Assurance Soc.*, 6 Ch. 614; *Postlethwaite v. Port Philip Co.* 43 C. D. 452; *Burdett-Coutts v. True Blue (Hannan's) Gold Mine* (1899) 2 Ch. 616; *De Rosaz v. Anglo-Italian Bank*, L. R. 4 Q. B. 474.

If any question arises as to whether a member has dissented in time, application can be made to the Court having jurisdiction to wind up the company to decide the point under sect. 193 of the Act *Union Bank of Kingston-upon-Hull*, 13 C. D. 808. In that case the application was by motion as contemplated by sect. 138 of the Companies Act, 1862 (sect. 193, Companies Act, 1908), but it is now usually made by originating summons.

How value
to be ascer-
tained.

Where there is a reference to arbitration under sect. 192 (3) and (6) of the Act of 1908, it rests with the arbitrator to fix the value. In doing this the arbitrator should no doubt consider what upon a cash sale the undertaking would fetch as a going concern, having due regard to its debts and liabilities and to all the circumstances of the case and what proportion of that cash the dissentient interest would represent.

The fact that the new company has given a large sum in paid-up shares affords some indication of value, but the arbitrator ought not to assume that the shares thus given are worth par. *Mysore West Gold Mining Co.*, 42 C. D. 535. Their value is a question of fact to be determined if necessary by the evidence of experts: the paid-up or partly paid-up shares given on a reconstruction are sometimes worth but little in the market; and evidence of this kind, that the shares are only saleable at a low figure, goes far to negative the notion that the nominal value of the consideration represents the actual value of the assets sold.

The market value of the shares in the selling company at the time of the reconstruction is again no certain criterion of the value of a dissentient member's interest. Yet it often happens that an arbitrator's valuation is found to accord very closely with such market value.

If there is to be an arbitration it is to be carried out in accordance with sects. 128 to 134 of the Companies Clauses Consolidation Act 1845 (8 & 9 Vict. c. 16). And by virtue of sect. 21 of the Arbitration Act, 1889, that Act also applies except so far as is inconsistent with the provisions of the Act of 1845. See *Annual Practice*, Vol. 2 "Arbitration Act, 1889," and notes.

A shareholder who has agreed to arbitration has no right to examine witnesses under sect. 115 (now sect. 174, Companies Act, 1908) for the purpose of increasing the value of his shares. *British Building Stone Co.*, (1908) 2 Ch. 450.

The costs of the arbitration proceedings are in the discretion of the Court. *Re Imperial Mercantile Credit Association*, 41 L. J. Ch. 116. If the liquidator has not tendered a price, the arbitration proceedings will not be at the peril of the dissentient shareholder as to costs, but the costs will be reserved. *Ibid*

Care should be taken so to frame the agreement that dissentient members shall have sufficient security for the payment of the purchase money for their interests; otherwise there will be risk of legal proceedings. See *infra*, Form 771, clause 8; *Hester & Co.*, 44 L. J. (N. S.) Ch. 757; *New Flagstaff Co.*, W. N. (1889) 123.

Security of dissentients must be regarded.

Where the selling company has a sufficiency of uncalled capital, it would seem from the above cases that such a clause is unnecessary. It may, however, be doubted how far this is consistent with the principles laid down in *Clinch v. Financial Corporation*, 4 Ch. 120.

It was for many years generally thought that the right of a member to dissent under sect. 161 of the Act of 1862 (192 of new Act) could by apt words be taken away by the articles of a company, and articles of association for many years frequently contained a clause framed on that footing. Such a clause first came under consideration in *Fox's case*, 6 Ch. 176. In that case it was inserted immediately before the winding-up resolution, and the Court considered that it was then too late, but did not say that in no circumstances would such a clause be valid. However, a closer scrutiny of sect. 161 seemed to show that the agreement was only to be binding subject to the proviso as to dissentients, and this being so, it was held that the articles could not displace the proviso or deprive the members of the right to dissent and insist on payment in cash in accordance with the proviso. See *Baring-Gould v. Sharpington Pick, & Co.*, (1899) 2 Ch. 80; *Payne v. Cork Co.*, (1900) 1 Ch. 308; and see *Pereril Gold Mines*, (1898) 1 Ch. 122; *Bisgood v. Henderson & Co.*, (1908) 1 Ch. 743; and *infra*, p. 1154. Perhaps, however, in arriving at this conclusion due weight was not given to two material considerations:

Excluding right to dissent

- (1) That by sect. 133 of the Act of 1862 (sect. 186 of the Act of 1908) the property of the company in a voluntary winding-up (including the proceeds of sale under sect. 161) is to be applied in satisfaction of its liabilities *pari passu*, and subject thereto shall, *unless otherwise provided* by the regulations, articles of the company, be distributed among the members according to their rights and interests. So that the regulations, articles are made supreme.
- (2) That the right of dissent is obviously a right reserved for the benefit of the shareholders individually, and is therefore one to which the principle embodied in the maxim *Quilibet potest renunciare juri pro se introducto* applies.

It may, therefore, be held hereafter, on fuller consideration, that the articles *can* deprive dissentients of their rights under the section

Where a notice is served upon arbitrators by one of the parties to the arbitration to appoint an umpire, they are "called upon to act" in the matter of the arbitration within the meaning of clause (c) of Sched. I. to the Arbitration Act, 1889, and the three months within which the arbitrators are by that clause bound to make their award run from the service of that notice upon them. *Baring-Gould v. Sharpington, &c. Syndicate, supra*.

Payment to
dissentient

A member who has duly dissented is entitled to have the purchase-money for his interest paid to him; and to enforce this right when the amount has been ascertained, he has a right of action against the company. *De Rosaz v. Anglo-Italian Bank*, 4 Q. B. 462.

Interest.

No interest is payable upon the purchase-money until the amount has been ascertained and a demand for payment made. *United States Cable Co.*, 48 L. J. Ch. 665. The proper rate is 4 per cent.

A dissentient member whose interest has been purchased under sect. 161 does not thereby escape from liability towards the creditors of the company which is being wound up. So it was held in *Vining's case*, 6 Ch. 601; but it may be that if a winding-up order is not made within a year the members of the selling company cease to be under any liability to the creditors. *City and County Investment Co.*, 13 C. D. 475.

This, however, is by no means clear, for there is nothing in the section to release the members. No doubt the agreement after a year will not be avoided by a winding-up; but how can that prevent an unpaid creditor from obtaining a compulsory or supervision order of the old company, with a view to payment out of the capital which was uncalled at the commencement of the winding-up? It is conceived that the liability of the members is not at an end until the dissolution of the old company, or until the creditors have become bound by novation.

Whence
fund to pay
dissentients
to come.

As to the source from whence the funds to pay dissentient members are to come: according to the above plan the new company is bound by the agreement to provide them. It is necessary to impose this obligation on the new company, because, by the agreement, the old company is to sell *all* its property. Sometimes, however, as in Form 771, *infra*, the funds are in fact provided by the sale of the shares which the dissentients might have claimed, the new company making up any deficiency.

A mode of reconstruction at times adopted is to provide by the agreement for the allotment of the share consideration to the liquidators or their nominees, instead of to the members directly, and not to insert any provision requiring the new company to pay the dissentients. In such case the agreement, or the special resolution sanctioning the same, will direct the liquidators of the old company to raise the funds to pay dissentients by the sale of a sufficient number of the shares in the new company to be allotted pursuant

to the agreement, and to distribute the residue of such shares among the assenting members. The result in either case is the same.

As to creditors, sect. 161 of the Act of 1862 did not nor does sect. 192 of the Act of 1908 contain any provision for the benefit or protection of creditors except the concluding paragraph (sect. 192 (5)) to the effect that if an order is made within a year for the winding-up of the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court.

Position of
creditors

Hence if the year elapses without such an order being made, the creditors are debarred from questioning the validity of the agreement (*City and County Investment Co.*, 13 C. D. 482); but save in this respect the reconstruction does not prejudice the creditor's right to be paid, and accordingly he can, if the company does not pay him off, petition for the winding-up of the company compulsorily or under supervision, or in the alternative he can, by virtue of sect. 193 of the Act of 1908, apply in the voluntary winding-up for an order restraining the liquidator from parting with the assets or purchase consideration under the agreement without first providing for payment of his debt or claim, and, if needs be, he can bring an action for the purpose. See *Lord Elphinstone v. Monkland Co.*, 11 App. Cas. 332; *Oppenheimer v. British and Foreign Co.*, 6 C. D. 741; *Gooch v. London Banking Assoc.*, 32 Ch. D. 41.

As to debentures and debenture stock holders, they are not in a worse position than other creditors, unless, indeed, their securities are so framed as to allow of a reconstruction without their consent. See Part III. of this work, 10th ed. p. 356.

The winding-up *prima facie* renders their securities enforceable and it needs be the Court will protect them by the appointment of a receiver (*Wallace v. Universal Automatic Machine Co.*, (1891) 2 Ch. 547; *Victoria Steamboats Co.*, (1897) 1 Ch. 158; for this is a very different thing from a sale of the undertaking in the ordinary course of the company's business, the company being kept going. In such case the sale may be valid as against debenture holders. *Foster v. Borar Co.*, (1901) 1 Ch. 326; *H. H. Vignand & Co.*, (1900) 2 Ch. 651.

In order to preclude danger, it is not uncommon, where a company which has issued debentures or debenture stock desires to reconstruct to obtain in the first place an agreement by the holders to accept debentures or debenture stock or preference shares of the new company in satisfaction, or to obtain the underwriting of sufficient debentures or debenture stock to clear off any who object; similarly, when the company is not in a very flourishing position the consent of unsecured creditors is sometimes sought for and obtained before actually going into liquidation.

Precautions
as regards
creditors

But generally creditors raise no objection to a reconstruction. Novation especially if the company is a flourishing one, or if the object is to

raise further funds by issuing to the members partly paid shares; and accordingly creditors with notice that the liabilities of the old company have been taken over by the new company usually deal with the new company on that footing, and in the result novation of contract (i.e., an agreement to accept the liability of the new company instead of the liability of the old company) is readily inferred. See as to novation, *Family Endowment Co.*, 5 Ch. 118; *Conquest's case*, 1 Ch. D. 344; *Smith, Knight & Co.*, 4 Ch. 671; *Ex parte Blood*, 9 Eq. 649, and *Re Manchester and London Life Assurance Co.*, 9 Eq. 649, also sect. 7 of the Life Assurance Companies Act, 1872.

If the creditor does not novate, he is not entitled to sue the new company for payment, for as to him the agreement for reconstruction is *res inter alios acta*; *supra*, p. 634. It is for the old company and its liquidators to enforce the agreement, and if the old company has been dissolved before novation the creditor who has not novated may lose his right. *Law Courts Chambers Co.*, 31 L. T. 669, Stirling, J. But a liquidator who prematurely dissolves is or may be liable in damages (*Pulsford v. Devenish*, (1903) 2 Ch. 625, and *New Zealand Joint Stock*, 23 T. L. R. 238), for he ought, before dissolving, to take every means to ascertain what claims there are outstanding against the company. See also sects. 188, 223 of the Companies (Consolidation) Act, 1908, and Part II., p. 721. As to assets accruing after dissolution, see *Henderson's Nigel Co.*, 105 L. T. 370.

Notice calling meetings to pass special resolution.

The validity of a special resolution sanctioning a sale or arrangement under sect. 192 (sect. 161, Companies Act, 1862) essentially depends on the sufficiency of the notices given convening the meetings. These ought to give the members either direct or indirect notice that the transaction is to be effected under sect. 192 (sect. 161, Companies Act, 1862). *Imperial Bank of China, &c. v. Bank of Hindustan, &c.*, 6 Eq. 91; *Ex parte Fox*, 6 Ch. 176. A notice which states (*inter alia*) that a resolution is to be proposed authorizing the liquidators to sell the assets to another company, and *to accept compensation in shares*, is probably sufficient; but the usual plan now is to refer expressly to the section. This precludes all doubt. Of course, the reference to sect. 192 may be either in the notice or in the accompanying circular (if any).

The notice must, as required by sect. 69 of the Act of 1908 (sect. 51 of the Act of 1862), specify the proposed resolution. See *supra*, p. 1092.

It must be duly served, in accordance with the regulations, a sufficiently long time before each meeting. See *supra*, p. 1097.

The interval between the two meetings must be at least fourteen clear days, and not more than one calendar month. *Supra*, p. 1096.

If the meeting is called to reconstruct and wind up with a view thereto, it is not competent to the meeting to drop the reconstruction and pass a naked resolution for winding-up (*Teede & Bishop, Limited*, W. N. (1901) 52-70 L. J. Ch. 409; 81 L. T. 561), unless,

indeed, the notice points to such an alteration. See, however, *Thompson v. Henderson's Transcaal Estates Co.*, (1908) 1 Ch. 765, in which it was held that where the notice specified several resolutions, some *ultra vires* and some *intra vires*, and all were passed, the latter were effective though the others failed.

In *Betts & Co. v. Macraughten*, (1910) 1 Ch. 430, a still more liberal construction was given by Eve, J., to a notice convening a meeting for the appointment of directors. *Supra*, p. 692.

If the agreement provides for any payment to outgoing directors by way of bonus or compensation, the notice must make due disclosure. *Kane v. Croydon Tramways*, (1898) 1 Ch. 358; *Tieszen v. Henderson*, (1899) 1 Ch. 861; *Normandy v. Ind, Coupe & Co.*, (1908) 1 Ch. 84, *supra*, p. 696.

In relation to a reconstruction the requirements of the Act of 1908 must be borne in mind, and the first question to consider is, whether the company is a "private company" within the meaning of sect. 72 of the Act (appointment of directors). How far Act of 1908 applies.

In regard to this, the offer of shares by the liquidator to the shareholders of the selling company pursuant to the reconstruction agreement is not considered an offer to the public, and accordingly, if the number of members is not to exceed fifty, and the articles contain the requisite restrictions, the company can be registered as a private company. In the result, therefore

It will not be necessary to comply with sect. 72, p. 6, *supra*.

Sect. 85, *supra*, as to allotment, will not apply, p. 10, *supra*.

Sect. 87, as to commencing business, will not apply, p. 21, *supra*.

Sect. 88, as to making returns and filing contracts, will apply, pp. 610, 611, *supra*.

Sect. 89 (1), enabling the company to pay underwriting commission, will apply, pp. 279, 288, *supra*. *Dominion of Canada General Trading Syndicate v. Bonstock*, (1911) 2 K. B. 648; and see *Baith v. New Africaander Gold Mining Co.*, (1903) 1 Ch. 295.

Seets 80 and 81 (as to disclosure in prospectuses) will not apply, for the circular to the members is not a prospectus inviting the public to subscribe for shares, pp. 12, 178, 179.

The statutory meeting will have to be held, but the preliminary report need not be forwarded or filed (sect. 65 (1)).

Where, however, a prospectus is issued or a statement in lieu thereof filed (sect. 82)

Sect. 72 must be complied with. See *supra*, p. 6.

Sect. 73 must be complied with. See *supra*, p. 719.

Sect. 85 as to minimum subscription, must be complied with; and before commencing business the company must comply with sect. 87 and obtain the requisite certificate that it is entitled to commence business, p. 20, *supra*.

Sect. 88, as to return of allotments of shares and filing contracts, will apply, pp. 610, 611, *supra*.

Sect. 89, as to underwriting commission, will apply, p. 279, *supra*

Sects. 80 and 81, as to prospectus, pp. 179, 167, *supra*, and

Sect. 83, as to not varying contract before statutory meeting, will apply, p. 324, *supra*

Underwriting
or guarantee-
ing the
subscription
of shares.

It frequently happens that the reconstruction of a company is effected in order to raise further sums by inducing the members of the selling company to take up partly paid shares in the new company in respect of the shares held by them in the old company, and in such cases the question of underwriting may be of great importance, for the success of the reconstruction may depend largely on whether the whole of the share consideration can be placed. Thus, if it is necessary to provide 20,000*l.* for payment of debts and for working capital, and it is proposed on the reconstruction to issue 200,000 *l.* shares, each credited with 1*s.* as paid, it is obvious that, unless all are taken up, the 20,000*l.* will not be provided.

To get the shares underwritten may therefore be of great importance when there is any danger that the members will not take them all up. But, as sect. 8 of the Companies Act, 1900, stood, it was no easy matter to provide for such underwriting. *Burrows v. Matabele Gold Reefs*, (1901) 2 Ch. 23; *Booth v. New Africander Mining Co.* (1903) 1 Ch. 295.

The language of that section has, however, been altered in the corresponding section of the Act of 1908, s. 89. The words in the first line "upon any offer of shares to the public" disappear, and with them disappears the difficulty of utilizing the powers of the section for the purposes of a reconstruction. See *Barrow v. Parinqa Mines* (1909) 2 Ch. 658; *Dominion of Canada General Trading Syndicate v. Brigstock*, (1911) 2 K. B. 648

Filing the
reconstruction
agreement.

As to filing the agreement with the Registrar of Companies. Where the reconstruction agreement provides, as it usually does, for the allotment of shares credited as fully or partly paid up, sect. 88 of the Companies Act, 1908, must be complied with, by filing, within one month after allotment of any shares pursuant thereto, a contract constituting the title of the allottees to such allotment, and the other returns in the section mentioned made: *infra*, p. 1469. It is not clear that the reconstruction agreement itself "constitutes the title" of the allottees, for they are not parties to it; and accordingly it is generally deemed expedient before allotment to sign a further contract between the company and the allottees, or a trustee for them, providing for the allotment to them, and then to file this and the reconstruction agreement within the month.

The penalties for not complying with the requirements of sect. 88 of the Act of 1908 are very heavy --50*l.* for every day's default and it seems better to avoid any risk.

Where a quotation on the Stock Exchange is to be applied for, it is necessary in the filed agreement to give the denoting numbers of the shares, and it may be as well to do this in all cases.

As the agreement to be filed is to be in writing, it must be signed or sealed by all parties.

The agreement having been carried into effect, the liquidator should take the necessary steps to dissolve the company, and with a view thereto should make out his account as required by sect. 195 of the Act of 1908, and should call the final meeting, lay the account before it, and then make the required returns to the Registrar, whereupon, at the end of three months, the company will be deemed to be dissolved. But sect. 223 of the Act must be borne in mind, for under that section an order may within two years be made declaring the dissolution void. *Spottiswoode, Dixon and Hunting*, (1912) 1 Ch. 410.

Subsequent
procedure

The dissolution will preclude any application for a winding-up order (*Pinto Silver Mining Co.*, 8 C. D. 273; *London & Caledonian*, (1879), 11 C. D. 140; *Schooner Pond Coal Co.* (1888), W. N. 70), unless the application is made within the three months (*Crookhaven Mining Co.*, 3 Eq. 69; *Whiteley Exerciser, Limtd. v. Gamage*, (1898) 2 Ch. 405), and any action against the old company or its liquidator or directors for the purpose of further winding up its affairs (*Coron v. Gorst*, (1891) 2 Ch. 73. But the Court may, it seems, with the consent of the Crown, direct the liquidator to distribute assets accruing subsequently to the dissolution. *Henderson's Nigel Co.*, 105 L. T. 370. See further, Part II

It must be borne in mind that where the new company takes over the whole of the assets of the old company, those assets will include any right of action by the old company against its directors for misfeasance (*Park Gate Waggon Co.*, 17 C. D. 239; *Wood v. Woodhouse*, (1896), W. N. 4), and the new company may accordingly take steps to enforce that right.

The liquidators, in a winding-up for the purpose of reconstruction, generally act without remuneration, or for a small fee.

Remuneration
of
liquidators

Where the special resolution sanctioning an agreement for a sale under sect. 192 is invalid for want of proper notice or otherwise, the transaction can nevertheless be confirmed. *For's case*, 6 Ch. 176. In order to effect this, the liquidators must call the necessary meeting and procure the members to pass proper special resolutions.

Confirmation
of invalid
resolution

It will be remembered that sect. 192 (5) provides that if an order be made within a year for the winding-up the company by or subject to the supervision of the Court, the resolution shall not be of any validity unless sanctioned by the Court. The Court cannot in such a case, it has been held, give the requisite sanction before the winding-up order (*Callao Bis*, 42 C. Div. 169), the policy of the Act being to protect creditors by reserving their rights. Sometimes in order to preclude danger, a supervision order is at once obtained and the sanction asked for. *New Flagstaff Co.*, W. N. (1889) 123. [But query whether *Callao Bis*, *ubi supra*, was rightly decided

Order to
wind up

Company may register with a view to reconstruction.

Any company, though not formed or registered under the Act of 1862, if capable of being registered under that Act, may effect a reconstruction under sect. 192. In order to do this it will register under the Act, and the reconstruction may then be carried into effect as above mentioned. It is no objection that the registration was made expressly with a view to winding-up and selling under sect. 192. *Southall v. British Mutual Life Assurance Society*, 6 Ch. 614, C. A.

Reconstruction in winding-up by Court.

Section 192 is only applicable in a purely voluntary winding-up. *Haford Hotel, W. N.* (1868) 86. "Altogether voluntarily" are the words of the section. But in a winding-up by or under the supervision of the Court a reconstruction may be effected by a sale under sect. 151 of the Act to a new company, for under that section the Court has powers at least as extensive as those conferred by sect. 192 on a liquidator. *Agra and Masterman's Bank*, 12 Eq. 409; 15 W. R. 554; *Imperial Mercantile Credit Association*, 12 Eq. 501; *Cambrian Co.*, 48 L. T. 114. Where a company gets into difficulties a reconstruction and an arrangement with creditors under sect. 120 (replacing the provisions of the Joint Stock Companies Arrangement Act of 1870) are not uncommonly effected at the same time. See *infra*, p. 1492.

Reconstruction by exchange of shares before winding-up.

A reconstruction by exchange of shares followed by a voluntary winding-up is another mode of reconstruction which, in special cases, is preferable to a proceeding under sect. 192, *e.g.* where it is desired to reconstruct on a basis which would be in contravention of the rule established in *Griffith v. Paget*, *supra*, p. 1441; see Form 790, *infra*, p. 1476; for instance, where the capital consists of preference shares and ordinary shares, and there is no clause in the articles like clause 153, *supra*, p. 785, and it is desired to reconstruct on the footing that in the new company the preference shareholders shall get preference shares and the ordinary shareholders shall get ordinary shares, or that both classes shall get ordinary shares in the new company in proportion to their market value and not in proportion to their nominal amount. In such cases it is sometimes possible to carry the thing through by an agreement for exchange to be ratified by all the shareholders. When all have ratified the agreement, the new company allots the shares, and then the old company goes into liquidation, and the new company, as the owner of all the shares in the old company, calls for and takes a conveyance of the assets of the old company and clears off its liabilities.

Reconstruction and Amalgamation by Sale under a Power in the Memorandum.

Reconstruction and amalgamation by sale under power

Another mode of effecting a reconstruction or amalgamation has been frequently adopted with success during the last twenty years, *viz.*:-

- (1.) To sell the company's undertaking under a power in its

memorandum of association for paid-up shares in a new company to be allotted to the selling company or its nominees; in memo-
randum of
association.

- (2.) Subsequently to resolve on a voluntary winding-up and pursuant to a power in the articles, to authorize the liquidator, after paying or providing for the debts and liabilities to distribute the surplus proceeds of sale, namely the shares amongst the members of the company according to their rights and interests.

This course can only be adopted when the memorandum of association contains the requisite power (*supra*, p. 510) to sell the undertaking for shares, and the articles contain the requisite power to distribute assets in kind (*supra*, p. 785). The sale having been made, the old company will pass a resolution to wind up and to distribute the shares in kind. See *supra*, p. 1128, Form 517.

This plan is best suited to cases in which the shares to be distributed are fully paid up.

For Form of Agreement for Sale, see *supra*, p. 371, and for resolution approving same, see Form 787, *infra*, p. 1471.

Reconstruction on these lines was, in many cases, found preferable to proceeding under sect. 161 of the Act of 1862 (sect. 192 of Act of 1908); for example, in cases in which it was desired to reconstruct conditionally on the new company finding further capital by the issue of shares or debentures, or conditionally on the selling company coming to some specified arrangement with its debenture holders. In such cases the agreement for sale reserved power to rescind if the condition was not fulfilled within a specified time, and in case of rescission the selling company could then continue its business; whereas, if it proceeded under sect. 161, that would not have been feasible, for it would have passed into liquidation.

So, in the case of amalgamation, if several companies agreed to sell their undertakings to a new company, or to one of the amalgamating companies conditionally on the purchasing company placing further capital or complying with some other condition; if the condition was not fulfilled the agreements could be rescinded and the several companies continue their business.

There was a further advantage in adopting this mode, in that it enabled the company or companies to avoid the danger arising from the provisions of sect. 161 in favour of dissentient members, for that section has not uncommonly been used by dissentients for blackmailing purposes. And the costs of an arbitration are in some cases capable of being run up to a very large sum. In one case they amounted to 10,000*l.* or thereabouts.

A sale followed by liquidation is, moreover, much less likely to prejudice a going concern than a liquidation followed by a sale.

There was ample authority for adopting this mode of reconstruction or amalgamation. Thus, in *Cotton v. The Imperial and Foreign*

Agency and Investment Corporation, (1892) 3 Ch. 454, where such a mode was adopted, Chitty, L. J. (then J.), refused an injunction to restrain the company from acting on the agreement for sale to the new company, holding that the agreement, made as it was under the power contained in the company's memorandum of association, was valid, notwithstanding that it was made in contemplation of a voluntary winding-up and distribution, and that the resolution for voluntary winding-up and distribution in specie was passed shortly after the resolution ratifying the agreement. His Lordship did not decide that the proposed distribution of the shares was valid, but there being power in the articles to distribute in specie, a distribution in exercise of the power was treated as following in the natural sequence of events. So, too, in *New Zealand, &c. Co. v. Peacock*, (1894) 1 Q. B. 622, the validity of such a scheme came into question, and was fully recognized by the Court of Appeal. In that case the company, under a power in its memorandum agreed to sell its undertaking and a call to be made by its directors to a new company, and the sale was made in contemplation of a voluntary winding-up and distribution. The call was made, and afterwards the resolution for voluntary winding-up was passed. In the action the liquidator sought to enforce payment of the call, and it was objected that the call was made for the purposes of an *ultra vires* scheme, and was therefore invalid; but the Court of Appeal (Lindley, A. L. Smith, and Davey, L.J.J.) held that the scheme was not *ultra vires*, and therefore that the call was not invalid. And these decisions were followed in several other reported cases, and were largely acted on. So, too, in *Grant v. United Switchback Co.* 10 C. D. 135; 37 W. R. 313, where there was an agreement for sale of the company's undertaking under a power in its memorandum it was held valid. Lindley, L. J., said, "It was clearly not *ultra vires* the company, for when we look at the memorandum of association we find power so wide as clearly to include such a transaction as this."

The *Reconstruction*
Case.

In a comparatively recent case, however (*Biggood v. Henderson's &c. Co.* (1908) 1 Ch. 743, below referred to as the *Biggood case*), a scheme of reconstruction in its main features closely resembling that adopted in *Cotton v. The Imperial, &c. Corp.*, *supra*, was held by the Court of Appeal to be *ultra vires* on the ground or principle that sect. 161 of the Act of 1862, now replaced by sect. 192 of the Act of 1908, by implication prohibits a company from selling its undertaking for shares under a power in its memorandum where the sale is made at a time when a voluntary winding-up and distribution of the shares is "proposed." In other words, the Court's view was that "If the company is proposed to be wound up, and the transaction is a sale and dissolution, then . . . the statute provides that sale by conversion into money may be replaced by exchange for shares on the terms, but only upon the terms, of complying with the provisions of

sect. 161," and as a corollary the Court held that *Cotton v. Imperial de Corp.*, *supra*, was wrongly decided.

Serious doubts, however, exist whether the ground or principle of the decision in the *Bisgood case*—namely, that the section is to be treated as implying such a prohibition—is sound, although it may be that the actual decision, looking to the special features of the case, was correct.

The following are some of the principal objections which have been raised to the construction thus placed by the Court on sect. 161 of the Companies Act, 1862:

In the first place it is objected that there is no sufficient reason for implying the prohibition. The section is affirmative in its terms, and (1) enables a liquidator who, in a voluntary winding-up, is selling the undertaking to receive shares in another company in compensation if he is authorized so to do by special resolution, and it also (2) enables the company to give that authority to the liquidator by special resolution passed in the course of the winding-up or antecedently thereto. But there is nothing in the section or elsewhere in the Act to indicate an intention on the part of the legislature to [curtail or] derogate from the power of a company to sell under its memorandum of association prior to the commencement of the winding-up.

In reading this implied prohibition into sect. 161, the Court may have conceived the implication justified by the well-known rule of construction recognized in *Chambers v. Manchester and Milford Railway* (5 B. & S. 588); *Baroness Wenlock v. River Dee Co.* (10 App. Cas. 359) and other cases, that where the legislature gives a company express power within certain limits to do a specified thing, it is to be taken *prima facie* to impliedly prohibit any deviation from the power so given. But applying that rule to sect. 161, it may be pointed out that the rule merely goes to prohibit the *liquidator* of a company from selling for shares otherwise than under the section, and to prohibit the company from *authorizing its liquidator*, or proposed liquidator, to sell for shares in another company except under the section. The rule cannot be wrested to curtail the powers of the company whilst *a going concern*.

In arriving at the implication in question, the Court seems, too, to have overlooked sects. 131 and 133 of the Act of 1862 (replaced by sects. 184 and 186 of the Act of 1908), which have an important bearing on the construction of sect. 161 [192]. Under sect. 131, there was an express provision that "in a voluntary winding-up the company's corporate state and all its corporate powers shall continue . . . until the affairs of the company are wound up"; and under sect. 133 (5), these corporate powers were to be exercisable by the directors, with the sanction of a general meeting or of the liquidators, so that where a company has power under its memorandum to sell its undertaking for shares in another company, that being one of its

corporate powers, can be exercised in the course of a voluntary winding-up, with the sanction of the company in general meeting or of the liquidators. And such a sale would not be fettered in any way by sect. 161 [192]. It is an alternative or cumulative power, and the fact that it is reserved is inconsistent with the view of the Court of Appeal that the Act impliedly prohibits in winding-up a sale for shares otherwise than under sect. 161.

Had the legislature so intended, it would have been easy for it to insert in sect. 161 [now 192] words to the effect that "except under or with reference to this section, no sale of the company's undertaking shall be made for shares or other interests in any other company where a voluntary winding-up and distribution of such shares is proposed." See sect. 13 (1) of the Assurance Companies Act, 1909.

But the section imposes no such restriction: it observes a significant silence on this point, and what adds not a little to the force of this criticism is that it appears from the context that where the legislature desired to invalidate transactions entered into in contemplation of winding-up, it did so by express provision, *e.g.* in sect. 161 [210] where, by apt words, certain transactions in contemplation of winding-up were invalidated.

Moreover, to imply in sect. 161 [192] the prohibition relied on by the Court of Appeal is to disregard the principle recognized and emphasized by the House of Lords in *Salomon v. Salomon & Co.* (1897) A. C. 22. In that case the Court of Appeal had read into the Act of 1862 provisions and conditions not expressed in it, but the House of Lords reversed the decision, holding that there was nothing to justify the implication, that the Act of 1862 was to be taken as it stood, and that it was not for the Court to supplement it by implied prohibitions and conditions. See *supra*, p. 942.

As a matter of judicial authority, too, apart from construction the principle of the *Bisgood* case is inconsistent with the decision of the Court of Appeal in *New Zealand, &c. Co. v. Peacock*, (1894) 1 Q. B. 622, above referred to (p. 1151, *supra*), and how can the Court of Appeal in 1907 arrogate to itself power to overrule a decision of the Court of Appeal in 1894?

Even assuming the decisions in *Cotton v. The Imperial, &c. Co.* and in *New Zealand, &c. Co. v. Peacock* to have been wrong, they were of so long standing, and had been acted on in such hundreds of cases and by so many thousands of people, they should not have been disturbed: the principle *stare decisis* always acted on by our Courts cannot be departed from without mischievous consequences.

The Court of Appeal was evidently under a misapprehension, as to the decision in *Cotton v. The Imperial, &c. Co.*, for it represents Chitty, J., to have decided in that case, that "under clause in the memorandum of association the company might sell its whole undertaking . . . and might under the authority of special reso-

lutions divide the proceeds of sale amongst the members without the safeguard provided by sect. 161; whereas, in truth, all that the judge decided was that the sale under the memorandum for shares was valid.

Nor, it may be pointed out, do the decisions relied on by the Court of Appeal in the *Bisgood* case justify the construction placed by the Court on sect. 161. Thus, to take them in order, *Wellton v. Saffery*, (1897) A. C. 299, on which the Court placed great reliance, when examined has in reality no application. It merely decided that where the Act of 1862 expressly or impliedly prohibits a thing, such as the issue of shares at a discount, the thing is *ultra vires* for all purposes, and cannot be treated as binding on the members *inter se* in a winding-up, even after the creditors have been paid off. The decision, therefore, does not in any way show that *Cotton v. The Imperial, &c. Corporation* was correctly decided, or justify the application made by the Court of Appeal.

So, too, *Pewell Gold Mines*, (1896) 1 Ch. 372, merely shows that a company cannot by any provision in its articles deprive its members of the right to petition for a winding-up of the company, and *Re Baring-Gould and Sharpington Syndicate*, (1899) 2 Ch. 80, and *Payne v. Cork Co.*, (1900) 1 Ch. 308, merely decided that where proceedings are taken under sect. 161 the whole machinery of the section must have effect, and therefore dissentients cannot be deprived of their rights under the section by virtue of a clause in the articles. They have no bearing on a case where the sale is being carried out by a going company under a power in its memorandum.

Taken together, the above objections to the principle on which the *Bisgood* case was decided constitute, it must be admitted, a serious impeachment of that principle. The Court, in its solicitude to prevent what it called "iniquitous cases of reconstruction," that is, cases in which people were, in effect, obliged to elect whether they would take partly paid shares or have them sold at perhaps a low price, seems to have strained the construction of the Act, and because articles sometimes imposed unfair conditions on dissentient shareholders, to have vetoed the power altogether. This is the more to be regretted, because the decision might have been put on other grounds. Reconstruction schemes on the lines in effect sanctioned in *Cotton v. The Imperial, &c. Corporation* have not at all been confined to iniquitous cases. Large numbers of them have been of a perfectly fair and *bona fide* character, and have been carried through with entire success. And if the dissentient shareholders felt or fancied themselves unjustly treated they could always apply to the Court to disallow the scheme of reconstruction, as in fact they did in several cases (*Manners v. St. David's G. & C. Mines*, (1904) 2 Ch. 593; *Bisgood v. Nile Valley Co.*, (1906) 1 Ch. 747; *Burdett-Contts v. True Blue Gold Mine*, 1899 2 Ch. 616; *Fuller v. White*

Feather Reward, (1905) 1 Ch. 823), sometimes successfully, sometimes not.

It is to be hoped, therefore, that the principle of the *Bisgood* decision will before long be re-considered by a higher tribunal.

Preliminary agreement for the purpose.

Sometimes a similar transaction is carried through by making a preliminary agreement ratified by all, or nearly all, the members, providing how their shares in the new company shall be distributed. See Form 789, *infra*, p. 1474. The mere fact that a few of the shareholders refuse to sign or ratify the agreement need not materially hamper the others.

Setting sale aside.

As to setting aside sale on reconstruction, where the liquidator is largely interested in the purchaser *coy*, see *Silkstone and Haigh Moon Co. v. Edey*, (1900) 1 Ch. 167, *supra*, p. 1400.

Re-entry on shareholders.

As to meaning of proviso for re-entry in a lease on a company "entering into liquidation," see *Horsey Estate, Limited v. Steiger*, (1898) 2 Q. B. 259; (1899) 2 Q. B. 79; approved by the House of Lords in *Fryer v. Ewart*, (1902) A. C. 187; and *Westbourne Grove Drapery Co.*, 5 Ch. D. 248.

A proviso in a lease for re-entry, if the lessees being a company should enter into liquidation either compulsory or voluntary, applies to the case of a solvent company going into voluntary liquidation for the purpose of reconstruction or amalgamation only, and is "a condition for forfeiture on the bankruptcy of the lessee" within the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 6 (*Fryer v. Ewart*, (1902) A. C. 187.)

Company may be a "respectable" person.

A limited company may be a "respectable and responsible person" within the meaning of a covenant by a lessee not to assign without the consent of the lessor (such consent not to be withheld in the case of a "respectable and responsible person"). *Willmott v. London Road Car Co.*, (1910) 2 Ch. 525.

PRECEDENTS.

AGREEMENT between LIQS of OLD COY and NEW COY with a view **Form 771.**
to the RECONSTRUCTION of the OLD COY.

Agreement
with a view to
reconstruction.

Parties.

AN AGREEMENT made the day of between the A. Coy,
Limtd (herein called the old coy), and and the liqs thof,
of the one part, and the A. Coy, Limtd (herein called the new coy),
of the other part.

Recitals

WHEREAS the old coy was incorporated in the year under the
Cos Acts, 1862 to , with a nominal capital of 50,000*l.*, divided
into 10,000 shares of 5*l.* each: AND WHEREAS the whole of the sd
shares have been issued, and the sum of 5*l.* per share stands credited
in the books of the old coy as having been pd up thereon: AND
WHEREAS by special resolution of the old coy passed and confirmed at
extraordinary general meetings thof, held respy the day of
and the day of , it was resolved: (1) That it was desirable
to reconstruct the old coy, and accordingly that the old coy should be
wound up voluntarily, and that the said and should be and
they were thereby appointed liqs for the purposes of such winding-
up; (2) That the sd liqs should be and they were thereby author-
ized to consent to the registration of a new coy to be named The
Coy, Limtd, with memdum and arts of assen as therein mentd; and
(3) That the draft agreement in the sd resolution referred to (being the
draft of these presents) should be and the same was thereby approved,
and that the sd liqs should be and they were thereby authorized,
pursuant to sect. 192 of the Cos (Consolidation) Act, 1908, to enter
into an agreement with such new coy (when incorporated) in the terms
of the sd draft and to carry the same into effect: AND WHEREAS,
pursuant to the resolution aforesd, the new coy has since been incor-
porated under the Cos (Consolidation) Act, 1908, with a nominal
capital of 50,000*l.*, divided into 10,000 shares of 5*l.* each: AND
WHEREAS by the arts of assen of the new coy, it is provided that the
same coy shall forthwith enter into the agreement therein referred to,
being these presents. NOW IT IS HEREBY AGREED as follows

Agreement
for transfer

1. The old coy and its liq shall transfer, and the new coy shall
take over, all and singular the lands, buildings, concessions, patents,
goods, chattels, moneys, credits, debts, bills, notes, and things in
action of the old coy, and the undertaking, business, and goodwill

Form 771. thof, with the full benefit of all contracts and agreements, and of all securities in respect of the sd things in action, to which the old coy is entld, and all other the real and personal ppty of the old coy whatsoever and wheresoever; subject nevertheless as to all the sd premises to the several mortgages, charges, liens, and incumbrances affecting the same or any pt thof

As to what contracts are assignable, see *Backlund v. Papillon*, 2 Ch. 67; *British Wagon Co. v. Lee*, 5 Q. B. D. 119; *Tolhurst v. Associated Portland Cement Co.*, (1903) A. C. 111; *Kemp v. Backelmann*, (1906) 2 K. B. 604, C. A.

New company
to pay debts,
&c. of old
company.

2. As a part of the consen for the sd transfer, the new coy shall undertake, pay, satisfy, and discharge all the debts, liabilities, and obligations of the old coy whatsoever, and shall adopt, perform, and fulfill all contracts and engagements now binding on it, and shall at all times keep the old coy, its liqrs, and contributories, indemnified against such debts, liabilities, obligations, contracts, and engagements, and against all actions, proceedings, costs, damages, claims, and demands in respect thof

As to novation, see *supra*, p. 1447

New company
to pay costs of
winding-up
old company.

3. As a further pt of the consen for the sd transfer, the new coy shall pay, and at all times hereafter keep the old coy, its liqrs, and contributories, indemnified against all the costs and expenses of and incident to the winding-up of the old coy, and of carrying the sd transfer into effect

Shares in new
company to be
allotted to
members of
old company.

4. As the residue of the consen for the sd transfer, every member of the old coy shall, in respect of each share therein held by him, be entld as of right, to claim an allotment to himself or herself, or to his or her nominee or nominees, of one 1*l*. share in the new coy, with the sum of 1*s*. credited as having been pd up thof, and the new coy shall allt the shares so claimed. The remaining 5*s*. per share shall be pd up to 1*s*. when the claim is made and as to 1*s*. on allotment, and as to the balance when called for; but no call is to exceed 1*s*. per share, so is to be made payable less than three months after the preceding call became payable

Claims to be
settled.

5. A member entld to claim an allotment as aforesd must claim the same within 21 days from the date hot by sending in to the new coy a claim in writing for an allotment of the shares, and such claim must be signed by the member making the same, and must be accompanied by a sum of 1*l*. shilling per share claimed, and where it requests that the allotment of shares may be made to a nominee or nominees of such member, it must be countersigned by such nominee or nominees

As to limiting a time for the claims, see *supra*, p. 1440.

In the absence of a specified limit the Court will imply as a term that the claim must be made within a reasonable time, *supra*, p. 1440; but it is not always easy to say what is reasonable, as it depends on the circumstances.

Where a member duly claims pursuant to this clause, his claim is to be regarded as an application which will not ripen into a contract until notice of allotment is given to him, and, accordingly, until the posting of such notice he can withdraw his application. *Hollins case*, L. R. 4 Ch. 325, n.; *Holman v. Fenner*, (1892) 2 Ch. 27; *supra*, p. 48.

This being so, notice of allotment should be issued as soon as possible after the claims come in. See Form 786, *infra*.

If desired, the agreement can be so framed that the notice by the liquidator should operate as an offer by the new company, the acceptance of which will complete the contract, *e.g.*, by adding to the next following clause the words: "The notice aforesaid shall be regarded as an offer of the shares made by the new company through the liquidator of the old company."

6. The liqs of the old coy shall within 7 days from the date hof give notice in writing to each member of the old coy, stating the number of shares which the member is entld to claim as of right under this agreemt, and the amount per share payable on claiming the same, and the situation of the registered office of the new coy and the time within which the claim for an allotment as afosd must be sent in to the new coy, and there must be enclosed therewith proper forms of claim addressed to the new coy for signature by the member. The notice afosd shall in each case be given by sending the same through the post addressed to the member at his or her registered address as appearing on the register of members.

Notice to be given by company.

Where the members are to claim within a specified time it is only fair to require notice to be given them at once, otherwise they may by oversight lose their rights.

7. As regards that proportion of the sd shares in the new co which members of the old coy other than dissentient members hntf mentd shall be entld to claim as afosd, but shall not within the period of 21 days before mentd claim, the sd liqs shall use their best endeavours to sell the same for what they will fetch, and the net proceeds of sale thof, after paying all expenses of and incident to the sale, shall be distributed rateably among the members who, if they had claimed, would have been entld to such shares in accordance with their rights and interests, and in substitution for such shares the new coy shall, upon the request of the sd liqs allot to such purchasers the shares sold to them resply credited as afosd, but such request to be effective must be made within _____ weeks from the date hereof.

sale of unclaimed shares.

Sometimes the agreement merely gives the members the right to claim, within a limited time, and makes no provision as to shares not claimed; in the case of the unclaimed shares belongg to the new company, but as unpaid shares. The company cannot then call for the same. See *Re London & Lancashire Cotton Corp*, 12 T. L. R. 41.

Nor in the absence of a provision in the agreement can the liqs take a view to sale, claim allotment to himself. *Re London & Lancashire Cotton Corp*, 12 T. L. R. 41. (W. N. 1897)

Form 771.

Form 771.

Where, however, the liquidator obtains the unclaimed shares under the terms of the agreement, the proceeds of sale thereof, even in the absence of a provision to that effect, should be divided among the non-claiming shareholders (*Lake View Extended Gold Co., W. N. (1900) 14.*)

And where the liquidator had, pursuant to the agreement, received certain paid-up shares, and the members entitled had not come in to claim same, he was allowed on petition to sell and pay proceeds into Court. (*Australian United Trust Mining Co., W. N. (1877) 37.*)

In the absence of a specified limit as regards time, a liquidator claiming under such a provision must sue and claim allotment within a reasonable time. See *supra*, p. 1440. And accordingly where a liquidator did not claim until after the expiration of some months, it was held by Vaughan Williams, J. that the claim was too late. *St. Augustine Mines Limited*, 25 April, 1895.

Sale of dissentient's shares.

Alternative to clause 9a.)

8. As regards the proportion of the sd shares in the new coy which, but for their dissent, would have been claimable by those members of the old coy who shall effectually dissent from the special resolutions aforesaid in accordance with the provisions of sect. 192 of the Cos (Consolidation) Act, 1908, the sd liqrs shall use their best endeavours to sell the same for what they will fetch, and the proceeds of sale thereof, after deducting all expenses of and incident to the sale, shall be applied in or towards payment of the amounts which shall become payable to such dissentient members in accordance with sect. 192 of the sd Act, and in so far as the same shall be deficient the new coy shall make up the deficiency. The new coy shall, upon the request of the sd liqrs, allot the shares sold under this clause to the purchasers thereof respectively credited as aforesaid, but such request to be effective must be made within — — weeks from the date thereof.

As an alternative, the old company can be left to deal with its dissentients, but the result is the same, for assets sufficient to meet the dissentients must be excepted.

How sales may be made.

9. And such sales as aforesaid may be made by the sd liqrs either by public auction or private contract, and either together or in lots, and either with or without reserve, and subject to any special or other conditions, and with power to buy in and re-sell, and generally upon such terms and conditions and in such manner as the sd liqrs shall in their absolute discretion think fit.

The object of the above clauses is to enable the liquidator to sell the shares at their market price, which may be less than the amount credited. The alternative plan is to let the unclaimed shares lapse for the benefit of the new company only, and that plan suits very well a case in which the shares are at par or at a premium; but where the market price is less than the amount credited to allow the shares to lapse would benefit no one, for the new company would not be able to issue them at a discount, and thus the lapsed shares would be unsaleable.

Alternative to clause 8.

9A. If the liqrs of the old coy shall, in order to carry the sd transfer into effect, have occasion to purchase the interest of any member of the old coy, then and in every or any such case the new coy shall be

relieved from the obligations imposed on it by clause 4 hereof as regards such member, but shall pay to the liqrs, for the purpose of effecting such purchase, such sum as, by arbitration between the old coy and such member, or by agreement made with the sanction of the now coy between him and the liqrs of the old coy, shall be determined to be the price payable in respect of such purchase.

Form 771.

When the agreement provides for the allotment of the shares as the liquidators direct, the clause will provide that in "any such case the number of shares to be allotted under clause 4 shall be proportionately reduced, but the new company shall pay, &c."

Sometimes a clause as follows is required.

The balance of — shillings remaining due on the shares in the new company, which shall be claimed and allotted as aforesaid, shall be paid as follows, namely: — per share shall be paid on allotment and — per share at the expiration of three calendar months from the date of allotment, and the remaining — per share when called for.

Sometimes it is necessary or better to provide for allotment to the nominees of the liquidator, thus:

(a) As the residue of the consideration for the said transfer the new company shall allot to the nominees of the liquidators of the old company 200,000 shares in the capital of the new company of 1/ each credited as paid up to the extent of 18s. per share, to the intent that such shares may be distributed among the members of the old company as nearly as may be in accordance with their rights and interests [with due regard to any contract between them, *e.g.*, Form 795].

(b) Every member of the old company who desires to take his proportion of the shares as aforesaid must claim the same within — days from the date hereof by sending in to the new company a claim in writing for the allotment, and such claim must be signed by the member making the same.

The liquidators of the old company shall within — days from the time when this agreement shall have become absolute as aforesaid give notice in writing to each member of the old company — [Clause 6 of Form 771, *supra*.]

Sometimes the shares which are to be distributed cannot be divided without fractions, and in such cases it is usual to make special provision as regard to fractions, *e.g.*, as follows:

"Nothing herein contained shall entitle any person to claim in respect of any fraction of a share in The M. Company, but those shares in The M. Company which but for this provision would have been distributable in fractions shall be sold by the liquidators of The L. Company, and the net proceeds shall be divided among those members of The L. Company who would have been entitled to such fractions in due proportions."

Sometimes the agreement provides for the issue of fractional certificates in respect of the fractional rights, and sets out the form of certificate, which is usually framed so that the owner of (say) ten has a right to require the allotment of a paid-up share in the company. See Form 784.

Where the agreement provides for the allotment of the shares to the liquidators, and such shares are in part credited as paid-up, it may be well to insert a clause providing that "The liquidators of the — company shall not be bound to accept an allotment of any of the shares mentioned in clause — hereof, which they shall not require for allotment to the members of the old company, in accordance with that clause," or to provide that the

Form 771. allotment shall be made "upon the request" of the liquidator. Unless this is done it may be contended that the liquidator is bound personally to take the shares, and this might involve him in liabilities. *Dyett's case*, 43 L. T. 85.

Title accepted.

10. The new coy shall accept, without investigation, such title as the old coy has to all the real and personal ppty and premises hby agreed to be transferred.

Delivery.

11. The old coy and its liqrs shall, as soon as conveniently may be but without prejudice to clause 12 hof, execute and do, at the expense of the new coy, all such assurances and things as shall be reasonably required by the new coy for vesting in it the sd ppty hby agreed to be transferred, or any part thof, and giving to it the full benefit of this agreement.

Lien in favour of dissentients.

12. Provided always that the old coy and its liqrs shall have a lien upon the whole of the ppty hby agreed to be transferred for all moneys (if any) payable by the new coy under clause 8 hof, and until the same shall have been pd the sd liqrs shall be at liberty to retain possession of all or any part of the sd ppty, and thereout at their discretion to raise and pay such moneys or any part thof.

As to this clause, see *supra*, p. 1445; and *New Flagstaff Co.*, W. N. (1889) 123.

Power to rescind.

13. Notwithstanding anything herein contained, if, in order to carry the sd transfer into effect, it would be necessary for the liqrs to purchase the interest of members holding more than --- shares in the old coy, the new coy shall be at liberty, by notice in writing, addressed to the liqrs of the old coy and left at the registered office of that coy, to rescind this agreement.

This clause is not at all unusual. There might happen to be so many dissentient members of the old company that the new company could not find the means to pay them off, and in such case it is convenient to give a power of rescission.

Agreement not to operate as conveyance.

In *Commissioners of Inland Revenue v. Angus & Co.*, 23 Q. B. Div. 579, it was held that an agreement framed on the lines of this form was not a conveyance on sale within the Stamp Act, 1870. And in some cases it seems that an agreement in this form is not considered an agreement for sale within sect. 59 of the Stamp Act, 1891. See *supra*, p. 338, and *Alpe's Digest*, 123. But *prima facie* such an agreement comes within sect. 59 of the Stamp Act, 1891 (see *supra*, p. 338), and has to be stamped accordingly. Where, however, the members of the new company and the old are the same, and hold the same or less capital in the new as they held in the old, and in the same proportions, the Revenue authorities have usually granted exemption.

Books.

14. Until the dissolution of the old coy, the new coy shall, at its own expense, produce and show at such times and to such persons, and in such places as the liqr for the time being of the old coy shall require, all the books, documents, and papers of the old coy agreed to be hby sold.

A clause as above is sometimes inserted *velar Co., 12 C. D. 717*. But **Form 771**
see *North Brazilian Sugar Co., 37 C. Div. 83*

15. The new coy shall, subject to the consent of the office and to the completion of the transfer hereunder, be entitled to the benefit of the current insurances of the premises **Benefit of insurance**

16. The new coy shall cause this agreement and also a sufficient contract constituting the titles of the allottees to the allotments of shares under clause _____ hereof to be duly filed with the Registrar of Companies pursuant to sect. 88 of the Cos (Consolidation) Act, 1908 **Filing of agreement and further contract**

IN WITNESS, &c

When the reconstructing company is a dividend-paying company, it may be necessary to make some provision for the distribution of the profits made since the last dividend, otherwise they would in effect be capitalised. If the amount distributable can be ascertained approximately, the agreement can provide for payment thereof to the liquidators or to the shareholders of the old company. But sometimes it is deemed expedient to attach the dividend to the shares in the new company, thus:

And further, the profits of the old coy made during the period commencing the 1st January, 1910, and ending 30th June, 1910, shall be ascertained as soon as conveniently may be after the execution hereof, and the amount of such profits, less the several sums during that period carried by the old coy to reserve or any sinking fund and less all dividends paid by the old coy during that period, shall, in the course of the year 1910, be divided by the new coy among the members of the old coy in proportion to the shares in the old coy held by them at the commencement of the winding-up of the old coy. The right of each member of the old coy to participate in the profits also under this clause shall be deemed to be annexed to the shares allotted to him or his nominee under this clause, and shall accordingly pass with the transfer of the shares, and payment to the holders for the time being of any of the sd shares shall be deemed equivalent to payment to the original allottee **Form 772**

Sometimes the agreement excepts certain of the assets so as to pay a dividend to the members of the old company, thus:

There shall be excepted from the ppty hby agreed to be transferred **Form 772a**
(a) the uncalled capital of the old coy, and (b) such assets as shall be sufficient to pay the members of the old coy a dividend on their shares in the old coy at the rate of £ _____ per share, as from the day of _____ up to the day of _____, and it shall be for the old coy or its liqrs to select the particular assets which are to be excepted as aforesd, and if and so far as the same shall not consist of money, the old coy or its liqrs shall convert the same into money, and the sd excepted assets shall be applied in paying to the members of the old coy the sd dividend in respect of the shares held by them resply

Sometimes the liquidator is given power to rescind the reconstruction agreement provided he pays the new company's expenses, thus:—

Form 773. Unless within thirty days from the date of the whole of the 200,000 shares, being the shares specified as the consen for this agreement, shall have been taken up, or such portion thereof as in the opinion of the liqr shall afford a sufficient amount of working capital for the new coy, the liqr shall be entld to determine this agreement by notice in writing to be delivered by him to the new coy, and if the liqr shall exercise this option he shall, as a condition of so exercising it, undertake to pay out of the assets of the old coy all proper costs and charges connected with the incorporation of the new coy and the final dissolution thereof. The liqr may at any time by notice in writing to the new coy waive his option to determine this agreement as aforesaid whether such option has or has not been exercised.

Power to
rescind where
shares not
taken up.

THE COY. LIMITED

Form 774. NOTICE IS HBY GIVEN that an extraordinary general meeting of the above-named coy will be held at ——— on ——— day the ——— day of ——— at ——— o'clock in the forenoon, for the purpose of considering and if thought fit, passing as extraordinary resolutions the resolutions following, viz.:

Notice and
resolutions
with a view
to recon-
struction.

(1) That it is desirable to reconstruct the coy, and accordingly that the coy be wound up voluntarily, and that A. B. of, &c. and C. D. of, &c. be and they are hby appointed liqrs for the purposes of such winding-up.

(2) That the sd liqrs be and they are hby authorized to consent to the registration of a new coy, to be named the A. Coy, Limtd, with a memorandum and arts of assen which have already been prepared with the privity and approval of the directors of this coy.

(3) That the draft agreement submitted to this meeting and expressed to be made between this coy and its liqrs of the one pt. and The A. Coy, Limtd, of the other pt. be and the same is hby approved, and that the sd liqrs be and they are hby authorized, pursuant to sect. 192 of the Companies (Consolidation) Act, 1908, to enter into an agreement with such new coy (when incorporated) in the terms of the sd draft, and to carry the same into effect with such (if any) modifications as they think expedient.

Should the above resolutions be passed by the requisite majority they will be submitted for confirmation as special resolutions to a second extraordinary general meeting, which will be subsequently convened.

Dated, &c.

By order,

Secretary

As to inserting in the notice the words "an extraordinary resolution," see **Form 774** Companies (Consolidation) Act, 1908, s. 69 (2), and remarks, *supra*, pp. 1093 *et seq.*

Where the new company is not to bear the same name as the old company, resolution (2) can be varied. Sometimes it is resolved "that the liquidators be authorized to transfer or sell the whole or any part of this company's business and property to any other company, and to receive, in compensation or part compensation for such transfer or sale, shares in such company, or to enter into any other arrangement whereby the members of this company may, in lieu of receiving cash, shares, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from such other company."

Sometimes the authority is "to make or enter into any such sale or arrangement as is contemplated by sect. 192 of the Companies (Consolidation) Act, 1908, and in particular to enter into an agreement with the _____ Company, Limited, for the sale to that company of this company's business and assets upon the terms set forth in the draft agreement submitted to the meeting."

Sometimes this notice is in the form of a circular, thus:

THE — COY., LIMTD.

SIR,

I beg to give you notice that an extraordinary general meeting of the above-named coy. will be held at _____ on _____ day, the _____ day of _____ instant, at twelve o'clock noon, for the purpose of sanctioning the reconstruction of the coy.

The object of the reconstruction is to modify the constitution of the coy, and in particular to enable it to, &c., &c. The directors are satisfied that the proposed modifications would be advantageous to the coy and the shareholders, but counsel has advised that such modifications can only be effected by reconstruction.

At the above-mentioned meeting the resolutions necessary for carrying out the reconstruction will be proposed. A copy of them will be found on the other side [*e.g.*, see **Form 774**]. It is perhaps unnecessary to point out that the resolution for winding-up is merely part of the machinery advised by counsel for effecting what is desired, and will not involve any disturbance of the business, since the new or reconstructed coy will at once step into the shoes of the existing coy.

The ppal shareholders have already expressed their cordial approval of the plan.

The directors will be glad if you will attend personally, or fill up and return the enclosed proxy. If the resolutions are duly passed they will be submitted for confirmation as special resolutions to another extraordinary meeting, which will be subsequently convened.

Scheme for the Reconstruction of the A. B. Coy, Limtd.

Form 776

1. A new coy to be formed with the same name as the existing coy, and with a capital of 50,000*l.* divided into 50,000 shares of 1*l.* each. The objects of the coy to include the objects of the present coy, and

Form 775

Circular

Form 776. also full power to, &c. (the desired additional objects), and such other powers as may seem expedient.

2. The undertaking of the existing coy to be made over to the new coy upon the footing that the new coy shall undertake all the debts and liabilities of the existing coy, and shall pay all the costs of winding it up and dissolving it, and all the costs of carrying the reconstruction scheme into effect; and further, shall allot to every member of the existing coy two fully pd-up shares of 1*l.* each in the new coy, in respect of every 1*l.* share in the existing coy held by such member.

3. The directors of the existing coy to be the directors of the new coy.

4. The reconstruction to be carried out under sect. 192 of the Companies Consolidation Act, 1908, and accordingly the existing coy to go into voluntary liquidation, and to authorize the liqrs to carry out the reconstruction immediately so that there may be no interruption of the business.

5. With all convenient speed the existing coy to be dissolved.

Sometimes it is found convenient, with a view to ascertaining the views of the shareholders and others as to a proposed reconstruction, to send out a scheme framed as above *mutatis mutandis*, and thus to disclose in detail the course proposed to be adopted. However, in many cases the disclosure made is in much less detail, and the parties rest satisfied with the circular stating that the proposed resolutions are with a view to the reconstruction of the company for the purpose already explained. See the form following.

Form 777.

Scheme of Reconstruction.

Another.

1. A new coy to be incorporated bearing same name as the present coy, with capital of 700,000*l.*, and power to issue 350,000*l.* 5 p.c. debenture stock.

2. The assets and liabilities of the present coy to be transferred to the new coy.

3. Every member of the old coy to receive for every 25*l.* capital of the old coy held by him or her

(1) 50*l.* pd-up shares in the reconstructed coy.

(2) 17*l.* 10s. debenture stock of the reconstructed coy carrying interest at 5 p.c.p.a.

4. The debenture stock to be either perpetual or payable after a term of years, and to be secured as a first charge on the undertaking by way of floating security.

5. The present coy to be dissolved, and, with a view thereto, resolutions for a voluntary winding-up to be passed, and the undertaking to be made over under sect. 192 of the Companies Consolidation Act, 1908.

AN AGREEMENT made the _____ day of _____, between the _____ Coy. Ltd. (incorporated in 19____ and hitherto called "the new coy"), of the first pt, the _____ Coy. Ltd. (incorporated in 1895, and hitherto referred to as the old coy, and _____ the liqs thof. of the second pt, and A. of _____, as trs for the allottees hitherto named, of the third pt, whereby it is agreed as follows:

Form 778

Supplemental
agreement
specifying
shares

1. Pursuant to the reconstruction agreement dated the _____ day of _____, and made between the parties hto, which is about to be filed with the Registrar of Companies, the new coy shall allot to each of the persons named in the schedule hto the number of _____ shares in the new coy's capital set opposite his or her name in such schedule, and the sd shares shall be numbered _____ to _____ inclusive.

2. The sd shares shall, as provided by the sd reconstruction agreement, be deemed for all purposes to be fully pd up, and shall be treated as in [part] satisfaction of the shares to be allotted in accordance with clause 4 of the sd reconstruction agreement.

3. The new coy shall cause the said reconstruction agreement and this agreement to be filed with the sd Registrar of Companies pursuant to sect. 88 of the Cos. (Consolidation) Act, 1908.

IN WITNESS, AC _____ Add schedule as in Form 779

It is not uncommonly deemed expedient, in order to preclude any question as to sect. 88 of the Companies (Consolidation) Act, 1908, to file supplemental contracts as above, showing how many shares are allotted. See *supra*, pp. 67, 68.

To the directors of the C. D. Coy. Ltd.

Form 779

Directors'
contract to
allot.

In accordance with clause _____ of the reconstruction contract, dated the _____ of _____, 19____, we, the undersigned, being the liqs of the A. B. Coy. Ltd. hby request you to allot to each of the persons named in the first column of the schedule hto the number of _____ shares in your coy set opposite the name of such person in the third column of the sd schedule, with the sum of _____ p. per share credited & pd up thnt; such shares to be pt of the shares specified in clause _____ of the reconstruction contract a/sd.

And we also request you to issue to us _____ fractional certificates in accordance with clause _____ see clause 3 of Form 63, *supra*, p. 144 of the reconstruction contract.

Dated this _____ day of _____

— } Liqs of the _____ Ltd.



Form 779.

SCHEDULE above referred to.

Names of Allottees.	Addresses and Description of Allottees.	Number of Shares to be allotted to each.
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Form 780.

THE "A" COY, LIMTD (below referred to as "the old coy").

Circular.

SIR or MADAM,

As liqrs of the old coy, we beg to give you notice that the agreemt for the transfer of the undertaking of the old coy to the "A" Coy, Limtd, incorporated in 1905, which was duly sanctioned by special resolution of the old coy, has now been executed, and is dated the — day of —.

[Agreement.]

You, as the holder of — shares in the old coy, are entld to claim, as of right, an allotment of — shares in the new coy of 1*l*. each with the sum of 18*s*. credited as pd up thon, and in compliance with the agreemt afsd, we now enclose the requisite claim for signature.

You can have the shares allotted to yourself or to your nominee or nominees, but in the latter case your nominee or nominees must countersign the claim as indicated therein.

The registered office of the new coy is situate at —, and you will be so good as to send your claim, when duly signed, in an envelope addressed to the new coy at that address, and we will take the necessary steps to procure the allotment of the shares claimed by you.

Under the agreemt the time for sending in claims is limtd to — days from the — day of —, and accordingly your claim must reach the new coy before the — day of —.

We are, Sir, &c.

To the "A" Coy, Limtd.

GENTLEMEN,

As the holder of shares in the "A" Coy, Limtd, incorporated in 1905, I claim an allotment of — shares in your capital of 1*l*. each, with 18*s*. per share credited as pd up thon, and I enclose the sum of 1*s*. per share, being the amount payable on applicon, and I undertake to pay the balance when called for.

I direct such allotment to be made as under, that is to say:—

Form 780.

Name of Allottee or
Allottees.

Number of Shares to be allotted
to each.

Dated this — day of — .

Signature of member —.

Address of member —.

NOTE.—Let the member or members sign here and state address.
And I, the undersigned nominee, concur in the above direction.

Signature —.

NOTE.—Let the nominee sign here his name, address, and
description.

SIR OR MADAM,

Form 781.

On behalf of the reconstructed coy (the C. D. Coy, Limtd), which, as you are aware, has been formed pursuant to the scheme for the reconstruction of the A. B. Coy, Limtd, I beg to give you notice that, in accordance with the terms of the reconstruction, — 10L shares in the capital of the reconstructed coy have been allotted to you, with the sum of 5L per share credited as pd up thou, in respect of your holding in the A. B. Coy, Limtd.

Notice of
allotment.

You will also be entld to — fractional certificates (transferable by delivery) each representing one-tenth of a share. Upon presentation of ten fractional certificates, the reconstructed coy will allot a 10L share, with 5L credited as pd up thou; and accordingly you can either dispose of your fractional certificates or acquire others, so as to obtain an allotment of a share as above.

Be so good as to sign the annexed slip and forward same to me without delay. It is important that your address should be correctly stated.

The certificates will be issued in due course, and in the meantime the allotment letter should be kept for the purpose of being exchanged for such certificates.

I am, yours obediently,

To —.

—, Secretary.

Form 782.

To the C. D. Coy, Limtd.

Reply to last. I request that the certificates of title to the — shares allotted to me as mentioned in your letter, No. —, and also the — fractional certificates, be forwarded by post to me as below.

Dated this — day of —

Usual signature

Name in full

Address

Profession or occupation (if any) -

~~For~~ If certificates not to be sent to the above address, state here the address to which they are to be sent.

Certificates to be sent to

Form 783.

The C. D. Coy, Limtd.

Fractional
certificate.

No. —, Fractional Certificate.

This is to certify that the bearer of this certificate, upon presenting the same, along with nine other like certificates, to the above-named coy, at its office, No. —, — Street, London, E.C., will be enttd to an allotment of one 10*l.* share in the capital of that coy, with the sum of 5*l.* credited as pd up thon. But such certificates must be accompanied by an applicon in writing, signed by the person to whom the allotment is to be made, and framed in accordance with the form indorsed hereon.

Dated this — day of —

Form 784.

To the C. D. Coy, Limtd.

Request for
allotment of
shares in
exchange for
fractional
certificates.

As the bearer of the ten fractional certificates annexed hto, numbered —, I request the allotment to me of one 10*l.* share in the capital of the coy, with the sum of 5*l.* credited as pd up thon.

Dated this — day of —

Signature

Name in full —

Address

Description or occupation -

Where certificates to be sent -

Form 785.

Request for
allotment to
specified
persons.

To the liqrs of the A. Coy, incorporated 18—, and huftr called the old coy, and to the B. Coy, incorporated 1888, and huftr called the new coy.

GENTLEMEN,

I, the undersigned, —, of —, a shareholder in the old coy, request that the fully pd-up shares in the new coy, to which I am

entitled under the reconstruction scheme, may be allotted in manner **Form 785** following:—

Names of Allottee or Allottees.	Number of Shares to be allotted to each of the Allottees.

Signature of shareholder —

Date —.

Where the shareholder inserts in the above table the name of any nominee or nominees besides or instead of his own, such nominer or nominees must sign the following request:—

And I, the undersigned, request the new coy to allot to me the share or shares set opposite my name in the above table.

Signature of Allottee or Allottees.

Dated this — day of —.

SIR or MADAM,

Form 786

In response to your claim, I am to inform you that — shares in the above-named coy with — per share credited as pd up have been allotted to you. The amount payable by you on application is — per share amounting to £—, and you will be so good as to remit the same to me [or to the coy's bankers] [*name, address*]

Letter of
allotment

Yours faithfully,

The — Coy, Limtd, incorporated in —.

Allotment No. — for the above-named coy.

Received from — of — the sum of £— payable on allotment.

Dated this — day of —.

Form 787.

Resolution
for sale of
undertaking.

That the provisional agreemt, dated the — day of — and made between A. B. on behalf of the coy of the one pt, and The — Coy, Limtd, of the other pt, be and the same is hby ratified and confirmed, and that the directors be authorized to affix the coy's seal thereto in token of such ratification and confirmation, and to carry the same into effect, with such (if any) modifications in the details thof as they may think fit to assent to.

The above is a form of resolution where the undertaking is sold before winding-up. See p. 1452 *et seq.*, *supra*.

Form 788.

Notice of dis-
sent pursuant
to sect. 192.

In the matter of the Cos (Consolidation) Act, 1908, s. 192.

And in the matter of the — Coy, Limtd.

To — and —, the liqrs of the above-named coy.

TAKE NOTICE that I dissent from the special resolutions of the coy passed and confirmed at general meetings thof, held resply on the — day of — and — day of —. And I hby require you either to abstain from carrying such resolution into effect, or to purchase the interest in the sd coy held by me at a price to be determined in accordance with sect. 192 (6) of the above-mentd Act.

Dated, &c.

A. B. of —.

See *Union Bank of Kingston*, 13 C. D. 808; *Anglo-Italian Bank v. De Rosaz*, L. R. 2 Q. B. 452; *De Rosaz v. Anglo-Italian Bank*, L. R. 4 Q. B. 462; *London and Westminster Bread Co.*, 38 W. R. 277, and *supra*, p. 1413.

In some preceding editions of this work a copy of the agreement sanctioned by the Court in *Imperial Mercantile Credit Association* (12 Eq. 504) was set out, but that form is now omitted for want of space.

Form 789. AN AGREEMENT by MEMBERS of a COMPANY for RECONSTRUCTION on LINES of SCHEME which INVOLVES a DISTRIBUTION of ASSETS OTHERWISE than in ACCORDANCE with EXISTING RIGHTS.

Reconstruc-
tion on
special lines.
Parties.
Recitals.

AN AGREEMENT, made the — day of —, between A., on behalf of all the members of the — Corporation, Limtd (hmftr called "the existing coy"), of the one part, and B., C., and D., directors of the existing coy, of the other or second part: WHEREAS it is desirable to reconstruct the existing coy in accordance with the following scheme, that is to say:—

- (a) A new coy, bearing the same name as the existing coy or some other similar name, to be registered under the Cos (Consolidation) Act, 1908, with a memdum and arts of assen

Form 789.

in the terms of the drafts which have already been prepared and approved by the directors of the existing coy.

- (b) The undertaking of the existing coy to be made over to the new coy upon the terms of the reconstruction agreement, which has already been prepared and approved by the directors of the existing coy.
- (c) The directors of the existing coy to be the first directors of the new coy.
- (d) The preferred stock and the deferred stock, and the founders' shares receivable under the reconstruction agreement, to be distributed among the members of the existing coy, so that as nearly as may be every member shall receive—
For every 11. of preferred stock in the existing coy, 11. of preferred stock in the new coy.
For every 11. of deferred stock in the existing coy, 11. of deferred stock in the new coy.

For every founders' share in the existing coy, one founders' share in the new coy.

- (e) The assets of the existing coy, excepted by the reconstruction agreement, are to be dealt with thus:—
(1.) The sum of £— cash is to be applied in paying to the holders of the preferred stock in the existing coy a dividend thereon for the half-year ending the 28th February, 19—, at the rate of 5 p.c.p.a.
(2.) The liqrs are to be at liberty to make over the accepted net revenue of the existing coy since 28th February, 19—, upon condition that the same is treated as net revenue of the new coy, applicable to the payment of dividend.
- (f) The reconstruction to be carried out under sect. 192 of the Cos (Consolidation) Act, 1908, subject to the provisions of the arts of assen of the existing coy, and accordingly the existing coy to go into voluntary liquidation, and to authorize the liqrs to carry out the reconstruction immediately, so that there may be no interruption of the business.
- (g) With all convenient speed the existing coy to be dissolved.

Now THEREFORE IT IS AGREED as follows:—

1. The existing coy shall be reconstructed in accordance with the sd scheme.

2. Each member of the existing coy who is a party to or ratifies this agreement shall concur in passing the requisite resolutions to effectuate such reconstruction, and shall accept the preferred stock and cash, and the deferred stock and the founders' shares, as the case may be, coming to him under the sd scheme as afsd in full satisfaction and discharge of all his interests as a member of the existing coy in the assets thof.

Reconstruction as per scheme.
Special resolutions.

Form 789.

Consideration.

When absolute.

3. The sd B., C. and D. shall use their best endeavours to procure the reconstruction of the existing coy in accordance with the sd scheme.

4. This agreemt is to become absolute—

(1.) If and when it is ratified in writing by all the members of the existing coy who are not parties to it, or

(2.) If and when the directors of the existing coy shall certify hereon in writing that in their opinion the proportion of the members who have ratified this agreemt is so large that the non-concurrence of the outstanding members should be disregarded, and in such case this agreemt shall be binding on those who are parties to it and on those who have ratified it, and shall be carried into effect as nearly as may be on the lines afd.

When void.

5. If this agreemt does not become absolute within six calendar months from the date hof, it shall thereupon become void.

AS WITNESS, &c.

Having regard to the decisions in *Griffith v. Paget*, 5 C. D. 894. and *Simpson v. Palace Co.*, 69 L. T. 72 (see *supra*, pp. 1141, 1142), it is sometimes necessary to get all the shareholders to assent beforehand to the particular scheme proposed. An agreement in the above form was used in a case where a winding-up would have abrogated all distinction between the several classes, and it was desired to reconstruct on the footing that the shareholders should all stand in the new company as they stood in the old company. The form has since been made use of (with requisite modifications) in a number of important cases involving many millions of money and thousands of shareholders.

Sect. 120 of the Act of 1908 affords but little assistance in this respect, for class meetings under that section can only be held after the commencement of the winding-up. Now a winding-up without special terms would prejudice one class, and that class will not consent to a winding-up on the chance that meetings may subsequently approve of an arrangement.

Form 790.

Agreement for exchange of shares.

AN AGREEMENT, made the — day of —, —, between A. of —, on behalf of himself and all the other holders of shares in the — Coy. Limtd (hmftr called "the old coy") of the one part, and B. of —, on behalf of the new coy hmftr mentd of the other part.

WHEREAS the old coy was incorporated in the year — under the Cos Acts, 1862 to 1900, as a coy with liability limtd by shares.

AND WHEREAS the nominal capital of the old coy is 300,000L., divided into 10,000 preference shares of 10L. each and 20,000 ordinary shares of 10L. each.

AND WHEREAS a coy (hmftr called "the new coy") is about to be formed and incorporated under the Cos (Consolidation) Act, 1908, as a coy with liability limtd by shares, and intended to be called "The — Coy, Limtd."

AND WHEREAS the memdum and arts of asson of the new coy have been prepared, and are approved of by the parties hto.

AND WHEREAS the capital of the new coy is to be 400,000*l.*, divided into 400,000 shares of 1*l.* each. **Form 790.**

AND WHEREAS it is desirable to make provision for the exchange of shares in the old coy for shares in the new coy, as hnfr provided.

NOW IT IS HEREBY AGREED as follows:—

1. When this agreemt becomes absolute, the sd A. and each holder of shares in the old coy who shall have ratified this agreemt shall exchange his or her preference and ordinary shares in the old coy for shares in the new coy, as hnfr provided.

2. The conson for the sd exchange shall in each case be as follows; that is to say: Sixteen fully pd-up shares in the new coy of 1*l.* each for every preference share in the old coy, and twelve fully pd-up shares in the new coy of 1*l.* each for every ordinary share in the old coy.

3. In order effectually to ratify this agreemt, each holder of shares in the old coy who desires to ratify the same must, after the incorporation of the new coy, sign and deliver to the Bank, Limtd, No. —, Street, E.C., the bankers of the new coy, a note of ratification and applicon in respect of the preference shares and another in respect of the ordinary shares in the old coy of such holder, and such applicons shall be framed in the terms of the forms set forth in the schedule hto, and must be accompanied by the certificate therein referred to.]

4. When this agreemt becomes absolute, the new coy shall allot to the sd A., and to each holder who shall have ratified the same as afsd, the fully pd-up shares in the new coy to which the sd A. and such holder shall be entld in exchange as afsd, and the sd A. and such holder shall transfer such shares to the new coy or its nominees as and when required.

It is not safe to add the words "that in the meantime the shares shall be held in trust for the new company," for that will attract *ad ratorem* duty. *Chesterfield v. Inland Revenue*, (1899) 2 Q. B. 7.

5. This agreemt shall become absolute when and so soon as it shall have been ratified as afsd by all the holders of the issued preference shares in the old coy, and by all the holders of the issued ordinary shares in the old coy, or by such proportion of the holders of each class afsd of the sd shares, not being less than nine-tenths in value, as the sd — shall consider sufficient, and shall have been adopted by the new coy, and if it shall not have been so ratified and adopted before the — day of —, it shall on that day become void.

6. In conson of the premises, the sd B. shall use his best endeavours to procure the incorporation of the new coy and the ratification and adoption afsd.

7. Each ratifying shareholder afsd shall be deemed to authorize

Form 790. the sd A., on behalf of such ratifying holder, (a) to enter into a supplemental agreement with the new coy when incorporated for the adoption by the new coy of this agreement and for the discharge of the sd B. from all liability thereunder, and for the identification of the shares to be allotted to such ratifying shareholder; and (b) to sign a transfer in accordance with clause 4 *h*of.

8. In respect of the pd-up shares afo^d, the new coy shall cause a sufficient contract or contracts, within the meaning of sect. 88 of the Cos (Consolidation) Act, 1908, to be filed with the Registrar of Cos.

As witness the hands of the parties hto the day and year first above written.

[THE SCHEDULE ABOVE REFERRED TO.]

Application Form in respect of Preference Shares.

THE — COY, LIMTD.

To the — Coy, Limtd.

GENTLEMEN, Having lodged with your bankers my certificate for — preference shares in the — Coy, Limtd, I hby ratify the agreement of the — day of —, 19—, a copy of which is indorsed hereon, and I request you, pursuant to that agreement, to allot me — fully pd-up preference shares of £ each in your capital (being at the rate of — shares for every — shares held by me in the — Coy, Limtd), and I agree to accept such shares and to sign a transfer of all my preference shares in the — Coy, Limtd, if and when called on so to do.

Signature —.
Name (in full) —.
Address —.
Occupation —.
Date —].

The usual plan is to omit clause 3 and the schedule, and to send out printed copies of the agreement with words at the foot, "I ratify the agreement of which the above is a copy," and space for a signature, and then ask the member to sign and return the form.

The agreement only wants a 6d. stamp. But if the transfer of shares is carried into effect, *ad valorem* duty will be payable. *J. & P. Coats, Ltd. v. Commissioners of Inland Revenue*, (1897) 2 Q. B. 423.

Form 791.

Circular as to
distribution
in specie.

THE NEW — COY, LIMTD.

DEAR SIR OR MADAM,

As you are doubtless aware, the following resolutions were passed at the extraordinary general meeting of the — Coy, Limtd, held on the 4th day of August, 19—.

[Resolution to wind up and to distribute shares in the New — Coy in specie, e.g., see Form 517, p. 1128.]

As a holder of ——— ordinary shares in the ——— Coy, Limtd, you are entld to call for the allotment to you or your nominee or nominees of ——— fully pd ordinary shares of 1*l*. each in the capital of the New ——— Coy, Limtd, and, as you will see from the above resolutions, your election must be made within twenty-one days from the passing of those resolutions. Form 791.

The agreemt providing for the issue of the shares referred to as fully pd has been or is about to be filed with the Registrar of Cos.

Annexed to this circular is a form of request for allotment, and we shall be obliged by your signing it and forwarding it to us, accompanied by the certificate for the shares now held by you, not later than the 25th day of August, 19—, and the shares will then be allotted in due course in accordance with your wishes.

Yours obediently.

To ——— ——— Liquidators

Form of Request for Allotment

To the liqrs of the ——— Coy, Limtd (in liquidation), and to the directors of the New ——— Coy, Limtd.

GENTLEMEN,

I, the undersigned, of ———, a shareholder in the ——— Coy, Limtd (in liquidation), request that the ——— fully pd-up ordinary shares in the New ——— Coy, Limtd, which I am entld to call for under a special resolution of the ——— Coy, Limtd, passed on the ——— of ———, may be allotted in manner following:—

Names of Allottees.	Addresses.	Number of Shares to be Allotted.
------------------------	------------	-------------------------------------

Dated this ——— day of ———.

Signature ———.

In the case of shares held by more persons than one, each person must sign this request.

Where the shareholder inserts in the above table the name of any nominee or nominees besides or instead of his own, such nominee or nominees must sign the following request:—

Form 791. And I, the undersigned, request the directors of the New — Coy,
— Limtd, to allot to me the — fully pd shares set opposite my name
in the above table, and I authorize the coy to insert my name in their
register of members in respect of such shares.

Signature of nominee —.

Dated this — day of —.

We request the directors of the New — Coy, Limtd, to allot the
sd shares as above.

— } Liqrs of the
— } Coy, Limtd.

AMALGAMATION.

CHAPTER XXIII.

INTRODUCTORY NOTES.

The term "amalgamation" as used in relation to companies has no technical meaning. It is a popular phrase, and as such, has for many years (see first edition of this work, published in 1877) been used to describe various transactions differing considerably in detail but generally falling within one or other of the following heads:—

What is an amalgamation?

- (a) The transfer of the undertaking of an existing company or of several existing companies to another existing not newly formed company, of which all the members of the transferring company or companies become or have the right to become members, and the subsequent dissolution of the transferring company or companies.
- b) The transfer of the undertaking of two or more existing companies to a new company formed to take over the same, of which all the members of the transferring companies become or have the right to become members, and the subsequent dissolution of the transferring companies.

The term "amalgamation" had long before 1877 been used to describe transactions of this kind. See the *Era case* (1861), 30 L. J. Ch. 137; *Higg's case*, 2 H. & M. 666; *Stace and Worth's case* (1869), 4 Ch. 682; *Dougan's case* (1873), 8 Ch. 545; *Wynne's case* (1873), 8 Ch. 1003; *Doman's case* (1876), 3 C. D. 21.

A transaction may be an amalgamation notwithstanding that the terms "purchase" and "sale" are used. See the last-mentioned cases. It is also immaterial that a substantial part of the assets are excepted. *Wall v. London and Northern Assets Corporation* (No. 1), (1898) 2 Ch. 469. Thorne Chitty, J., said: "In this case there is a selling of the assets with the exception I have mentioned, and there is, I think, an amalgamation in this sense, that the purchasing company gives to the selling company shares in itself to be distributed according to the clause which I shall mention presently.

That seems to me in the ordinary and reasonable sense of the term, and certainly in the sense in which it is used in this article, to be an amalgamation." See also *South African Supply and Cold Storage Co.*, (1904) 2 Ch. 268, that the exception of a portion of the assets from the transfer does not deprive the transaction of the character of an amalgamation.

Where a company has been dissolved in pursuance of an amalgamation scheme designed to defeat payment of the company's debenture holders, such dissolution will be declared void under sect. 223 of the Companies (Consolidation) Act, 1908. *Re Spottiswood, Dixon and Hunting, Ltd.*, (1912) 1 Ch. 410.

Advantages
of amalga-
mation.

A large company is generally in a much better position to carry on business successfully than a small one. The expense of management in a small company is relatively much more burdensome than in a large one, and in order to keep it down a small company is, very commonly, obliged to employ directors and other officers and agents of inferior business capacity. Again, the shares of a small company are not uncommonly unsaleable, except perhaps in a local market where the demand may be limited and uncertain. This places a small company at a disadvantage: it may, and often does, find considerable difficulty in placing its original capital, and still greater in raising any further share capital. And not only has a small company difficulty in placing share capital, but it has little or no chance of borrowing on debentures.

This is why the amalgamation of small undertakings has for some time been making considerable progress. Another great inducement to amalgamation is the desire to terminate competition. However good competition may be for the public, it is very often ruinous to the parties engaged in it.

An amalgamation may be effected:

By special
Act.

(1.) By special Act of Parliament. It is not very often that this mode is adopted by companies formed under the Companies Acts. See Part III.

Under
sect. 192.

(2.) Under sect. 192 of the Act of 1908. This is the mode generally adopted.

(3.) Under a power in the memorandum of association to sell the undertaking for shares in another company (see Form 114, *supra*, p. 510), combined with a power in the articles to divide assets in a winding-up *in specie*. So long as the validity of this kind to sell the undertaking was recognized (*supra*, p. 1452 *et seq.*), it was not at all uncommon to effect an amalgamation of several companies by forming a new company, which acquired the undertakings of the old companies in exchange for shares, and then later on the old companies went into liquidation and distributed the shares. This plan was specially applicable where the new company was going

to offer its capital, or some part of it, for public subscription, as the arrangements for amalgamation could be made conditional on the new company floating, and then, if it did not float, the agreements could be determined and the old companies could go on as before. But since the *Bisgood case* (see *supra*, p. 1454) this mode of amalgamation is no longer practicable. Apart from this it was not always available, owing to the absence of a sufficient power in the memorandum to sell the business.

The fact that the agreement for sale purports to provide how the consideration is to be distributed among the shareholders of the selling company does not render the agreement itself invalid, although the proposed distribution may be inconsistent with the rights of the shareholders under the memorandum and articles. *Wall v. London and Northern Assets Corporation*, (1898) 2 Ch. 469. But an injunction may in such a case be obtained to prevent the assets from being distributed amongst the members otherwise than in accordance with their rights and interests in the company. *Manners v. St. David's Gold and Copper Mines*, (1904) 2 Ch. 593.

**Amalgamation under sect. 192 of the Companies Act, 1908
(sect. 161 (*supra*, p. 1434) of the Companies Act, 1862).**

There are two modes of effecting an amalgamation under sect. 192. **Two modes of effecting amalgamation under sect. 192.**
Thus:—

(a) Company A. and Company B. desire to amalgamate. Company A. passes a special resolution to wind up, appointing liquidators, and directing them to sell the assets to Company B. in consideration of shares in that company to be allotted to the members of Company A. The liquidators act accordingly, and Company A. is then dissolved.

Mode (a).

(b) Company A. and Company B. desire to amalgamate. Company C. is formed to acquire their assets and liabilities, and to carry on the amalgamated business. Each of the old companies then passes a special resolution as in the last case, the liquidators carry the sale into effect, and the old companies are thereupon dissolved. See *Higg's case*, 2 H. & M. 666.

Mode (b).

Plan (a) can only be adopted where one of the companies desiring to amalgamate has power to acquire the property and liabilities of the other or others.

When above modes adopted.

Plan (b), on the other hand, is available in every case, and is often adopted, even where there is an ample power to purchase, for the circumstances of the companies, or the terms of the amalgamation, very commonly render the establishment of a new company necessary.

It may be convenient here to follow closely the course of proceed-

Proceedings
on amalga-
mation.

ings upon an amalgamation in accordance with these two modes. And, first, as to mode (a).

Mode (a).

We will suppose that Company A. and Company B. desire to amalgamate; that the directors of Company B. have full power to purchase the assets of Company A.; and that there are sufficient unallotted shares of Company B. at the disposal of the directors thereof.

Terms.

The first thing is for the directors of the two companies to arrange the terms on which the sale is to be made. They must settle whether the consideration is to consist exclusively of shares, or partly of shares and partly of cash, whether the shares are to be fully or partly paid up, whether Company B. or the liquidator of Company A. is to purchase the interests of dissentients, and satisfy the debts of Company A., whether any of the directors of Company A. are to become directors of Company B., and whether Company B. is to compensate any of the officers of Company A. for loss of office, and so forth.

Agreement.

When the terms are settled they will be embodied in a conditional agreement. See *infra*, Form 793. Notice of the arrangement is then given to the members of Company A. by the directors thereof, and meetings are called to pass a special resolution to wind up, appointing a liquidator, and directing him to adopt the agreement. The special resolution having been passed, the liquidator adopts the agreement and carries it into effect. Company B. will allot the shares as provided by the agreement; the dissentients will be satisfied as arranged. The debts of Company A. will be paid and liquidated by Company B., or the liquidators of Company A., according to the arrangement. As soon as may be, Company A. will then be dissolved.

It will be observed that the proceedings are very similar to those upon a reconstruction.

Plan (b).

If the amalgamation is to be effected by a sale to a new company according to plan (b), the terms of amalgamation will be settled between the directors of the companies proposing to amalgamate, and embodied in an agreement made with some person on behalf of the intended new company. Each of the companies then passes a special resolution as above, and the subsequent course will be the same as above upon amalgamation according to plan (a).

An amalgamation according to plan (b) closely resembles a reconstruction by means of sect. 192 of the Act of 1908 (sect. 162 of 1862), except that it involves the reconstruction of two or more companies instead of one. See *supra*, p. 1435 *et seq.*

How debts of
transferring
company to
be paid.

In every case of amalgamation, the question arises whether the debts, costs of winding up the selling company, and the obligation of satisfying the dissentient members of that company, are to be borne by the purchasing company, or not. The chief advantage of throwing the burden on the purchasing company is that the members of the selling company, who will be called on to sanction the arrangement by special resolution, are more likely to do so if they know precisely how many shares in the purchasing company they are to receive; but

this cannot be, if the selling company is to bear the burden. On the other hand, the purchasing party may not be willing to accept a burden which is more or less indefinite: it may well prefer to purchase the assets for a fixed sum.

In practice the burden is almost always thrown on the purchasing company.

Where the burden of paying the debts, costs of winding-up, and obligation of satisfying dissentient members of the selling company or companies is *not* to be thrown on the purchasing company, the agreement with the purchasing company will be for the sale of the assets in consideration of a definite number of shares in the purchasing company to be allotted to the liquidators of the selling company, or as they direct; and the special resolution of the selling company, besides providing for the winding-up, appointment of liquidators, and adoption of the agreement, will direct the liquidators to sell so many of the shares as may be necessary to pay the debts, costs of winding-up, and to satisfy dissentients, to apply the proceeds for these purposes, and to distribute the remaining shares among the members. Sometimes the agreement provides for the retention by the selling company of sufficient funds to pay its creditors.

In some cases the directors of a company can only acquire the assets of another company with the sanction of their own company in general meeting or by special resolution; and where this is the case, as regards a company to which a sale by way of amalgamation is proposed to be made under sect. 192 (sect. 161), the necessary sanction must be obtained; and it ought to be obtained *before* the selling company is called on to pass the special resolution for winding up, &c., for it would be a serious miscarriage for the selling company if, after the passing of the resolution to wind up, the agreement fell through. The only course would then be to reconstruct or to apply to the Court to stay the liquidation.

It is very common, upon an amalgamation, to provide that some of the directors of the selling company shall become directors of the purchasing company. Where the amalgamation is effected by means of the formation of and sale to a new company, this is provided for by the articles of the new company; but if the sale is to be to an existing company, it is generally necessary to obtain the sanction of the agreement by ordinary or special resolution of that company, for the power of appointing directors is almost always vested in the company in general meeting. See *Stace and Worth's case*, 4 Ch. 685; and *James v. Eve*, L. R. 6 H. L. 335.

So, too, it may be necessary to get the sanction of an ordinary or special resolution of the purchasing company where the agreement involves the creation of new shares by that company.

Upon an amalgamation, it is by no means uncommon to provide for compensation to such of the directors or other officers of the selling company as are not to take office under the purchasing company.

Where transferring company to pay its own debts.

When special resolution of purchasing company necessary.

As to appointment of directors of selling company to be directors of purchasing company.

Sanction if new shares have to be created.

Compensation to officers of selling company.

Nor is there any objection to such an arrangement provided there is no concealment. *Southall v. British Mutual Life Assurance Society*, 6 Ch. 614. It has been held that the notice convening the meeting ought to disclose such provisions. *Kaye v. Croydon Tramways Co.*, (1898) 1 Ch. 358, followed in *Tiessen v. Henderson*, (1899) 1 Ch. 861; and see *Normandy v. Ind, Coope & Co.*, (1908) 1 Ch. 84.

Notices of meetings to be explicit.

The notices calling general meetings to pass the special resolutions should be sufficiently explicit. (See p. 1448.) They should be accompanied by a circular showing the nature of the plan, and, if no previous communication on the subject has been made to the members, the advantages or necessity which should induce its adoption.

The notices ought to contain some reference, direct or indirect, to sect. 192 of the Act, particularly if the memorandum or articles contain a power "to amalgamate." See the case of the *Imperial Bank of China, &c. v. Bank of Hindustan, &c.*, 6 Eq. 91; also *Fox's case*, 6 Ch. 176. It is now usual to refer expressly to sect. 192.

As the validity of the resolutions depends on the sufficiency of the notices, it is a serious mistake not to render them proper and sufficient beyond dispute. See also *supra*, p. 1448.

Objects of purchasing may be more extensive than those of selling company.

Upon an amalgamation effected under sect. 192 of the Act, it is no objection that the objects of the purchasing company are more extensive than those of the selling company (*Southall v. British Mutual Life Assurance Society*, 11 Eq. 65); nor that they are entirely different; indeed it is often one of the very purposes of the amalgamation that the objects of the purchasing company should be more extensive and diversified.

What companies can amalgamate under sect. 192.

Any company capable of being registered under the Act of 1908 (see Part VII. of the Act) may effect a reconstruction or amalgamation under sect. 192. It should register under the Act and immediately afterwards resolve on a voluntary winding-up and sale. Sect. 249 (1) of the Act provides that such a registration shall not be invalid by reason that it has taken place with a view to the company being wound up, and it has been decided that registration with a view to winding up and selling under sect. 192 is not open to objection. *Southall v. British Mutual Life Assurance Society*, 11 Eq. 65.

As to name of amalgamated company.

If it is desired that the purchasing company should assume the name of the selling company, or part of it, the agreement will provide accordingly, and the change will be made, with the consent of the Board of Trade and of the liquidators, under sect. 8 of the Act. This has been done in various cases, and may be effected in a few days.

Amalgamation with foreign company.

An amalgamation with a foreign company might have been effected under sect. 161 of the Act of 1862, but it cannot be under sect. 192. See *Thomas v. The United Butter Corp. of France*, (1909) 2 Ch. 484, and *supra*, p. 1439.

An agreement for sale adopted by the liquidators pursuant to a direction of the company is valid. See *supra*, p. 1440.

The agreement may provide for the allotment of the shares to the liquidators, or to the members directly. See *supra*, p. 1440.

As to dissentients, see *supra*, pp. 1442-1444.

Dissentients.

As to their right of action for purchase money, see *supra*, p. 1446.

As to arbitration, see *supra*, p. 1444.

As to the rights of dissentients being restricted by the articles, see *supra*, p. 1445.

As to altering articles of association with a view to deprive dissentients of their rights under sect. 161 (now sect. 192), see *supra*, p. 1445; *Fox's case*, 6 Ch. 183; *Baring-Gould v. Sharpington Syndicate*, (1899) 2 Ch. 80; *Payne v. Cork Co.*, (1900) 1 Ch. 308.

An agreement in a winding-up to sell the assets in consideration of shares, coupled with a provision that if the realized value should not amount to a fixed sum the deficiency should be made good by a call on the members of the selling company, is not such a sale as can be made under sect. 192. Even if the call was to be made on the assenting members only, it is considered that such a sale would be invalid. "It is sufficient to say that, in my opinion, the liquidators of a company would have no right to place a shareholder of a company in this position, that he must either dissent altogether from the arrangement, and be subject to have his share taken from him at a valuation, or else come in under the arrangement, and thus be forced to subject himself to the liability of guaranteeing the sufficiency of the assets." Per Lord Cairns, L. C., *Clinch v. Financial Corporation*, 4 Ch. 120; p. 1439, *supra*. The property to be sold under sect. 192 is the assets of the company, exclusive of its uncalled capital (if any). S. C. See, however, *supra*, p. 1439.

Clinch v. Financial Corporation.
Invalid agreement.

But there is no objection to a sale being made in consideration of shares which are to be deemed only in part paid up (*City and County Investment Co.*, 13 C. Div. 475; *Imperial Mercantile Credit Association*, 12 Eq. 504; *Hester & Co.*, 44 L. J. Ch. 757; *Postlethwaite v. Port Philip Co.*, 43 C. D. 452; *Mason v. Motor Traction Co.*, (1905) 1 Ch. 419, a case of sale under powers in the memorandum of association); or in consideration of deferred or preference shares.

Sale for partly paid-up shares valid

As to validity of sale to a trustee for the new company, see *supra*, p. 1439.

Sale to trustee.

As to amalgamation and transfer of the business of assurance companies, see the Assurance Companies Act, 1909, in Appendix, *infra*. Under the Act last mentioned the sanction of the Court must be obtained to any transfer or amalgamation. See further, *supra*, p. 1329.

Amalgamation of life-assurance companies.

PRECEDENTS.

Form 793.

AGREEMENT with a view to an AMALGAMATION between two existing companies.

Agreement
with a view
to amalga-
mation.

In the following case a company A. and company B. C. are desirous of amalgamating; the directors of the latter have full power to acquire the assets of the former, and there is a sufficient number of unissued shares in the B. C. company for the purposes of the agreement.

The agreement will be as follows:—

Parties.

AN AGREEMENT made the — day of —, between N., of —, on behalf of the A. Coy, Limtd (hmftr called the A. Coy), of the one pt, and the B. C. Coy, Limtd (hmftr called the B. Coy), of the other pt. WHEREAS *recite incorporation of A. Coy: capital 40,000l., in 20l. shares, with 10l. paid up: all the shares issued and fully paid up*: AND WHEREAS the B. Coy was incorporated in the year — under the Cos Acts, 1862 to —: AND WHEREAS the nominal capital of the B. Coy is 60,000l., divided into 6,000 shares of 10l. each, whereof 3,000, and no more, have been issued, and now stand credited in the books of the B. Coy as having been fully pd up: AND WHEREAS it is intended to procure the A. Coy to pass special resolutions for a voluntary winding-up, appointing liqrs, and directing them to adopt and carry into effect this agreemt:

Recitals.

NOW IT IS HBY AGREED as follows:—

Condition.

1. This agreemt is conditional on the adoption hof before the — day of — next, by the liqrs of the A. Coy, with the sanction of a special resolution of that coy.

Sale.

2. The A. Coy shall transfer and the B. Coy shall take over all and singular [*supra*, Form 771, cl. 1].

Part con-
sideration.

3. As a pt of the consen for the sd transfer the B. Coy shall pay, satisfy, and discharge all the debts, liabilities, and engagements of the A. Coy now, or at the time of such adoption as afsd, binding on it, and shall at all times keep the A. Coy, &c. [*supra*, Form 771, cl. 2].

Compensation
to officers of
A. Company.

4. As a further pt [*supra*, Form 771, cl. 3].
5. As a further pt of the consen for the sd transfer, the B. Coy shall, within three months from the adoption hof by the liqrs of the old coy, with such sanction as afsd, pay to — the sum of £—, to — the sum of £—, and to — and — the sum of £— apiece, such sums to be accepted by the sd persons in full discharge of all claims by them resply upon the A. Coy for loss of office occasioned by the winding-up thof.

6. As the residue for the consen of the sd sale the B. Coy shall allot to or to the nominee or nominees of every member of the A. Coy, who shall require the B. Coy so to do, one of its 20l. shares with the sum of 10l. credited as pd up thereon in respect of every 20l share in the A. Coy held by him.

Form 793

Allotment
of share

See further forms as to consideration, pp. 1460, 1463.

Add other appropriate clauses.]

9. The sale hby agreed to be made shall take effect as from the date of, and until the completion thof the A. Coy shall stand possessed of the ppty hby agreed to be sold, and shall carry on its business in trust for the B. Coy.

When sale to
take effect

10. The A. Coy and its liqrs shall, as soon as conveniently may be after the adoption hof by the sd liqrs in manner aforesaid (but without prejudice to clause 11 hof), execute *supra*, Form 771 [clause 11]

Completion

11. Provided always *supra*, Form 771, clause 12.

Lien

12. If this agreement shall not before the — day of — next be adopted by the liqrs of the A. Coy, with the sanction of a special resolution of that coy, either of the parties hereto may, upon giving one week's notice in writing to the other, rescind the same.

Power to
rescind.

13. When and so soon as this agreement shall have become binding on the A. Coy and the liqrs thof, the said N. shall be discharged from all liability in respect thof.

Discharge of
person con-
tracting for
selling
company

14. Notwithstanding anything *supra*, Form 771, clause 13]

IN WITNESS, &c.

In incorporating the clauses above referred to, they must be modified by substituting "A" and "B" for the words "old" and "new" where necessary.

The agreement will have to be filed under sect. 88 of the Companies (Consolidation) Act, 1908.

The resolution to be passed by the A. Company may be as follows:—

1. That it is expedient to effect an amalgamation of this coy with the B. C. Coy. Limtd, and that with a view thereto this coy be wound up voluntarily, and that — and — be and they are hby appointed liqrs for the purpose of such winding-up.

Form 794

Resolution
for amalga-
mation

2. That the conditional agreemt submitted to this meeting be and the same is hby approved, and that the liqrs be and they are hby authorized, pursuant to sect. 192 of the Companies (Consolidation) Act, 1908, to adopt the said agreemt and carry the same into effect, with such, if any, modification as the sd liqrs may think expedient.

Form 795.

Resolution for the amalgamation of two companies with a third.

1. That it is expedient to effect an amalgamation of this coy. with the A. Coy, Limtd, and with the B. Coy, Limtd.

2. That the following draft agreements, submitted to this meeting, namely:

(a) A draft agreement, dated, &c., and expressed to be made between N., on behalf of the A. Coy, Limtd, of the one pt, and this coy of the other pt:

(b) A draft agreement, dated, &c., and expressed to be made between R., on behalf of the B. Coy, Limtd, of the one pt, and this coy of the other pt:

be and they are hby approved, and that the directors be and they are hby authorized to execute agreements in the terms of the sd drafts resply, and to carry the same into effect.

3. That the capital of this coy be increased to £ —, by the creation of — new shares of £ — each.

4. That the directors be and they are hby authorized, upon the adoption of the sd first-mentd agreement by the liqrs of the A. Coy, Limtd, with the sanction of a special resolution of that coy, to appoint — and —, two of the present directors of the sd coy, to be directors of this coy.

5. That [similar resolution as to B. Coy].

6. That the following clause be substituted for clause — of the arts of asson of this coy, namely: "The number of directors of the coy shall not exceed twelve, and shall not be less than seven."

In the above case three companies, A., B., and C., desire to amalgamate. The transaction is to be effected by the winding-up of A. and B., and sale to C., which is to carry on the amalgamated business. Company C. has issued all its shares, and the capital must therefore be increased in order to effect the amalgamation. One of the terms of the arrangement is that two of the directors of each of the A. and B. companies shall be appointed directors of the C. company. In such a case one mode of effecting the transaction is as follows:—

Two draft agreements between the A. and B. companies, respectively, and the C. company will be prepared. They will be in the form of that given *supra*, p. 1488, *mutatis mutandis*.

These drafts will be submitted to the C. company, which will pass the above special resolutions.

The A. and B. companies will then pass special resolutions as above, p. 1489, and the liquidators will in due course adopt the agreements, which will be carried into effect.

The clause in the agreements as to the appointment of the directors will be as follows:—

"Upon the adoption of this agreement by the liquidators of the [A.] company, with the sanction of a special resolution of that company, — and —, two of the present directors thereof, shall be appointed directors of the C. company."

This clause can of course be modified so as to enable the A. company in general meeting to select the two directors, or to enable the directors of that company to do so.

That [amalgamation expedient, *supra*, p. 1490].

1. That, &c. [Wind up and appointment of liqrs.]

2. That the sd liqrs be and they are hby authorized to consent to the registration of a new coy to be named "The A. and B. Coy, Limtd," with a memdum and arts of assen, which have been already prepared with the privity and approval of the directors of this coy.

3. That the draft agreemt expressed to be made between the liqrs of this coy of the first pt, this coy of the second pt, the liqrs of the B Coy, Limtd, of the third pt, the B. Coy, Limtd, of the fourth pt, and the A. and B. Coy, Limtd, of the fifth pt, be and the same is hby approved, and that the sd liqrs be and they are hby directed to enter into an agreemt on behalf of this coy in the terms of the sd draft, and to carry the same into effect.

In this case company A. and company B. desire to amalgamate, and for divers reasons it is necessary to effect this by the formation of a new company to absorb the old ones.

An agreement, expressed to be made between the A. and B. companies and the liquidators thereof respectively, and the new company, will be prepared, or there may be two separate agreements each similar to that *supra*, p. 1488.

Each of the A. and B. companies will then pass a second resolution as above.

Immediately after the passing of the resolution the liquidators will sign the proper consent authorizing the registration of the A. and B. Company, which will be forthwith incorporated. For Form of Consent, see *supra*, p. 1090.

The primary object of the A. and B. Company, as set forth in the memorandum, will be:—

"To purchase or otherwise acquire, and to undertake all or any part of the business, property, assets, and liabilities of the following companies, namely:—

The A. Company, Limited,

The B. Company, Limited,

or either of them, upon such terms and conditions, and subject to such stipulations as may be agreed on."

The memorandum will also contain all requisite objects for carrying on the amalgamated business.

The articles will authorize the directors to execute the agreement.

As soon as may be after the registration of the new company, the agreement will be executed by all parties, and carried into effect. It must also be filed under sect. 88 of the Companies (Consolidation) Act, 1908.

Form 786.

Resolution for amalgamation to be effected by the formation of a new company.

ARRANGEMENTS AND COMPROMISES.

Preliminary In previous editions of this work the subject of arrangements and compromises under the Joint Stock Companies (Arrangement) Act 1870 (now sect. 120 of the Companies (Consolidation) Act, 1908) has been dealt with in Part II. (Winding-up), the reason being that the provisions of that Act applied only to a company "in the course of being wound up either voluntarily or by or under supervision of the Court." But as the jurisdiction in this respect has been altered and amplified, it seems desirable to treat or touch on arrangements and compromises in this Part also. By the Companies Acts, 1900 and 1907, two important changes were introduced:—

- (1.) By sect. 24 of the Act of 1900, the provisions of the Joint Stock Companies (Arrangement) Act were made to apply "not only as between the company and the creditors or any class thereof, but as between the company and the members of any class thereof."
- (2.) By sect. 38 of the Act of 1907, the Act of 1870 was made applicable whether the company was or was not in course of being wound up.

The Act of 1870, so modified, has been re-enacted in sect. 120 of the Act of 1908. That section runs as follows:—

**Sect. 120 of
Act of 1908.**

120.—(1.) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.

(2.) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or class of creditors, or on the members or class of members, as the case may be, and also on the company, or in the case of a company in the course of being wound up on the liquidator and contributories of the company.

(3.) In this section the expression "company" means any company liable to be wound up under this Act.

Under this section the Court can therefore sanction a compromise or arrangement between the company and its creditors or any class of them, and a compromise or arrangement between the company and its members or any class of them, and the sanction of the Court may be

obtained whilst the company is a going concern, without a winding-up. This extension of the jurisdiction was first granted by sect. 38 of the Companies Act, 1907, and the power to sanction an arrangement between the company and its members or any class thereof was first given by sect. 24 of the Companies Act, 1900. Those were great boons.

The word "compromise" in the section involves, it may be remarked, the notion of some dispute or difference as to the rights of the respective parties, but the word "arrangement" is more extensive in its signification. Those words both appear as alternatives in sect. 2 of the Joint Stock Companies Arrangement Act, 1870, and ever since that Act the Courts have acted on the footing that "arrangement" is a word having the widest signification. Thus, in an early case on the Act, it was held that "an arrangement" might be provided for the issue of fully paid-up shares in a company (to be formed) in satisfaction of the company's debentures. *Slater v. Darlaston Steel Co.*, W. N. (1877), pp. 139, 165. And the same point was decided by North, J., in *Re Mammoth Copperopolis of Utah* (May, 1879), affirmed by the C. A. 4 Aug. 1879, and by Chitty, J., in *Re North Western, &c. Co.* (1882), third edition of this work, p. 603 and p. 606. And the jurisdiction to sanction an arrangement so providing was emphasized by North, J., in *Empire Mining Co.*, 44 C. D. 402, and by the Court of Appeal in *Alabama, New Orleans, Texas and Pacific Junction Railway Co.*, (1891) 1 Ch. 213. In fact, the Court has declined to place any limit on the meaning of the word "arrangement." "What the Court has to do," said Lindley, J., in that case, "is to see first of all that the provisions of the statute have been complied with, and secondly, that the majority has been acting *bonâ fide*. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interest of those whom they represent, take a view which can be reasonably taken by business men. The Court must look at the scheme and see whether the Act has been complied with; whether the majority are acting *bonâ fide*, and whether they are coercing the minority to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one, and whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it." It is no objection, therefore, to a scheme as the above cases show, that it drastically affects the position of any class of creditors as, for example, by converting them into shareholders, or by postponing, curtailing, or even extinguishing their rights in some way. It is sufficient that the class taking the view which can reasonably be taken by business men, approve of the scheme in the interests of all,

expressing that approval by resolution passed by the statutory majority. And these principles are not confined to an arrangement between the company and its creditors, or some class thereof, they apply equally to an arrangement between the company and its members, or some class thereof. So held in *Edinburgh American Land Mortgage Co. v. Lang's Trustees*, (1909) S. C. 488—Ct. of Sess.

But of late it has been suggested that the jurisdiction conferred by sect. 120 to sanction "an arrangement," though expressed in the most general terms, is by implication limited or restricted so as not to enable the Court to sanction an arrangement between the company and its members, or any class of them, which departs from the constitutional rights of the members as defined in the memorandum of association, *e.g.*, by infringing the rights attached by the memorandum to the preference shares. This suggestion is based on sect. 45 of the Act, which points out a mode in which the conditions of the memorandum may in certain respects be altered by special resolution sanctioned by the Court (see *infra*, p. 1519). But there seems no sufficient ground for thus restricting the power of the Court. The jurisdiction conferred by sect. 120 is expressed in general terms, and sect. 45, which is very limited in its scope, does not at all cover the same ground, and should be regarded as pointing out an alternative mode of procedure available in certain cases; for otherwise there would be a great many cases in which a desirable arrangement could not be sanctioned for want of jurisdiction. See, too, *Forms infra*.

In like manner it was at one time suggested and held that the general jurisdiction to confirm a reduction of capital was impliedly restricted so as not to allow the confirmation of a reduction in contravention of the constitutional rights of the members under the memorandum of association. Thus in *Quebrada Land and Copper Co.*, 40 C. D. 361, North, J., only confirmed a reduction which involved a departure from the constitutional rights of the classes on being satisfied that practically all the shareholders of the class prejudiced consented. So in *Union Plate Glass Co.*, 42 C. D. 513, Kay, J., refused to confirm a reduction which involved a departure from constitutional rights of the members by throwing an undue proportion of the loss on the preference shareholders. "How could," said Kay, J., in that case, "any company in general meeting having only a general power to reduce capital say, 'In this case we agree that the capital of all the ordinary shareholders shall be reduced, but the capital of the shareholders who are entitled to preferential dividend—a right which it is to be observed gives them no preference as to capital in any kind of way—shall not be reduced.' I do not know how a majority could bind a dissentient individual by a resolution of that kind; in my opinion it could not. I am distinctly of opinion that such a resolution as that would be beyond the powers of the company. But if it were not, to expect the Court to sanction a

resolution of that kind, which is in fact the resolution that has been passed in this case . . . is quite out of the question."

So in *Denver Hotel Co.*, (1893) 1 Ch. 495, the Court of Appeal was of opinion that the Companies Act, 1867, could not be construed so as to enable a company to prefer one shareholder to another of the same class as himself by buying up his shares.

But these cases and the principles on which they rested were overruled in *British and American Trustee and Finance Corporation v. Couper*, (1894) A. C. 399, in which case it was held that the Court had jurisdiction to confirm any kind of reduction whatever, and that the fact that the reduction required the confirmation of the Court went far to preclude any notion that the jurisdiction was limited in any way. "If," said Lord Herschell in that case, "the scheme which the Court is asked to confirm be in fact one for the reduction of capital, I am, with all deference, at a loss to understand how the Court, in confirming it, could be acting *ultra vires*, seeing that, as I have pointed out, the statute has not prescribed the manner in which the reduction is to be carried out, nor has it prohibited any method of effecting that object. I do not see any danger in the conclusion that the Court has power to confirm such a scheme as that now in question, nor any reason to doubt that this was the intention of the Legislature. The interests of creditors are not involved, and I think it was the policy of the Legislature to invest the prescribed majority of the shareholders with power of deciding whether there should be a reduction of capital, and, if so, how it should be carried into effect. The interests of the dissenting minority of the shareholders (if there be such) are properly safeguarded by this: *that the decision of the majority can only prevail if it be confirmed by the Court*. This is a complete answer to the argument ably urged by Counsel at the Bar that if all the shareholders of the same class were not dealt with in precisely the same fashion, the interest of the minority might be unduly sacrificed to those of the majority. There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar would be most narrowly scrutinised by the Court, and that no such scheme ought to be confirmed unless the Court is satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the Court has no power to sanction it." In like manner it would seem, by parity of reasoning, that the Court has jurisdiction to sanction an arrangement under sect. 120, notwithstanding that in doing so it gives legal effect to what could not be validly arranged between the members and the company apart from the section, as for instance where—contrary to *Ashbury v. Watson*, 30 C. D. 376—the scheme alters rights conferred on the preference shareholders as regards capital or dividend, or both, by the memorandum of association.

It is also to be noted that having regard to sub-sect. (2) of sect. 120, the arrangement, if sanctioned by the Court, is to be binding on

all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company by virtue of the section. Here, then, is a positive enactment that the arrangement if so sanctioned is to be binding, binding by virtue of the Act of Parliament, and binding, not merely as the memorandum and articles of the company are by sect. 14 of the Act made binding, that is to say, in a qualified way, but binding to all intents and purposes.

In a recent case (*General Motor Co.*) the Court of Appeal, 1 Ap. 1912, held that it had no jurisdiction to sanction an arrangement of a very remarkable character.

The Court.

The Court which has jurisdiction to sanction a compromise or arrangement under the section is "the Court having jurisdiction to wind up the company." Sects. 120 (3), 131 and 285.

What
companies
within the
section.

The expression "any company" in sect. 120 means any company liable to be wound up under this Act. See sub-sect. (3). Thus, the section is applicable not only to a registered company, but to an unregistered company as defined in sect. 267, *e.g.*, a company incorporated by special Act for supplying water, gas, electricity, a tramway, &c.

Creditor.

Who are
creditors
within
section.

The term "creditor," as used in the Act of 1870, was construed in a wide sense, and it may be assumed that it will be similarly construed in reference to sect. 120 of the new Act. It includes "every conceivable class of creditor." Per Bowen, L. J., *Alabama New Orleans Co.*, (1891) 1 Ch. 243. Accordingly it includes not merely creditors in respect of debts presently payable, but creditors in respect of debts still current; and not merely creditors in the ordinary sense, but persons who can prove for damages, *e.g.*, policy holders whose policies are still current (*Sovereign Life Assurance Co. v. Dodd*, (1892) 2 Q. B. 573); and not merely unsecured creditors, but secured creditors, *e.g.*, debenture holders and debenture stock-holders. *Slater v. Darlaston Steel Co.*, W. N. (1877) 139; *Re Empire Mining Co.*, 44 Ch. D. 402; *Re Alabama Rail. Co.*, (1891) 1 Ch. 228; *Re Dynevor Collieries*, 11 Ch. D. 605.

"The language of the section is wide enough to include all creditors, whether they hold securities or do not hold securities—they are still creditors, and they can come in if they like and prove. If they are amply secured they need not come—they can hold their securities; but still they are creditors. Unless this Act [of 1870] is construed so as to include all creditors, it appears to me that in a great many instances the Act would be a dead letter." Per Lindley, L. J., in *Alabama, New Orleans, Texas and Pacific Junction Ry.*, *supra*, p. 1493. See also *Midland Coal, &c. Co.*, (1895) 1 Ch. 267, n.; appeal in H. L. compromised, 74 L. T. 744; *Wood v. De Mattos*, L. R. 1 Ex. 100.

In a very early case on the Act of 1870 it was held that to proceed under that Act it was necessary that the amount of the debts should be capable of being ascertained or estimated. *Albert Life Assurance Co.*, 6 Ch. 381, where numberless cases arose as to whether there had been a novation by policy holders or not.

As to classes of creditors, separate meetings have to be convened where it is proposed to deal with more than one class. Unsecured creditors form one class; secured creditors form another class e.g., debenture holders. *Alabama, New Orleans, &c. Co.*, (1891) 1 Ch. 213; *Empire Mining Co.*, 44 C. D. 402. Each series of debenture holders again forms a separate class.

In *Dynevor Collieries Co.*, 11 Ch. D. 610, Brett, L. J., held that debenture holders might be properly summoned to vote *en masse*, though there were several classes of them, but there the arrangement was for a lease of the whole undertaking.

In the case of policy holders, current policy holders may form one class and matured policy holders another. *Sovereign Life v. Dodd*, (1892) 2 Q. B. 573.

The meeting should adequately represent the entire body of creditors or class of creditors. Per Bowen, L. J., *Re Alabama, New Orleans, &c. Co.*, (1891) 1 Ch. 245. It is for the Chief Clerk (now the Master) to see that due notice is given to the creditors. *Ibid.*

The section, however, does not apply to foreign or colonial creditors. Thus, if an arrangement is made and sanctioned in England, A. B. and C., who reside in a colony, can notwithstanding the arrangement sue the company in the colony as freely as if the arrangement had not been made. *New Zealand Loan Co. v. Morrison*, (1898) A. C. 349; and see *Ellis v. MacHenry*, L. R. C. P. 234; *Gibbs v. Société des Métaux*, 25 Q. B. D. 399.

So in the case of members, if there are different classes of shareholders, separate meetings should be held. In a recent case—*United Providence Assurance Co.*, (1910) 2 Ch. 477 Swinfen Eady, J., held that shareholders who had paid up their shares in advance at interest and ordinary fully paid shareholders were not in the same position, and directed separate meetings to be held of each class.

The Court has in some cases directed subsidiary meetings to be convened abroad (*English, Scottish, &c. Bank*, (1893) 3 Ch. 385), but the meetings within the jurisdiction must be the governing factor.

The Court has in some cases given directions as to the deposit of proxies abroad and as to telegraphing the particulars to London. *English, Scottish, &c. Bank*, (1893) 3 Ch. 385.

The liquidator is, if the company is in winding-up, the proper person to preside at meetings under the Act. *Slater v. Darlaston Steel & Iron Co.*, W. N. (1877) 139.

Though it is no longer necessary before a compromise or arrangement can be sanctioned that an order should have been made or an

effective resolution passed for the winding-up of the company, there may still be cases in which a winding-up may be necessary. For example, where a company is being sued by pressing creditors whom it cannot pay, it may be necessary to pass a resolution to wind up voluntarily or even to present a petition for a compulsory order so as to stop actions and allow time for a compromise or arrangement under the section, with, perhaps, a subsequent stay of the winding-up. It must be borne in mind that unless there is a winding-up there is no power in the Court to restrain proceedings against the company. The mere commencement of proceedings for a compromise or arrangement under sect. 120 does not operate as a stay of action and proceedings (*Booth v. Wallden Spinning Co.*, (1909) 2 K. B. 368). This is a defect in the section. See sect. 7 of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127).

Binding
character
of order.

A compromise or arrangement under the section shall, "if sanctioned by the Court, be binding on all the creditors or the class of creditors or on the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company." The effect of these words is to give to the compromise or arrangement a statutory operation. Those who are bound by the scheme cannot in any way object to the terms of it. Their remedy is to appeal for the purpose of having it set aside, but whilst the order stands unappealed its propriety cannot be challenged. *Nicholl v. Everhardt*, 61 L. T. 489; *The Empire Life*, 31 C. D. 78; *Midland Coal &c. Co.*, (1895) 1 Ch. 627. Leave to appeal is necessary in some cases. Creditors and contributories, for instance, cannot appeal unless they appeared at the hearing. *Securities Insurance Society*, (1894) 2 Ch. 410. The sanction of the arrangement only binds those whom it purports to bind. *Sovereign Life v. Dodd*, (1892) 2 Q. B. 273. Where a meeting of unsecured creditors was convened a person having a contingent claim was held bound. *Midland Co.*, (1895) 1 Ch. 267. A creditor or member who is bound and afterwards acts in contravention of the arrangement can be sued by the company and if needs be an injunction obtained.

Who may Apply.

Who may
apply.

Looking to the terms of the Act the company can apply, a creditor can apply, a member can apply, and, finally, if the company is being wound up, the liquidator can apply. Where there is not a winding-up the company is generally the proper person to make the application.

How appli-
cation made.

The section says that the application may be made in "a summary way," and accordingly in the High Court the mode of application for an order to convene the meetings is now almost always made by summons. If there is no winding-up by or under the supervision of

the Court this should be an originating summons. Applications have however, from time to time been made by motion or petition.

It is not in every case that a meeting of members is necessary. For example, where it is proposed to deal only with the debenture holders of the company by reducing the rate of interest and cancelling arrears of interest, all that is necessary is to call a meeting of the debenture holders. So where the scheme merely affects members, *e.g.*, is to reduce the rate of dividend on the preference shares and to cancel arrears, then it would be necessary to convene a meeting of the preference shareholders only; or if in such case it is part of the arrangement that the ordinary shares shall be reduced, then a meeting of the ordinary shareholders also would have to be convened. On the other hand, where the ordinary shareholders or members have no beneficial interest in the company, as, for example, where the assets are over-charged by debentures so that nothing will remain for the members after the amount owing on the debentures has been satisfied, then it may not be necessary to hold any meeting of ordinary shareholders or members. So held by Chitty, J., 9th August, 1881, in *Dominion of Canada, &c. Co.*, where it was alleged in the petition and proved that the value of the assets was less than the amount of the debentures charged thereon. *Brownfields Guilds Pottery Society*, W. N. (1898) 80; *Tea Corporation*, (1904) 1 Ch. 12, in which last case non-approval of the scheme by the ordinary shareholders was held immaterial, on the ground that as an immediate realization of the assets would produce no surplus for such shareholders, they had no interest entitling them to veto the scheme. The same principle applies to a class of creditors, *e.g.*, to the unsecured creditors where the assets are insufficient to satisfy prior charges.

Debentures, debenture stock, and other securities made payable to bearer are not uncommon, and in such cases special care should, therefore, be taken that the holders have fair notice of the meeting. This is generally done by direction that the notice convening the meeting shall be advertised in several of the principal newspapers, and further that a circular should be sent to all those persons who are known to be creditors. In the case of bearer securities it has been held that at a meeting summoned under the Act (1870) those persons only could be regarded as entitled to vote who produced their securities at or before the meeting. *Wedgwood Coal Co.*, 6 C. D. 627.

The voting at any meeting under the section may be either in person or by proxy. Jessel, M. R. (*Madras Irrigation Co.* W. N. (1881) 120), held that a proxy must be a member of the class on the ground that "it was well established that for the purpose of a meeting of any particular class of persons, proxies could only be given to and held by members of that class, and accordingly that the proxies in this case given to the official liquidator were invalid."

The author has not been able to discover any prior authority for this so-called well established rule, and it is not easy to find any

Meetings of
members

Proxies

sound reason why the Court should depart from the words of the Act, words which clearly import that a creditor may be present and vote by proxy without any limitation or restriction whatever as to the status of the proxy.

Majority.

Under the Act of 1870 the majority required was a majority in *number* representing three-fourths in value of such creditors or class of creditors, &c., but in sect. 120 of the new Act the words "in number" disappear.

It has been held that, in computing the majority, those members of the class only have to be taken into account who are present in person or by proxy. Those not present in person or by proxy must be disregarded. *Phoenix Bessemer*, 1 C. D. 151; *Alabama, New Orleans, &c. Co.*, (1891) 1 Ch. 213.

"The value" in the case of creditors means the amount due to the particular creditor. In the case, however, of a creditor whose claim is not liquidated, the "value" is the amount for which he is entitled, or would be entitled in a winding-up to prove. In the case of members, "value" has reference to the amount of the shares or stocks held by them respectively.

The report to be made to the Court should state accurately the number of the class—shareholders, creditors, policy holders, &c.—present and the value thereof, and how the members of the class vote. The report is usually made an exhibit to an affidavit and verified thereby.

The Petition.

The petition to the Court comes after the meetings. It states the incorporation of the company, its objects, capital, and registered office, the circumstances which have given rise to the need for a compromise or arrangement, the terms of the proposed compromise or arrangement, the order for the meetings, the convention and holding of such meetings, the passing of the resolution for approval, and it prays the Court to sanction the compromise or arrangement.

Although it is usual to apply by petition to the Court to sanction a compromise or arrangement, there is jurisdiction to make the order on summons, and this was done in the cases following:—*Gaudet Frères*, Malins, V.-C., 24th July, 1878, A. 1489; *Northern Coal Co.*, Malins, V.-C., 12th September, 1876, B. 1598; *Wernstrill Colliery Co.*, Hall, V.-C., 2nd December, 1875, B. 1991; *Uruari Co.*, Chitty, J., 7th April, 1892.

In either case the application must be supported by affidavit evidence.

Specimen Schemes.

Character of Compromise or Arrangement.

In many cases a scheme has been sanctioned providing for the formation of a new company; for the transfer of the undertaking of the old company to the

new company; for the issue by the new company to the debenture holders of the old company of debentures or debenture stock of the new company, payable at a more distant period; for the undertaking by the new company of the other debts and liabilities of the old company; and for the issue to the shareholders of the old company of shares in the new company, with a liability thereon of so much per share.

But except in a winding-up there cannot be a reconstruction: *Re General Motor-Cab Co.*, C.A., 1 April, 1912.

The scheme very commonly provides that the debentures or debenture stock which are to be issued to the debenture holders or debenture stock-holders of the old company shall be payable at a deferred date at the expiration, say, of a term of 5, 10, 20, or 30 years.

Sometimes there are considerable arrears of interest on the debentures of the old company. When this is the case such arrears are in some cases extinguished altogether, and in other cases are satisfied by the issue of additional debentures or debenture stock, or by the issue of paid-up shares.

Where a company is loaded with debentures it is very common for the scheme to provide for the creation by the new company of a new series of debentures or debenture stock, ranking in priority to the debentures or debenture stock which are to be given to the debenture or debenture stock-holders of the old company.

Sometimes the debenture holders of the old company receive preference shares, or even ordinary shares, in the new company in satisfaction of their debentures (*Slater v. Dorlston Steel Co.*, W. N. (1877) 165; *Empire Mining Co.*, 44 Ch. D. 402; *Alabama, New Orleans, &c. Co.*, (1891) 1 Ch. 213), and sometimes they receive only a composition, whether in shares or debentures, in satisfaction of their claims.

At times the debentures or debenture stock given to the debenture or debenture stock-holders of the old company carry a right to vote at general meetings of the new company, and a right to appoint and remove one or more directors. This right is sometimes to subsist until the debentures or debenture stock are redeemed, and is sometimes to subsist only for a term, or until the profits arrive at a certain figure.

As to the ordinary creditors, the scheme sometimes provides for payment of the ordinary creditors in full in cash, especially where they are of small amount, or the non-payment would be detrimental to the business.

Sometimes they are given a composition of so much in the pound, payable in cash either by instalments or otherwise.

Sometimes, again, they are given debentures or debenture stock, or preference shares or ordinary shares.

Sometimes a scheme provides only for an arrangement between the company and its members of some class, e.g., by providing as to preference shares that the preferential rights attached to the preference shares shall be modified, by reducing the preferential dividend by cancelling arrears, and by altering the holders' rights in winding-up, and as to ordinary shareholders, that in consideration of the concessions made by the preference shareholders they, the ordinary shareholders, shall submit to a reduction of capital in derogation of their rights. And when the arranging company is being wound up, it may be part of the arrangement that the winding-up shall be stayed, and the company resume business; or it can be stayed

except for certain specified purposes. *Western of Canada Oil Co.*, W. N. (1874) 148.

So where there is a debenture action pending, the Court can stay the proceedings wholly or in part if the statutory majority of the debenture holders agree.

A scheme or arrangement is very commonly initiated where a debenture action is in progress and the undertaking in the hands of a receiver. In such case an application for an order to summon meetings should be made in the action, and under the section. This accords with the past practice. A scheme may provide for the passing of special resolutions to alter the memorandum or articles (see *Western of Canada Oil Co.*, W. N. (1874) 148); or the alteration can be effected by the scheme. Thus, in the *Oakham Co.*, Jessel, M. R. sanctioned a scheme adopting new articles.

Court's
discretion
and power.

The Court has a discretion as to sanctioning an arrangement, even if agreed to by the statutory majority. It must be satisfied that the scheme is a proper one (*Empire Mining Co.*, 11 Ch. D. 402), that is, that it is made in good faith and is fair and reasonable. *Alabama, New Orleans, &c. Co.*, (1891) 1 Ch. 113. It is the duty of the Court, for instance, to see that the majority has been acting *bonâ fide* and that the minority has not been overridden by a majority having interests clashing with those of the minority whom they seek to coerce.

On the same principle the Court will not sanction an arrangement which has been carried by the votes of creditors who are not acting *bonâ fide* in the interests of the class (*Wedgwood Co.*, 6 C. D. 627), but the mere fact that some creditors are shareholders does not invalidate their votes. See *Alabama, New Orleans, &c. Co.*, *supra*; and in *Buenos Ayres Water Co.*, 66 L. T. 408, it was held that a special concession made by a third party to voters was not to be regarded as a bribe, and therefore did not invalidate their votes.

Again, as a matter of fairness, the Court should not, so Fry, J., held in *Re Richards & Co.*, 11 Ch. D. 676, sanction an arrangement which would prejudice a creditor whose rights would have been preferential if the petition to wind up had been carried on, *e.g.*, a judgment creditor who would have got leave to issue execution in the winding-up.

Further, the Court has to look at the scheme and say whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interest of those whom they represent, take a view which can be reasonably taken by business men. Lindley, J., *Alabama, New Orleans, &c. Rail. Co.*, *supra*; and see *English, Scottish and Australian Chartered Bank*, (1893) 3 Ch. 385. "I have," said Bowen, L. J., in the first of these two cases, "no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that

class as such, otherwise the sanction of the Court would be a sanction of what would be a scheme of confiscation.'

But if the arrangement is an honest and fair one the Court, as James, L. J., said in *Dyneror Collieries Co.*, 11 Ch. D. 605, will not be astute to find out any technical defects in the proceedings. See also *Edinburgh American Land Co. v. Lam's Trustees* (1909), S. C. 18 Ct. of Sess., where the scheme had been approved by the statutory majorities of members of various classes, and the Court refused to withhold its sanction because of the opposition of a minority of debenture holders.

The Court does not in the case of a compromise or arrangement require provision to be made for paying out dissentient members of the class. To do so would defeat the very object of the section, for it is sufficiently obvious that the object of the section is to entrust the specified majority with the power to bind the whole class, and if the majority cannot bind the class but every objecting member is to be at liberty to insist on being paid out in cash, the value of the section is largely diminished. However, in *Canning Jarrah Timber Co.*, (1900) 1 Ch. 708, where there was an arrangement in conjunction with a reconstruction under sect. 161 of the Act of 1862 (now sect. 192), it was held by the Court of Appeal that there ought to be provision for payment out of dissentients, as in sect. 161. This was not the view of Chitty, J., as expressed in *Dominion of Canada, &c. Co.*, 55 L. T. 352. "The object of the Act," said his Lordship, "is to allow classes of creditors to enter into what?—A compromise or arrangement. I think, therefore, that Mr. L. (an objector), as a member of this class of creditors, is bound by the resolution that was come to at the meeting of the class"; and the same principle appears to be applicable to an arrangement or compromise of the members. No doubt, if the scheme is carried out in part under sect. 192, a dissentient member may properly claim the rights given to him by that section, but where sect. 192 is not made use of, it is submitted that there is no sufficient reason to hold that a dissentient should be given special rights. Where the Legislature intends dissentients to have special rights and privileges, it makes express provision for the same, as, for example, in sect. 9 (5) of the Act, where the Court is empowered to confirm an alteration of objects, it is provided that "the Court shall, in exercising its discretion under this section, have regard to the rights and interests of the members of the company or of any class of them as well as to the rights and interests of the creditors, and it may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members, and may give such directions and make such orders as it may think expedient for facilitating and carrying into effect any such arrangement: Provided that no part of the capital of the company may be expended in any

such purchase." So, too, in sect. 192, by which power is given to a liquidator, with the sanction of a special resolution, to transfer the whole or part of the business or property of the company to another company, there is express power given in sub-sect. (3) to any member not voting in favour of the special resolution at either of the meetings held for passing or confirming the same, to express his dissent therefrom, and to insist on payment of the fair value of his interest in cash. But sect. 120 contains no such provisions.

Under-writing.

Now that a company can pay for underwriting (sect. 89), there is no objection to providing in a scheme that the company shall offer certain shares for subscription and shall pay a commission for underwriting the same. See *supra*, p. 279.

Reduction of capital

A scheme of arrangement which involves a reduction of capital is occasionally submitted. In such a case it has been held that the scheme must be sanctioned as an arrangement and also as a reduction of capital, and that all the requisite proceedings in sect. 46 of the Act in regard to reduction must be carried through. See *Cooper, Cooper and Johnson*, 51 W. R. 314.

Modifications.

The scheme of arrangement usually contains a clause empowering the company or its liquidator to assent to any modifications or conditions approved or imposed by the Court, and the clause is sometimes qualified, *e.g.*, by adding the words "and by the trustees for the debenture holders." In the absence of any such clause, it is more than doubtful whether the Court can sanction a modified scheme or impose conditions which must operate by way of modification.

Foreign and colonial companies.

The Joint Stock Companies (Arrangement) Act, as was held by the Privy Council, did not apply to the colonies. *New Zealand Loan, &c. Co. v. Morrison*, (1898) A. C. 349. Therefore, a scheme sanctioned by the Court here is, *quoad* colonies, to be regarded as a proceeding in a foreign Court, and cannot be pleaded by the company in a colonial Court as a defence to an action by a non-assenting colonial creditor for the value of the amount of his claim.

As to referring scheme to Official Receiver to report, see Winding-up Rule 74, Part II. of this work.

PRECEDENTS.

In the High Court of Justice,
Chancery Division.
Mr. Justice —.

Form 797.

Summons for
meetings.

In the matter of the Companies (Consolidation) Act, 1908,
and
In the matter of the — Coy, Limited

Let all parties concerned attend at the chambers of Mr. Justice — at the Royal Courts of Justice, Strand, Middlesex, at the time fixed in the margin hereof on the hearing of the application of the above-named company, hitherto referred to as the coy, that the coy may be directed to convene separate meetings of (1) *state what meeting, as, for example,*] (1) the holders of preference shares in the coy's capital; and (2) the holders of ordinary shares in the coy's capital; and (3) the holders of the first debentures of the coy; and (4) the holders of the second debentures of the coy, for the purpose of considering, and if thought fit, approving, with or without modification, the scheme of arrangement proposed to be made between the holders of the said preference shares and ordinary shares and first debentures and second debentures respectively of the coy, and that directions may be given as to the mode in which the said meetings are to be convened, and that a chairman thereof may be appointed, and may be ordered to report the result thereof to the Court, &c.

SCHEME OF ARRANGEMENT under sect. 120 between the company and
its debenture holders.

Form 798

Scheme of
arrangement
as to debenture
holders.

1. The time for the payment of the first debentures of the — Company, Limited (hereinafter called the company), for £— is hereby postponed for — years, that is to say, until the — day of —, and the company's first debentures aforesaid shall henceforth be read and construed as if that date had been originally inserted therein instead of the — day of —.

P.

5 D

Form 798.

2. The time for the payment of the company's second debentures for £ — is hereby postponed for — years, that is to say, until the — day of —, and the said second debentures shall henceforth be read and construed as if that date were inserted therein instead of the — day of —.

3. Each holder of any of the sd debentures shall produce the same to the company and permit a note to be placed therein referring to this scheme.

4. The coy may assent to any modification or condition which the Court may think fit to approve or impose.

Form 799.

R. AND J. PULLMAN, LIMTD.

Scheme of
arrangement
as to share-
holders.

SCHEME OF ARRANGEMENT between the coy and its members under
sect. 120 of the Act of 1908.

1. The capital of the coy is to be reduced [*state how*].

2. The arrears of dividend up to the 31st December, 1911, to be cancelled, and any profits up to that date available for dividend to be capitalized.

3. Instead of the provisions contained in paragraphs (a) to (f) inclusive of clause 6 of the company's memorandum of association, the rights of the several classes of shares in the company's capital as regards dividend and distribution of assets in winding-up, to be as follows:

The profits of each year to be applicable first to the payment of a cumulative preferential dividend at the rate of 5 per cent. per annum on the 70,000*l.* preference shares.

Secondly, to the payment of a dividend at the rate of 7 per cent. per annum on the capital paid up on the ordinary shares, but so that they shall for the purposes of such dividend be deemed to be of the nominal value of 1*l.* each instead of 1*s.* each, and to be fully paid up to the extent of 1*l.* per share.

Thirdly, to the accumulation of a reserve fund of 20,000*l.* for the purposes specified in clause 113 of the company's articles of association.

As to the residue, the same to be paid as to one equal moiety to the holders of ordinary shares by way of additional dividend, and as to the other equal moiety to the holders of the founders' shares in each case respectively in proportion to the number of shares of the class held by them respectively.

And in a winding-up the assets available for distribution amongst the members shall be applied first to the payment off of the capital paid up on the preference shares; secondly, to the payment off of the capital paid up on the ordinary shares and founders' shares *pari passu*, but on the footing that the ordinary shares shall for that purpose continue to have paid up thereon the sum of 1*l.* per share, not 1*s.* per share, and the balance to belong to the holders of the preference, ordinary, and founders' shares respectively, in proportion to the capital paid up on the said shares of each class respectively, but so that for this purpose the ordinary shares shall be deemed to be paid up to the extent of 1*l.* per share instead of 1*s.* per share. Paragraphs (g) and (h) of the memorandum of association to apply to the reduced capital.

Form 799.

4. The company's articles of association shall be regarded as modified accordingly.

See Form 809, *infra*.

HATCHER AND SONS, LIMITED.

Form 800.

SCHEME OF ARRANGEMENT between the above-named company and the holders of the preference shares and the holders of the ordinary shares in the capital of the said company altering rights conferred by memorandum.

Scheme of
arrangement
as to members.

1. The special resolutions of the company passed and confirmed, &c., providing for the reduction of the company's capital, and for sub-division of its shares, and for the cancellation of arrears of preference dividend, and for other matters, shall be binding on the company, and on the holders of the said preference shares, and on the holders of the said ordinary shares, and shall be carried into effect accordingly.

2. The holders of the said preference shares and the holders of the said ordinary shares shall accept the provisions made by the said special resolutions in satisfaction of their existing rights with respect to their preference and ordinary shares.

3. Unless the said special resolutions are confirmed by the Court before the — day of —, this scheme is on that day to become void.

The resolution above referred to provided for the reduction of the company's capital and proceeded as follows:—

And that of each of the 33,000 fully paid-up preference shares of 1*s.* each resulting from such reduction, and each of the 6,000 unissued preference

Form 800.

shares of 15s. each, a portion of the nominal value of 1s. shall be converted into one ordinary share credited as to the said issued shares as fully paid-up. All the said ordinary shares to rank *pari passu* in all respects with the other ordinary shares in the company, and that all arrears of the cumulative preferential dividend, whether declared or not, on the 34,000 issued preference shares accrued up to, &c., shall be cancelled and extinguished, but if the same shall not be confirmed by the Court on or before 31st December, 1911, this resolution shall on that day be void and of no effect, and that this resolution shall be conditional on a scheme of arrangement between the company and its members holding preference shares and between the company and its members holding ordinary shares being adopted under sect. 120 of the Companies (Consolidation) Act, 1908, for giving effect to the provisions of this resolution. Such scheme of arrangement to be framed in accordance with the terms following, that is to say, &c.

Form 801.

HATCHER AND SONS, LIMITED

**Order for
meetings.**

Upon the application of the above-named coy by summons dated 12th June, 1911, upon hearing counsel for the applicants and upon reading an affidavit of H. filed 17th June, 1911, and the exhibits therein referred to and the two affidavits of, &c. It is ordered that the applicants do convene separate meetings of (1) the holders of preference shares, and (2) the holders of ordinary shares in the capital of the above-named coy, such meetings to be held at — on the 1st day of August, 1911, at 2 o'clock and 3 o'clock in the afternoon respy, for the purpose of considering and, if thought fit, approving, with or without modification, a scheme of arrangement proposed to be made between the holders of the sd preference shares and the holders of the sd ordinary shares respy and the sd coy. And it is ordered that at least ten days before the day appointed for such meetings, advertisements convening the same and stating that a copy of the scheme of arrangement can be seen at the office of the solicitors of the applicants be inserted as follows: once in the *London Gazette*, and once in the *Times* and the *Daily Mail* newspapers, twice in the *Taunton Courier*, and twice in the *Somerset County Herald*. And it is also ordered that at least seven days before the day appointed for such meetings circular letters to the same effect, together with a proper form of proxy and all particulars of the scheme, be sent to such of the sd holders of preference shares and holders of ordinary shares respy whose addresses are known to the applicants. And the judge doth appoint W., of —, or failing him H., of —, chairman of the sd meetings. And it is ordered that the sd chairman do report the result of the sd meetings to the judge. *Hatcher & Sons, Limited, Eve. J., 10th July, 1911.*

No. 00276 of 1911.

In the High Court of Justice,
Chancery Division.

Mr. Justice Neville.

Form 802.

Notice
convening
meetings of
shareholders

In the Matter of the Companies (Consolidation) Act, 1908,
and
In the Matter of R. & J. Pullman, Limited.

Notice is hereby given that by an order dated the 25th day of July, 1911, Mr. Registrar Hoad has directed separate meetings of

1) the preference shareholders, (2) the ordinary shareholders, and
3) the holders of founders' shares in the above-named company for the purpose of considering and, if thought fit, approving, with or without modification, the scheme of arrangement proposed to be made between the said company and the holders of such preference, ordinary and founders' shares respectively. The said meetings will be held on Monday, the 14th day of August, 1911, at Winchester House, Old Broad Street, in the City of London, as regards the meeting of the said ordinary shareholders at 3 o'clock in the afternoon, as regards the meeting of the said preference shareholders at 3.45 o'clock in the afternoon, and as regards the meeting of the holders of the said founders' shares at 4.15 o'clock in the afternoon, at which place and respective times all the aforesaid preference and ordinary shareholders and holders of founders' shares are requested to attend. A copy of the said scheme of arrangement can be seen at the office of Messrs. A., B. & C., the solicitors of the said company, at ---, in the City of London.

The ordinary and preference shareholders and the holders of founders' shares may attend such meetings respectively, and vote in person or by proxy, provided that all proxies are deposited at the registered offices of the company, --- Street, Soho Square, London, not later than 48 hours before the times fixed for holding the said meetings respectively.

Holders of founders' shares in the said company payable to bearer desiring to attend or vote personally must produce at the time and place of the meeting of such holders, and to obtain admission thereto, their certificates of shares for the purpose of identification. The holders of founders' shares desiring to attend or vote by proxy must on or before 10th day of August, 1911, deposit their certificate for shares with the company's bankers, the --- Bank, at ---, London, E.C., where the said banker's certificate of deposit and proxy forms can be obtained. The banker's certificate of deposit will entitle the holder to attend and vote in respect of the founders' shares so deposited at the meeting of the holders of the said founders' shares,

Form 802. and any adjournment thereof, and any poll to be taken in consequence thereof, and after the transaction of the business of the meeting the share certificates will be returned upon the surrender of the said certificate of deposit.

The Court has appointed A. B., Esq., J.P., or failing him, Mr. C. D., or failing him, Mr. E. F., directors of the company, to be chairman of the said several meetings respectively. The above-mentioned scheme will be subject to the subsequent approval of the Court.

Dated the 29th day of July, 1911.

A., B. & C.,
Solicitors for the company.

Form 803. In the High Court of Justice.
Companies Winding-Up.

Notices
convening
meetings of
shareholders
as to wind-
ing-up.

In the matter of the North-West Argentine Railway Co., Limited.

Notice is hereby given that by an order of the Court dated 21st January, 1901, J. K. and L. M., the liqrs of the above-named coy, were directed to convene separate meetings of (1) the holders of preferred shares issued by the above-named coy, and (2) the holders of deferred shares issued by the above-named company, for the purpose of considering and, if thought fit, approving, with or without modification, the scheme of arrangement proposed to be made between the company and the said respective classes of shareholders, which scheme is as follows:—

That certain income debenture stock of the Cordoba Central Railway Co., Limited, of the nominal amount of 310,000*l.*, representing the surplus assets of the above-named coy after providing for payment in full of the debts and liabilities of the coy, be subject to such provision as may be required, as hereinafter mentd, for the costs of and incidental to the winding-up, and of these proceedings, including the remuneration of the liqrs not already provided for, distributed amongst the shareholders otherwise than in accordance with their rights as defined by the constitution of the coy, namely, as to 100,000*l.* to be distributed *pari passu* amongst the class of holders of deferred shares, and as to the balance, namely, 210,000*l.*, or so much thereof as remains after providing for the remuneration above referred to, be distributed *pari passu* amongst the class of holders of preferred shares.

Such meetings will be held on Thursday, the 14th February, 1901, at Winchester House, Old Broad Street, London, E.C., at the following times, namely:—

Meeting of holders of preferred shares at 2.15 in the afternoon.

Meeting of holders of deferred shares at 2 in the afternoon, at which time and place all such holders are respectively requested to attend. **Form 803.**

Shareholders may attend such meetings respby, and vote either in person or by proxy. Forms of proxy may be obtained at the offices of the liqr, A. B., at — Street, London, E.C., on any week-day between the hours of 10 a.m. and 5 p.m. prior to the day appointed for holding the said meetings.

The order appoints J. K., or failing him, L. M., to act as chairman of the said meetings, and directs the chairman to report the result of such meetings to the Court.

Dated this — day of February, 1901.

— & —,
— Street, E.C.

Witness —

Solicitors for the said liqrs.

The scheme above set forth was sanctioned in due course.

The parties had endeavoured to carry the scheme out with the assistance of the Court (see *North-West Argentine Rail. Co.*, (1900) 2 Ch. 882), but the Court held that the scheme was irregular inasmuch as it provided for a distribution of the assets otherwise than in accordance with the legal rights of the parties thereto, i.e., gave the preference shareholders about 13,000l. more than their proper proportion, thus infringing the rules laid down in *Griffith v. Paget* (1877), 5 C. D. 894.

In the course of the year 1900 the Companies Act, 1900, was passed, and sect. 24 of that Act (the Joint Stock Companies Arrangement Act, 1870) was extended so as to include an arrangement between a company and its members or any class of its members. Accordingly, the application was made to the Court under the Act as so amended. In due course the order was made by Wright, J.

RESOLUTION referring to Scheme of Arrangement.

Form 804.

That the scheme of arrangement submitted to this meeting be and the same is hereby approved and agreed to. **Resolution.**

[Title.]

Form 805.

I, the undersigned [an unsecured creditor] of the above-named coy, hereby appoint W., of, &c., whom failing, P., of, &c., (a) [(a) If any other proxy is preferred, strike out names here inserted and add name of proxy preferred and initial alteration] as my proxy, to act for me at the meeting of [unsecured creditors] to be held at —, **Form of proxy.**

Form 805.

on — day, the — th day of —, 19—, at — o'clock in the — noon,
for the purpose of considering and, if thought fit, approving, with or
without modification, a scheme of arrangement proposed to be made
between the said co^y and its unsecured creditors, and at such meeting
and any adjournment thereof to vote for me and in my name;
(b) [(b) *If for, insert "for," if against, insert "against," and strike
out the words below after "scheme," and initial such alterations*] the
said scheme either with or without such modification as my proxy
may approve.

Dated this — day of —, 19—.

Signature —
Address —.

Amount of debt in figures. £ s. d.

NOTES.

1. The proxy must be lodged with the liquidator at his office, —, not later than the day before the meeting at which it is to be used.
2. Any alterations made in the form of proxy should be initialled.

In the form as used the portions printed in italics are printed in the margin. The form has been often adopted by the Court.

Sect. 120 recognizes the right to attend the meeting in person or by proxy, and accordingly a voter is entitled to attend by proxy and to frame the instrument of proxy as he chooses. It does not seem that the Court is empowered to prescribe the form of proxy which he shall use.

Form 806.

Report by
chairman.

[Title.]

In the matter, &c.

Report of Chairman.

I, J. K., the person appointed by the Honourable Mr. Justice — to act as chairman of the meeting of the debenture holders [*or first debenture holders, or second debenture holders, or unsecured creditors, or preference shareholders, or ordinary shareholders*] of the above-named company, summoned by advertisement dated the — day of —, and held on the — day of —, at —, in the County of —, do hereby report to the said judge the result of the said meeting as follows:

The said meeting was attended either personally or by proxy by holders of [preference shares] of the said company [*or as the case may be*] entitled together to — [preference shares in the capital of the said company of £— each.]

The question submitted to the said meeting was whether the holders of [preference shares] in the said company approved of the scheme of arrangement submitted to the meeting and agreed thereto.

The said meeting was unanimously of opinion that the scheme of arrangement should be approved and agreed to, *or* [The result of the voting upon such question was as follows:—

Form 806.

The undermentioned preference shareholders voted in favour of the proposal being adopted and carried into effect.

Name of Preference Shareholder.	Address.	Number of Preference Shares held by each.	Number of Votes.
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The undermentioned preference shareholders voted against the said proposal being adopted and carried into effect.

Name of Preference Shareholder.	Address.	Number of Preference Shares held by Voter.]
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Dated the day of

(Signed) J. K.,

Chairman.

In the High Court of Justice.

Form 807.

(Title, &c.)

Petition.

The humble petition of the Coy, Limited, sheweth as follows:—

1. Your petitioners, the above-named company [incorporation, objects, &c.].
2. Capital.
3. Commencement of business.
4. Issue of debentures.
5. Financial difficulties and reasons why arrangement desirable.
6. Order to convene meetings.
7. Result of meetings, &c.
8. Prayer that the said scheme of arrangement may be sanctioned by the Court.

For orders sanctioning scheme of arrangement and compromise, see Part II. (11th ed.) of this work.

Form 808.

WOODWARD, GROSVENOR AND CO., LIMITED AND REDUCED.

Order
sanctioning
scheme of
arrangement
in conjunction
with reduction
of
capital.

On the petition, &c., and upon hearing the sd petition and reading the order, dated 25th January, 1909, whereby the sd coy was ordered to convene meetings of (1) the holders of preference shares of the above-named coy, and (2) the holders of ordinary shares of the above-named coy for the purpose of considering, and, if thought fit, approving, with or without modification, a scheme of arrangement proposed to be made between the sd holders of the preference shares and ordinary shares resply and the sd coy, a copy of which scheme was set forth in paragraph 9 of the affidavit of G., filed 7th January, 1909, hnftr mentioned, the order dated the 21st March, 1909, dispensing with the list of creditors, *London Gazette*, &c. newspapers, all for 29th January, 1909, and each containing an advertisement of the notice convening the sd meeting directed to be held by the sd order of the 25th January, 1909, the *London Gazette* and *Times* newspapers, both of the 6th April, 1909, and each containing a notice of the presentation of the sd petition, and that the same was appointed to be heard on the 21st April, 1909, the affidavit of B., &c., this Court doth, in accordance with the provisions of the Companies (Consolidation) Act, 1908, hby sanction the scheme of arrangement set forth in the 9th paragraph of the sd petition and in the first schedule hto, and doth declare the same to be binding on the holders of the preference and ordinary shares of the sd coy resply, and on the sd coy. And this Court doth order that the cancellation and reduction of capital of the above-named coy resolved on and effected by special resolution, &c., which resolution was in the words and figures following, that is to say: That the capital of the coy, be reduced from 150,000*l.* divided into 75,000 preference shares of 1*l.* each, and 75,000 ordinary shares of 1*l.* each, of which 50,000 preference shares of 1*l.* each and 50,000 ordinary shares of 1*l.* each only have been issued and fully paid, to 112,500*l.* divided into 75,000 preference shares of 1*l.* each fully paid, and 75,000 ordinary shares of 10*s.* each fully paid, and that such reduction be effected by cancelling capital which has been lost or is unrepresented by available assets to the extent of 10*s.* per share on each of the sd 50,000 ordinary shares which have been issued and are now outstanding, and by reducing the nominal amount of the ordinary shares of the coy's ordinary share capital to 10*s.* per share, but this resolution to be conditional on an arrangement sanctioned by the Court being made for the cancellation of the arrears of dividend on the preference shares afsd accrued up to the 30th day of June, 1908, whether declared or not, and amounting to 13,000*l.*, be and the same is hby confirmed in accordance with the provisions of the Companies (Consolidation) Act, 1908. And the Court doth hby approve the minute, &c. And it is ordered that notice of the registration of this order with the Registrar of Joint Stock Companies, and this order, so far

as it applies to the cancellation and reduction of capital of the above-named coy and of the sd minute, be published, &c. And it is ordered that the addition of the words "and reduced" to the title of the coy be continued for one month from the date of this order, except on tickets and labels and cards, in respect of which sd tickets and labels the sd words may be dispensed with.

Form 808.

The schedule set forth the scheme of arrangement as follows:

1. Reduction of the coy's capital by cancelling the sum of 10s. per share, one half of the capital paid up on each of the 50,000 issued ordinary shares afsd, and by reducing the nominal amount of each such share from 12. to 10s. ordinary, resolved on by special resolution shall be carried into effect.

2. The arrears of dividend on the sd 50,000 preference shares proved up to the 30th June, 1908, whether declared or not, shall be extinguished.

The above order was made by Neville, J., 21st April, 1909.

The preferential dividend above referred to was attached by the company's memorandum of association.

In the High Court of Justice,
Chancery Division.

Mr. Justice Swinfen Eady.

00276 . 1911.

Tuesday, the 28th day of November, 1911.

In the matter of the Companies (Consolidation) Act, 1908,
and

In the matter of R. and J. Pullman, Limited and Reduced.

Form 809.

Another.

Upon the petition of the above-named R. and J. Pullman, Limited and Reduced, on the 9th November, 1911, preferred unto this Court, and upon hearing counsel for the petitioners and upon reading the said petition, the order dated 25th July, 1911, whereby the said company was ordered to convene separate meetings of (1) the preference shareholders, (2) the ordinary shareholders, and (3) the holders of founders' shares resply of the said coy for the purpose of considering, and if thought fit, approving with or without modification the scheme of arrangement proposed to be made between the said coy and the said holders of the said preference, ordinary, and founders' shares resply of the said coy, which scheme was incorporated in the affidavit of James Curtis Hook, filed 21st July, 1911, huftr mentioned, the order dated the 14th November, 1911, dispensing with the list of creditors, the *London Gazette* and the *Times*

Form 809. newspapers, both of the 4th August, 1911, and each containing an advertisement of the said notice convening the said meetings directed to be heard by the said order dated 25th July, 1911, the *London Gazette* and the *Times* newspapers, both of the 17th November, 1911, and each containing a notice of the presentation of the said petition, and that the same was appointed to be heard on the 28th November, 1911, the three several affidavits of J. C. H., filed 21st July, 1911, 19th September, 1911, and the 9th November, 1911, and the affidavit of Joel Emanuel —, filed 9th November, 1911, and the exhibits in the said affidavits or some of them respy referred to, and the report, dated the 11th September, 1911, of the chairman of the result of the meetings directed to be held by the said order dated 25th July, 1911. This Court doth hereby sanction the scheme of arrangement set forth in the seventeen paragraphs of the said petition and in the first schedule hereto, and doth declare the same to be binding on the preference shareholders, the ordinary shareholders, and the holders of founders' shares of the above-named company and also on the said company. And this Court doth order that the cancellation and reduction of the capital of the above-named company resolved on and effected by the special resolution passed and confirmed at two extraordinary general meetings of the petitioners, the said R. & J. Pullman, Limited and Reduced, held respy on the 23rd October, 1911, and the 7th November, 1911, and which resolution, so far as it relates to the reduction of the coy's capital, was in the words and figures following, that is to say:

That the capital of the coy now consisting of 213,000*l.*, divided into 70,000 preference shares of 1*l.* each, 140,000 ordinary shares of 1*l.* each, and 3,000 founders' shares of 1*l.* each, be reduced to 80,000*l.* divided into 70,000 preference shares of 1*l.* each, 140,000 ordinary shares of 1*s.* each, and 3,000 founders' shares of 1*l.* each, and that such reduction be effected by cancelling paid-up capital to the extent of 19*s.* per share on each of the said ordinary shares, and by reducing the nominal amount thereof from 1*l.* to 1*s.* each, be and the same is hereby confirmed in accordance with the provisions of the above-mentioned Act.

And the Court doth hereby approve the form of the minute set forth in the second schedule hereto. And it is ordered that this order be produced to the Registrar of Companies, and that an office copy thereof be delivered to him, together with a minute, in the words or to the effect set forth in the second schedule.

And it is further ordered that notice of the registration by the Registrar of Companies of this order, so far as it applies to the reduction of capital of the company, and of the said minute, be published as follows, that is to say, once each in the *London Gazette* and in the *Times* newspaper within ten days after such registration.

And it is ordered that the addition of the words "and reduced"

to the title of the said coy be continued for one month from the date of this order. **Form 809.**

J. H. Hood,

Registrar, Companies Winding-Up

The first schedule above referred to sets out copy resolution and scheme of arrangement.

Upon the petition of Hatcher & Sons, Limited and Reduced, on the 25th November, 1911, preferred to the High Court of Justice, and upon hearing counsel for the petitioners, and upon reading the sd petition, an order dated 4th December, 1911, dispensing with the settlement of the list of creditors, the *London Gazette* of 5th December, 1911, the *Times* newspaper, &c., &c., each containing an advertisement notice of the presentation of the sd petition, and the petition was appointed to be heard this day, and an affidavit of L., filed 16th December, 1911, and the exhibits therein referred to, this Court doth in conformity with the provisions of the Companies (Consolidation) Act, 1908, confirm the cancellation and reduction of the capital effected by the special resolution passed at an extraordinary general meeting of the shareholders of Hatcher & Sons, Limited and Reduced, held on the 10th day of April, 1911, and confirmed at an extraordinary general meeting of the sd coy held on the 25th day of April, 1911, which resolution was in the words and figures following, that is to say:—That the share capital of the coy, namely, 50,000*l.*, divided into 34,000 fully paid-up preference shares of 1*l.* each, and 6,000 unissued like preference shares of 1*l.* each, and 7,000 fully paid-up ordinary shares of 1*l.* each, and 3,000 unissued like ordinary shares of 1*l.* each, be reduced to 29,750*l.*, divided into 33,000 fully paid-up preference shares of 15*s.* each, and 6,000 unissued like preference shares of 15*s.* each, and 7,000 fully paid-up ordinary shares of 1*s.* each, and 3,000 unissued ordinary shares of 1*s.* each, and that such reduction shall be effected

Form 810.

Another.

- (a) By cancelling and extinguishing the 1,000 fully paid-up preference shares of 1*l.* each, numbered 1 to 1,000 inclusive, the holder of which has assented to the cancellation thereof and also the capital paid up thereon as being capital lost or unrepresented by available assets; and
- (b) By cancelling the sum of 5*s.* per share on the remaining 33,000 issued preference shares of 1*l.* each as being lost or unrepresented by available assets, and by reducing the nominal amount of the sd shares, and of the sd 6,000 unissued preference shares, to 15*s.* per share; and
- (c) By cancelling the sum of 19*s.* per share on the said 7,000 issued ordinary shares of 1*l.* each as being lost or unrepresented by available assets, and by reducing the nominal value of such shares and of the sd 3,000 unissued ordinary shares to 1*s.* per share.

Form 810.

And that of each of the 33,000 fully paid-up preference shares of 15*s.* each which would result from such reduction and of each of the 60,000 unissued preference shares of 15*s.* each, a portion of the nominal value of 1*s.* shall be converted into one ordinary share credited as to the sd issued shares as fully paid up, all the sd ordinary shares to rank *pari passu* in all respects with the other ordinary shares in the coy.

And that all arrears of cumulative preferential dividend, whether declared or not on the 34,000 issued preference shares of 1*l.* each proved up to the 31st January, 1911, shall be cancelled and extinguished, but if the same shall not be confirmed by the Court on or before 31st December, 1911, the sd resolution shall on that day be void and of no effect.

The preferential dividend above referred to was attached by the company's memorandum, so that *Ashbury v. Watson*, 30 C. D. 376, applied.

And that the sd resolution shall be conditional on a scheme of arrangement between the coy and its members holding preference shares, and between the coy and its members holding ordinary shares, being adopted under sect. 120 of the Companies (Consolidation) Act, 1908, for giving effect to the provisions of the sd resolution.

Notice summoning the sd meeting of the 25th April, 1911, stated that if the sd resolution were confirmed at that meeting by the requisite majority, application would be made to the Court to call the necessary meetings under sect. 120 of the Companies (Consolidation) Act, 1908, of the Shareholders and the coy to approve and agree to the sd scheme. And it is ordered that the words "and reduced" form part of the name of the coy for one month from the date of this order, and this Court doth approve of the minute set forth in the first schedule hto, and the Court doth approve of the scheme of arrangement set forth in the second schedule hto. And it is ordered that this order be produced to the Registrar of Companies, and that an office copy of this order be delivered to him together with the sd minute. And it is ordered that notice of the registration of this order and of the sd minute be published in the following newspapers, that is to say, once in the *London Gazette*, and once each in the *Times*, *Daily Mail*, *Taunton Courier*, *The Taunton Mail*, and the *Taunton Echo* newspapers, within ten days after such registration.

The first schedule set out the minute.

The second schedule set out scheme of arrangement between the above-named coy and the holders of the preference shares and the holders of the ordinary shares of the sd coy.

1. Special resolution of the coy passed and confirmed at extraordinary general meetings of the coy held resply on the 10th day of April, and 25th day of April, 1911, providing for the reduction of the coy's capital and for the subdivision of its shares and for the cancellation of arrears of preference dividend, and for other matters,

shall be binding on the coy and on the holders of the sd preference shares and the holders of the sd ordinary shares, and shall be carried into effect accordingly **Form 810.**

2. The holders of the sd preference shares and the holders of the sd ordinary shares shall accept the provisions made by the special resolutions afd in satisfaction of their existing rights in respect of their preference shares and ordinary shares.

3. Unless the sd resolution shall be confirmed by the Court before the 31st December, 1911, this scheme shall on that date become void *Hatcher & Sons, Limtd and Reduced, Joyce, J., 28th December, 1911. Order entered 2nd January, 1912.*

In the matter,

Notice is hereby given, &c.

See Form 623, *supra*.

Form 811.

Advertise-
ment of order.

Reorganization of Capital under sect. 45 of the Companies Consolidation Act, 1908.

Sect. 45 is in the terms following, that is to say:

45. (1) A company limited by shares may by special resolution confirmed by order of the Court modify the conditions contained in its memorandum so as to reorganize its share capital, whether by consolidation of shares of different classes or by the division of its shares into shares of different classes.

Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class, and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class.

(2) Where an order is made under this section an office copy thereof shall be filed with the Registrar of Companies within seven days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed.

The above section appears only to provide for the specified cases of reorganization, that is to say, (1) reorganization by consolidation of shares of different classes, and (2) reorganization by the division of the company's shares into shares of different classes. In such cases it provides a mode of carrying out the reorganization subject to the conditions specified in the section. It is apprehended that the section does not by implication control or limit the powers of the Court under sect. 120, see *supra*, p. 1494, or any power which the company may have by its constitution apart from the section.

In *Australian Estates and Mortgage Co., Ltd.*, (1910) 1 Ch 414, it was held that unless the preferential rights attached to preference shares were so attached by the memorandum of association, sect. 45 of the Act did not apply. In that case the company passed a resolution for reducing its capital by writing off certain lost capital, and in conjunction with this another resolution was passed altering the rights of the classes, which resolution was passed pursuant to a provision in the company's articles of association, and it was held that the resolutions were valid, and that sect. 45 did not apply, and the reduction was sanctioned.

In *Stewart Precision Carburetter Co., Ltd.*, there was an application to confirm a special resolution to convert certain preference shares into ordinary shares, and to attach to the preference shares the right to participate *pari passu* with the ordinary shares in the surplus profits of each year. This resolution was passed and confirmed at separate meetings of the preference shareholders, but no meetings of the ordinary shareholders were held to consider it. Eve, J., confirmed the resolution, saying: "The question was whether there ought to have been a separate meeting of the ordinary shareholders. Undoubtedly the resolution did to a certain extent interfere with the rights of the ordinary shareholders as regarded the surplus profits, but it could not strictly speaking be said to interfere with any special privilege of the ordinary shareholders. The interference, therefore, did not come within the words of the section, and the resolution will be confirmed." *Law Journal Notes*, 30th March, 1912, p. 218.

Special Acts.

Chapter XXIII. of the 10th edition of this work dealt with Special Acts, Provisional Orders, &c. In the present edition the matter is placed as Part III., along with Debentures and Debenture Stock.

APPENDIX.

APPENDIX.

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TABLE OF CORRESPONDING SECTIONS

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15	10	83	139
16	12	85	140, 149
16	11	86	149
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17	15		142
17	244		143
19	18	89	144
20	8	90, 134	123, 13
21	19	91	145
22	22	91, 149	219
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24	29	92	149 (4), 5
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26, 27	26	94	149
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28	42	96	151, 4
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37	35	106	168
38	125	107	169
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43	100, 101	111, 112, 113	172
44	108	115, 127, 154, 155, 166	285
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11	94	40	108
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14	103	42	20
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16	105	44	109
18	102	45	70
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6	6	18	24
7	5	19	25
8	6	20	26
9	23	21	—
10	7	22	19
11	8	23	27
12	7	24	28
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LIFE ASSURANCE Act, 1872.	ASSURANCE Act of 1909.	LIFE ASSURANCE Act, 1872.	ASSURANCE Act of 1909.
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COMPANIES (CONSOLIDATION) ACT, 1908.

8 EDW. 7, c. 69.

An Act to consolidate the Companies Act, 1862, and the Acts
amending it. [21st December, 1908.]

[Came into operation 1st April, 1909. See sect. 296.]

Enacted by the King's most Excellent Majesty, by and with the advice and
consent of the Lords Spiritual and Temporal, and Commons, in this present
Parliament assembled, and by the authority of the same, as follows:

PART I.

CONSTITUTION AND INCORPORATION.

Prohibition of Large Partnerships.

1.—(1.) No company, association, or partnership consisting of more than ten
persons shall be formed for the purpose of carrying on the business of banking,
unless it is registered as a company under this Act, or is formed in pursuance of
some other Act of Parliament, or of letters patent.

(2.) No company, association, or partnership consisting of more than twenty
persons shall be formed for the purpose of carrying on any other business that has
for its object the acquisition of gain by the company, association, or partnership,
or by the individual members thereof, unless it is registered as a company under
this Act, or is formed in pursuance of some other Act of Parliament, or of letters
patent, or is a company engaged in working mines within the stannaries and
subject to the jurisdiction of the Court exercising the stannaries jurisdiction.

S. 1 of 1862.
Prohibition of
partnerships
exceeding
certain
number
p. 109

Memorandum of Association.

2. Any seven or more persons (or, where the company to be formed will be a
private company within the meaning of this Act, any two or more persons asso-
ciated for any lawful purpose may, by subscribing their names to a memorandum
of association and otherwise complying with the requirements of this Act in
respect of registration, form an incorporated company, with or without limited
liability (that is to say), either—

- i) A company having the liability of its members limited by the memorandum
to the amount, if any, unpaid on the shares respectively held by them
(in this Act termed a company limited by shares); or
- ii) A company having the liability of its members limited by the memorandum
to such amount as the members may respectively thereby undertake
to contribute to the assets of the company in the event of its being
wound up (in this Act termed a company limited by guarantee); or
- iii) A company not having any limit on the liability of its members (in this
Act termed an unlimited company).

Ss. 6 et seq.
of 1862
Mode of
forming
incorporated
company
pp. 447. 795

S. 8 of 1862.
Memorandum
of company
limited by
shares.
pp. 454, 455

3. In the case of a company limited by shares—

1.) The memorandum must state—

- (i) The name of the company, with "Limited" as the last word in its name;
- (ii) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate;
- (iii) The objects of the company;
- (iv) That the liability of the members is limited;
- (v) The amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount;

2.) No subscriber of the memorandum may take less than one share;

(3.) Each subscriber must write opposite to his name the number of shares he takes.

4. In the case of a company limited by guarantee—

1.) The memorandum must state—

- (i) The name of the company, with "Limited" as the last word in its name;
- (ii) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate;
- (iii) The objects of the company;
- (iv) That the liability of the members is limited;
- (v) That each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges, and expenses of winding up, and for adjustment of the rights of the contributors among themselves, such amount as may be required, not exceeding a specified amount.

2.) If the company has a share capital—

- (i) The memorandum must also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount;
- (ii) No subscriber of the memorandum may take less than one share;
- (iii) Each subscriber must write opposite to his name the number of shares he takes.

S. 9 of 1862.
Memorandum
of company
limited by
guarantee.
p. 448, 492
et seq., 795
et seq.

S. 10 of 1862.
Memorandum
of unlimited
company.
p. 448

5. In the case of an unlimited company

1.) The memorandum must state—

- (i) The name of the company;
- (ii) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate;
- (iii) The objects of the company.

2.) If the company has a share capital—

- (i) No subscriber of the memorandum may take less than one share;
- (ii) Each subscriber must write opposite to his name the number of shares he takes.

S. 11 of 1862.
Stamp and
signature of
memorandum.

S. 12 of 1862.
Restriction on
alteration of
memorandum.
p. 460

Ss. 13, 20 of
1862

Name of
company and
change of
name.

6. The memorandum must bear the same stamp as if it were a deed, and must be signed by each subscriber in the presence of at least one witness who must attest the signature, and that attestation shall be sufficient in Scotland as well as in England and Ireland.

7. A company may not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act.

8.—(1.) A company may not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires.

(2.) If a company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling it as to be calculated to deceive, the first-mentioned company may, with the sanction of the registrar, change its name.

(3.) Any company may, by special resolution and with the approval of the Board of Trade signified in writing, change its name.

(4.) Where a company changes its name, the registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case.

(5.) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

9.—(1.) Subject to the provisions of this section a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it—

- (a) to carry on its business more economically or more efficiently; or
- (b) to attain its main purpose by new or improved means; or
- (c) to enlarge or change the local area of its operations; or
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or
- (e) to restrict or abandon any of the objects specified in the memorandum.

2.) The alteration shall not take effect until and except in so far as it is confirmed on petition by the Court.

(3.) Before confirming the alteration the Court must be satisfied

- (a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and
- (b) that, with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has been determined, or has been secured to the satisfaction of the Court:

Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

(4.) The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.

(5.) The Court shall, in exercising its discretion under this section, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement: Provided that no part of the capital of the company may be expended in any such purchase.

(6.) An office copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within fifteen days from the date of the order, be delivered by the company to the Registrar of Companies, and he shall register the same, and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company.

The Court may by order at any time extend the time for the delivery of documents to the registrar under this section for such period as the Court may think proper.

(7.) If a company makes default in delivering to the Registrar of Companies any document required by this section to be delivered to him, the company shall be liable to a fine not exceeding ten pounds for every day during which it is in default.

Ss. 1, 2 of 1890.

Alteration of objects of company.
p. 1309

Articles of Association.

10.—(1.) There may, in the case of a company limited by shares, and there shall in the case of a company limited by guarantee or unlimited, be registered with the memorandum articles of association signed by the subscribers to the memorandum and prescribing regulations for the company.

S. 14 of 1862
Registration of articles.
pp. 629, 795

(2.) Articles of association may adopt all or any of the regulations contained in Table A. in the First Schedule to this Act.

(3.) In the case of an unlimited company or a company limited by guarantee the articles, if the company has a share capital, must state the amount of share capital with which the company proposes to be registered.

(4.) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles must state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration.

S. 15 of 1862.

Application
of Table A.

p. 629

11. In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A. in the First Schedule to this Act, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

12. Articles must—

Ss. 14, 16 of
1862.

Form, stamp,
and signature
of articles.

p. 629

- (a) be printed;
- (b) be divided into paragraphs numbered consecutively;
- (c) bear the same stamp as if they were contained in a deed; and
- (d) be signed by each subscriber of the memorandum of association in the presence of at least one witness, who must attest the signature, and that attestation shall be sufficient in Scotland as well as in England and Ireland.

Ss. 50, 176 of
1862.

Alteration of
articles by
special
resolution.

p. 630

13.—(1.) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles; and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution.

(2.) The power of altering articles under this section shall, in the case of an unlimited company formed and registered under the Joint Stock Companies Acts, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum.

General Provisions.

S. 11 of 1862.

Effect of
memorandum
and articles.

pp. 449, 632

14.—(1.) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

(2.) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company, and in England and Ireland be of the nature of a specialty debt.

S. 17 of 1862.

Registration of
memorandum
and articles.

pp. 449, 629

Effect of
registration.

p. 449

15. The memorandum and the articles (if any) shall be delivered to the Registrar of Companies for that part of the United Kingdom in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them.

16.—(1.) On the registration of the memorandum of a company the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited.

(2.) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up, as is mentioned in this Act.

Ss. 18 of 1862
and s. 1 of 1890.
Conclusiveness
of certificate of
incorporation.
pp. 25, 463

17.—(1.) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under this Act.

(2.) A statutory declaration by a solicitor of the High Court, and in Scotland by an enrolled law agent, engaged in the formation of the company, or by a person named in the articles as a director or secretary of the company, of compliance with all or any of the said requirements shall be produced to the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance.

18.—(1.) Every company shall send to every member, at his request, and on payment of one shilling or such less sum as the company may prescribe, a copy of the memorandum and of the articles (if any).

(2.) If a company makes default in complying with the requirements of this section, it shall be liable for each offence to a fine not exceeding one pound.

S. 19 of 1862.
Copies of memorandum and articles to be given to members.

Associations not for Profit.

19. A company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by its individual members, shall not, without the licence of the Board of Trade, hold more than two acres of land: but the Board may by licence empower any such company to hold lands in such quantity, and subject to such conditions, as the Board think fit.

S. 21 of 1862.
Restriction on charitable and other companies holding land.

20.—(1.) Where it is proved to the satisfaction of the Board of Trade that an association about to be formed as a limited company is to be formed for promoting commerce, art, science, religion, charity, or any other useful object, and intends to apply its profits (if any) or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Board may by licence direct that the association be registered as a company with limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly.

P. 501
S. 23 of 1867.
Power to dispense with "Limited" in name of charitable and other companies.

(2.) A licence by the Board of Trade under this section may be granted on such conditions and subject to such regulations as the Board think fit, and those conditions and regulations shall be binding on the association, and shall, if the Board so direct, be inserted in the memorandum and articles, or in one of those documents.

(3.) The association shall on registration enjoy all the privileges of limited companies, and be subject to all their obligations, except those of using the word "Limited" as any part of its name, and of publishing its name, and of sending lists of members and directors and managers to the Registrar of Companies.

P. 499

(4.) A licence under this section may at any time be revoked by the Board of Trade, and upon revocation the registrar shall enter the word "Limited" at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by this section:

Provided that before a licence is so revoked the Board shall give to the association notice in writing of their intention, and shall afford the association an opportunity of being heard in opposition to the revocation.

Companies limited by Guarantee.

21.—(1.) In the case of a company limited by guarantee and not having a share capital, and registered on or after the first day of January, nineteen hundred and one, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

S. 27 of 1900.
Provision as to companies limited by guarantee.
P. 785

(2.) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered on or after the first day of January, nineteen hundred and one, purporting to divide the undertaking of the company into shares or interests shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

PART II.

DISTRIBUTION AND REDUCTION OF SHARE CAPITAL, REGISTRATION OF UNLIMITED COMPANY AS LIMITED, AND UNLIMITED LIABILITY OF DIRECTORS.

Distribution of Share Capital.

S. 22 of 1862.

Nature of shares.

p. 665

S. 23 of 1862.

Certificate of shares or stock.

p. 1139

S. 24 of 1862.

Definition of member.

pp. 45, 483

S. 25 of 1862.

Register of members.

p. 70

22.—(1.) The shares or other interest of any member in a company shall be personal estate, transferable in manner provided by the articles of the company, and shall not be of the nature of real estate.

(2.) Each share in a company having a share capital shall be distinguished by its appropriate number.

23. A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be *prima facie* evidence of the title of the member to the shares or stock.

24.—(1.) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2.) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.

25.—(1.) Every company shall keep in one or more books a register of its members, and enter therein the following particulars:—

(i) The names and addresses, and the occupations, if any, of the members, and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member;

(ii) The date at which each person was entered in the register as a member;

(iii) The date at which any person ceased to be a member.

(2.) If a company fails to comply with this section it shall be liable to a fine not exceeding five pounds for every day during which the default continues; and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

S. 26 of 1862.

Annual list of members and summary.

p. 762

26.—(1.) Every company having a share capital shall once at least in every year make a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

(2.) The list must state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and have ceased to be members respectively and the dates of registration of the transfers, and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

a) The amount of the share capital of the company, and the number of the shares into which it is divided;

b) The number of shares taken from the commencement of the company up to the date of the return;

(c) The amount called up on each share;

d) The total amount of calls received;

e) The total amount of calls unpaid;

(f) The total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount in respect of any debentures, since the date of the last return;

(g) The total number of shares forfeited;

h) The total amount of shares or stock for which share warrants are outstanding at the date of the return;

(i) The total amount of share warrants issued and surrendered respectively since the date of the last return;

- (k) The number of shares or amount of stock comprised in each share warrant ;
- (l) The names and addresses of the persons who at the date of the return are the directors of the company, or occupy the position of directors, by whatever name called ; and
- (m) The total amount of debt due from the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar of companies under this Act, or which would have been required so to be registered if created after the first day of July nineteen hundred and eight.
- (3.) The summary must also (except where the company is a private company include a statement, made up to such date as may be specified in the statement, in the form of a balance sheet, audited by the company's auditors, and containing a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets have been arrived at,* but the balance sheet need not include a statement of profit and loss.
- (4.) The above list and summary must be contained in a separate part of the register of members, and must be completed within seven days after the fourteenth day aforesaid, and the company must forthwith forward to the registrar of companies a copy signed by the manager or by the secretary of the company.
- (5.) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding five pounds for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

27. No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies registered in England or Ireland.

28. On the application of the transferor of any share or interest in a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.

29. A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer.

30.—(1.) The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company, and, except when closed under the provisions of this Act, shall during business hours (subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member gratis, and to the inspection of any other person on payment of one shilling, or such less sum as the company may prescribe, for each inspection.

(2.) Any member or other person may require a copy of the register, or of any part thereof, or of the list and summary required by this Act, or any part thereof, on payment of sixpence, or such less sum as the company may prescribe, for every hundred words or fractional part thereof required to be copied.

(3.) If any inspection or copy required under this section is refused, the company shall be liable for each refusal to a fine not exceeding two pounds, and to a further fine not exceeding two pounds for every day during which the refusal continues, and every director and manager of the company who knowingly authorizes or permits the refusal shall be liable to the like penalty ; and, as respects companies registered in England or Ireland, any judge of the High Court, or the judge of the Court exercising the stannaries jurisdiction in the case of companies subject to that jurisdiction, may by order compel an immediate inspection of the register.

31. A company may, on giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not exceeding in the whole thirty days in each year.

32.—(1.) If—

- (a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company ; or

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Reo Gallowsay v. Schell, Scotch & Co., W. N. (1912, 131)

S. 30 of 1902
Trusts not to be entered on register.

p. 650

S. 26 of 1907.
Registration of transfer at request of transferor.

S. 24 of 1902.
Transfer by personal representative.

p. 678

S. 32 of 1902.
Inspection of register of members.

p. 70

S. 33 of 1902.

Power to close register.

p. 71

S. 35 of 1902.
Power of Court to rectify register.

p. 1392

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2.) The application may be made, as respects companies registered in England or Ireland, by motion in the High Court, or by application to a judge of the High Court sitting in chambers, or by application to the judge of the Court exercising the stannaries jurisdiction in the case of companies subject to that jurisdiction, and, as respects companies registered in Scotland, by summary petition to the Court of Session, or in such other manner as the said Courts may respectively direct; and the Court may either refuse the application, or may order rectification of the register, and payment by the company of any damages sustained by any party aggrieved.

(3.) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register.

(4.) In the case of a company required by this Act to send a list of its members to the registrar of companies, the Court, when making an order for rectification of the register, shall by its order direct notice of the rectification to be given to the registrar.

S. 37 of 1862.
Register to be
evidence.

p. 71

S. 2 of 1883.

Power for
company to
keep colonial
register.

p. 757

S. 3 of 1883.

Regulations
as to colonial
register.

p. 757

S. 3 of 1883.
Stamp duties
in case of
shares regis-
tered in

33. The register of members shall be *prima facie* evidence of any matters by this Act directed or authorized to be inserted therein.

34.—(1.) A company having a share capital, whose objects comprise the trans- action of business in a colony, may, if so authorized by its articles, cause to be kept in any colony in which it transacts business a branch register of members resident in that colony (in this Act called a colonial register).

(2.) The company shall give to the registrar of companies notice of the situation of the office where any colonial register is kept, and of any change in its situation, and of the discontinuance of the office in the event of its being discontinued.

(3.) For the purpose of the provisions of this Act relating to colonial registers the term "colony" includes British India and the Commonwealth of Australia.

35.—(1.) A colonial register shall be deemed to be part of the company's register of members (in this and the next following section called the principal register).

(2.) It shall be kept in the same manner in which the principal register is by this Act required to be kept, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the district wherein the colonial register is kept, and that any competent Court in the colony may exercise the same jurisdiction of rectifying the register as is under this Act exercisable by the High Court, and that the offences of refusing inspection or copies of a colonial register, and of authorizing or permitting the refusal may be prosecuted summarily before any tribunal in the colony having summary criminal jurisdiction.

(3.) The company shall transmit to its registered office a copy of every entry in its colonial register as soon as may be after the entry is made; and shall cause to be kept at its registered office, duly entered up from time to time, a duplicate of its colonial register, and the duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register.

(4.) Subject to the provisions of this section with respect to the duplicate register, the shares registered in a colonial register shall be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a colonial register shall, during the continuance of that registration, be registered in any other register.

(5.) The company may discontinue to keep any colonial register, and thereupon all entries in that register shall be transferred to some other colonial register kept by the company in the same colony, or to the principal register.

(6.) Subject to the provisions of this Act, any company may, by its articles, make such provisions as it may think fit respecting the keeping of colonial registers.

36. In relation to stamp duties the following provisions shall have effect:—

(a) An instrument of transfer of a share registered in a colonial register shall be deemed to be a transfer of property situate out of the United Kingdom, and, unless executed in any part of the United Kingdom, shall be exempt from British stamp duty:

- (b) On the death of a member registered in a colonial register, the shares of the deceased member shall, if he died domiciled in the United Kingdom, but not otherwise, be deemed, so far as relates to British duties, to be part of his estate and effects situate in the United Kingdom for or in respect of which probate or letters of administration is or are to be granted, or whereof an inventory is to be exhibited and recorded, in like manner as if he were registered in the principal register.

37.—(1.) A company limited by shares, if so authorized by its articles, may, with respect to any fully paid-up shares, or to stock, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide by coupons or otherwise, for the payment of the future dividends on the shares or stock included in the warrant, in this Act termed a share warrant.

(2.) A share warrant shall entitle the bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant.

(3.) The bearer of a share warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members; and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a share warrant in respect of the shares or stock therein specified without the warrant being surrendered and cancelled.

(4.) The bearer of a share warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either to the full extent or for any purposes defined in the articles: except that he shall not be qualified in respect of shares or stock specified in the warrant for being a director or manager of the company in cases where such a qualification is required by the articles.

(5.) On the issue of a share warrant the company shall strike out of its register of members the name of the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member, and shall enter in the register the following particulars, namely:—

- (i) The fact of the issue of the warrant;
- (ii) A statement of the shares or stock included in the warrant, distinguishing each share by its number; and
- (iii) The date of the issue of the warrant.

(6.) Until the warrant is surrendered, the above particulars shall be deemed to be the particulars required by this Act to be entered in the register of members; and, on the surrender, the date of the surrender must be entered as if it were the date at which a person ceased to be a member.

38.—(1.) If any person—

- (i) with intent to defraud, forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any share warrant or coupon, or any document purporting to be a share warrant or coupon, issued in pursuance of this Act; or by means of any such forged or altered share warrant, coupon, or document, purporting as aforesaid, demands or endeavours to obtain or receive any share or interest in any company under this Act, or to receive any dividend or money payable in respect thereof, knowing the warrant, coupon, or document to be forged or altered; or
- (ii) falsely and deceitfully personates any owner of any share or interest in any company, or of any share warrant or coupon, issued in pursuance of this Act, and thereby obtains or endeavours to obtain any such share or interest or share warrant or coupon, or receives or endeavours to receive any money due to any such owner, as if the offender were the true and lawful owner,

he shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years.

(2.) If any person without lawful authority or excuse, proof whereof shall lie on him, engraves or makes on any plate, wood, stone, or other material any share warrant or coupon purporting to be a share warrant or coupon issued or made by any particular company in pursuance of this Act, or to be a blank share warrant or coupon so issued or made, or to be a part of such a share warrant or coupon, or uses any such plate, wood, stone, or other material for the making or printing of any such share warrant or coupon, or of any such blank share warrant or coupon, or

colonial registers.

S. 27 of 1867.
Issue and effect of share warrants to bearer.

P. 690

S. 34 of 18
Forgery, personation, unlawfully engraving plates, &c.

any part thereof, or knowingly has in his custody or possession any such plate, or any other material, he shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years.

39. A company, if so authorized by its articles, may do any one or more of the following things; namely:

- (1.) Make arrangements for the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares;
- (2.) Accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any shares held by him, although no part of that amount has been called up;
- (3.) Pay dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others.

40.—(1.) When a company has accumulated a sum of undivided profits, which with the sanction of the shareholders may be distributed among the shareholders in the form of a dividend or bonus, it may, by special resolution, return the same, or any part thereof, to the shareholders in reduction of the paid-up capital of the company, the unpaid capital being thereby increased by a similar amount.

(2.) The resolution shall not take effect until a memorandum, showing the particulars required by this Act in the case of a reduction of share capital, has been produced to and registered by the registrar of companies, but the other provisions of this Act with respect to reduction of share capital shall not apply to a reduction of paid-up share capital under this section.

(3.) On a reduction of paid-up capital in pursuance of this section any shareholder, or any one or more of several joint shareholders, may within one month after the passing of the resolution for the reduction, require the company to retain and the company shall retain accordingly, the whole of the money actually paid on the shares held by him either alone or jointly with any other person, which consequence of the reduction, would otherwise be returned to him or them; thereupon those shares shall, as regards the payment of dividend, be deemed to be paid up to the same extent only as the shares on which payment has been accepted by the shareholders in reduction of paid-up capital, and the company shall invest and keep invested the money so retained in such securities authorized for investment by trustees as the company may determine, and on the money so invested or on so much thereof as from time to time exceeds the amount of calls subsequently made on the shares in respect of which it has been retained, the company shall pay the interest received from time to time on the securities.

(4.) The amount retained and invested shall be held to represent the future calls which may be made to replace the share capital so reduced on those shares, whether the amount obtained on sale of the whole or such proportion thereof as represents the amount of any call when made produces more or less than the amount of the call.

(5.) On a reduction of paid-up share capital in pursuance of this section, the powers vested in the directors of making calls on shareholders in respect of amount unpaid on their shares shall extend to the amount of the unpaid capital as augmented by the reduction.

6. After any reduction of share capital under this section the company shall specify in the annual list of members required by this Act the amount of the unpaid capital as augmented by the reduction, and shall specify in the statements of accounts laid before any general meeting the amount of undivided profits returned in reduction of share capital under this section.

41.—(1.) A company limited by shares, if so authorized by its articles, may, if the conditions of its memorandum as follows that it may, it may:

- (a) increase its share capital by the issue of new shares of such amount as it thinks expedient;
- (b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;
- (c) convert all or any of its paid-up shares into shares of any denomination, or convert its stock into paid-up shares of any denomination;
- (d) sub-divide its shares, or any part of them, into shares of a smaller amount than is fixed by the memorandum, or, if the shares are not so fixed, into shares of a smaller amount than the sub-division thereof, if any, unpaid on each reduced share shall be the same proportion of the whole of the share from which the reduced share is derived.

S. 24 of 1867.
Power of company to arrange for different amounts being paid on shares.
pp. 649, 657
THE

S. 3 of 1880.
Power to return accumulated profits in reduction of paid-up share capital.
p. 1124

S. 12 of 1862,
S. 21 of 1867.
Power of company limited by shares to alter its share capital.
pp. 1104, 1114,
1115, 1122

(c) cancel shares which, at the date of the passing of the resolution on behalf, have not been taken or agreed to be taken by any person, and limit the amount of the share capital by the amount of the shares so cancelled.

2. The powers conferred by this section, with respect to sub-division of shares, must be exercised by special resolution.

3. Where any alteration has been made under this section in the memorandum of a company, every copy of the memorandum issued after the date of the alteration shall be in accordance with the alteration.

If a company makes default in complying with this provision it shall be liable to a fine not exceeding one pound for each copy in respect of which default is made, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

4. A cancellation of shares in pursuance of this section shall not be deemed a reduction of share capital within the meaning of this Act.

42. Where a company having a share capital has consolidated and divided its share capital into shares of larger amount than its existing share capital, or converted any of its shares into stock, or reconverted stock into shares, it shall give notice to the registrar of companies of the consolidation, division, conversion, or reconversion, specifying the shares consolidated, divided, or converted.

43. Where a company having a share capital has converted any of its shares into stock, and given notice of the conversion to the registrar of companies, the provisions of this Act which are applicable to shares only shall apply to so much of the share capital as is converted into stock; and the registrar shall show the amount of stock held by each member instead of shares, and the particulars relating to shares hereinbefore required by this Act.

44. (1) Where a company having a share capital, which has not been converted into stock, has increased its share capital beyond the registered capital, and where a company not having a share capital has increased the number of its members beyond the registered number, the registrar of companies, in the case of an increase of share capital, within fifteen days after the passing, or in the case of a special resolution, the confirmation of the resolution, and in the case of an increase of the number of members within fifteen days after the increase was resolved on or took effect, shall give notice of the increase to the registrar, and the registrar shall record the increase.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding five pounds for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

45. (1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the reclassification of shares of different classes or by the division of its shares into shares of different classes:

Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class.

(2) Where an order is made under this section an office copy thereof shall be filed with the registrar of companies within seven days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed.

Reduction of share capital

46. (1) Subject to confirmation by the Court, a company limited by shares, if so authorized by its articles, may by special resolution reduce its share capital in any way, and in particular without prejudice to the generality of the foregoing power may—

(a) Extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

Notice to registrar of consolidation of share capital, conversion of shares into stock, &c.

Effect of conversion of shares into stock.

Notice of increase of share capital or of members.

Reorganisation of share capital.

Special resolution for reduction of share capital.

(b) Either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(c) Either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2.) A special resolution under this section is in this Act called a resolution for reducing share capital.

S. 11 of 1867.

Application to Court for confirming order.

pp. 1255, 1275

S. 10 of 1862.

Addition to name of company of "and reduced."

pp. 1266, 1287

47. Where a company has passed and confirmed a resolution for reducing share capital it may apply by petition to the Court for an order confirming the reduction.

48. On and from the confirmation by a company of a resolution for reducing share capital, or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, then on and from the presentation of the petition for confirming the reduction, the company shall add to its name, until such date as the Court may fix, the words "and reduced," as the last words in its name, and those words shall, until that date, be deemed to be part of the name of the company:

Provided that, where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if it thinks expedient, dispense altogether with the addition of the words "and reduced."

S. 13 of 1867.

Objections by creditors, and settlement of list of objecting creditors.

pp. 1290, 1292

49.—(1.) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

(2.) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

(3.) Where a creditor entered on the list whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount: (that is to say, —

(i) If the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim;

(ii) If the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

S. 11 of 1867.

Order confirming reduction.

pp. 1291, 1297

S. 9 of 1867.

Registration of order and minute of reduction.

50. The Court, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has been determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

51.—(1.) The registrar of companies on production to him of an order of the Court confirming the reduction of the share capital of a company, and the delivery to him of a copy of the order and of a minute (approved by the Court, showing with respect to the share capital of the company, as altered by the order, the amount of the share capital, the number of shares into which it is to be divided, and the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share, shall register the order and minute.

(2.) On the registration, and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect.

(3.) Notice of the registration shall be published in such manner as the Court may direct.

(4.) The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

52.—(1.) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein; and must be embodied in every copy of the memorandum issued after its registration. S. 16 of 1867. Minute to form part of memorandum.

(2.) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding one pound for each copy in respect of which default is made, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

53. A member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid, or (as the case may be) the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute: S. 16 of 1867. Liability of members in respect of reduced shares.

Provided that if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Act with respect to winding up by the Court, to pay the amount of his debt or claim, then—

- i) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration; and
- (ii) if the company is wound up, the Court, on the application of any such creditor, and proof of his ignorance as aforesaid may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up.

Nothing in this section shall affect the rights of the contributories among themselves.

54. If any director, manager, or officer of the company wilfully conceals the name of any creditor entitled to object to the reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor, or if any director or manager of the company aids or abets in or is privy to any such concealment or misrepresentation as aforesaid, every such director, manager, or officer shall be guilty of a misdemeanour. S. 19 of 1867. Penalty on concealment of name of creditor.

55. In any case of reduction of share capital, the Court may require the company to publish as the Court directs the reasons for reduction, or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction. S. 4 of 1877. Publication of reasons for reduction.

56. A company limited by guarantee and registered on or after the first day of January nineteen hundred and one, may, if it has a share capital, and is so authorized by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act. S. 27 of 1900. Increase and reduction of share capital in case of a company limited by guarantee having a share capital.

Registration of Unlimited Company as Limited.

57.—(1.) Subject to the provisions of this section, any company registered as unlimited may register under this Act as limited, or any company already registered as a limited company, may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations, or contracts incurred or entered into by, to, with, or on behalf of the company before the registration, and those debts, liabilities, obligations, and contracts may be enforced in manner provided by Part VII. of this Act in the case of a company registered in pursuance of that Part. S. 4 of 1879. Registration of unlimited company as limited. pp. 525. 637

(2.) On registration in pursuance of this section the registrar shall close the former registration of the company, and may dispense with the delivery to him of

copies of any documents with copies of which he was furnished on the occasion of the original registration of the company, but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act, and as if the provisions of the Acts under which the company was previously registered and regulated had been contained in different Acts of Parliament from those under which the company is registered as a limited company.

S. 5 of 1879.

Power of unlimited company to provide for reserve share capital on re-registration.

58. An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely:—

- (a) Increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purposes of the company being wound up;
- (b) Provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up.

Reserve Liability of Limited Company.

S. 5 of 1879.

Reserve liability of limited company.

pp. 589, 1127

59. A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid.

Unlimited Liability of Directors.

Sec. 4, 7 of 1867.

Limited company may have directors with unlimited liability.

60.—(1.) In a limited company the liability of the directors or managers, or of the managing director, may, if so provided by the memorandum, be unlimited.

(2.) In a limited company in which the liability of a director or manager is unlimited, the directors or managers of the company (if any), and the member who proposes a person for election or appointment to the office of director or manager, shall add to that proposal a statement that the liability of the person holding that office will be unlimited, and the promoters, directors, managers, and secretary (if any) of the company, or one of them, shall, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

(3.) If any director, manager, or proposer makes default in adding such a statement, or if any promoter, director, manager, or secretary makes default in giving such a notice, he shall be liable to a fine not exceeding one hundred pounds, and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the default.

S. 8 of 1867.

Special resolution of limited company making liability of directors unlimited.

61.—(1.) A limited company, if so authorized by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors, or managers, or of any managing director.

(2.) Upon the confirmation of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the memorandum; and a copy thereof shall be embodied in or annexed to every copy of the memorandum issued after the confirmation of the resolution.

(3.) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding one pound for each copy in respect of which default is made; and every director or manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

PART III.

MANAGEMENT AND ADMINISTRATION.

Office and Name.

S. 39 of 1862
Registered

62.—(1.) Every company shall have a registered office, to which all communications and notices may be addressed.

(2.) Notice of the situation of the registered office, and of any change therein, shall be given to the registrar of companies, who shall record the same. office of company. p. 65

(3.) If a company carries on business without complying with the requirements of this section it shall be liable to a fine not exceeding five pounds for every day during which it so carries on business.

63.—(1.) Every limited company—

(a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible;

(b) shall have its name engraved in legible characters on its seal;

(c) shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

S. 41 of 1862.

Publication of name by a limited company.

(2.) If a limited company does not paint or affix, and keep painted or affixed its name in manner directed by this Act, it shall be liable to a fine not exceeding five pounds for not so painting or affixing its name, and for every day during which its name is not so kept painted or affixed, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

(3.) If any director, manager, or officer of a limited company, or any person on its behalf, uses or authorizes the use of any seal purporting to be a seal of the company whereon its name is not so engraved as aforesaid, or issues or authorizes the issue of any notice, advertisement, or other official publication of the company, or signs or authorizes to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque, order for money or goods, or issues or authorizes to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company.

Meetings and Proceedings.

64.—1. A general meeting of every company shall be held once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting, and, if not so held, the company and every director, manager, secretary, and other officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding fifty pounds. S. 24 of 1907. Annual general meeting. p. 688

(2.) When default has been made in holding a meeting of the company in accordance with the provisions of this section, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.

65.—(1.) Every company limited by shares and registered on or after the first day of January nineteen hundred and one shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company which shall be called the statutory meeting. S. 12 of 1900. First statutory meeting of company. p. 690

(2.) The directors shall, at least seven days before the day on which the meeting is held, forward a report (in this Act called "the statutory report") to every member of the company and to every other person entitled under this Act to receive it.

(3.) The statutory report shall be certified by not less than two directors of the company, or, where there are less than two directors, by the sole director and manager, and shall state—

(a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted;

(b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid;

(c) an abstract of the receipts of the company on account of its capital, whether from shares or debentures, and of the payments made thereout, up to a

date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company:

- d) the names, addresses, and descriptions of the directors, auditors (if any), managers (if any), and secretary of the company; and
- (e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval together with the particulars of the modification or proposed modification.

(4.) The statutory report shall, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares, and to the receipts and payments of the company on capital account, be certified as correct by the auditors, if any, of the company.

(5.) The directors shall cause a copy of the statutory report, certified as by this section required, to be filed with the registrar of companies forthwith after the sending thereof to the members of the company.

(6.) The directors shall cause a list showing the names, descriptions, and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7.) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8.) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(9.) If a petition is presented to the Court in manner provided by Part IV. of this Act for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

(10.) The provisions of this section as to the forwarding and filing of the statutory report shall not apply in the case of a private company.

S. 13 of 1900.
Convening of
extraordinary
general
meeting on
requisition.
p. 690

66.—(1.) Notwithstanding anything in the articles of a company, the directors of a company shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company.

(2.) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3.) If the directors do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists, or a majority of them in value, may themselves convene the meeting, but any meeting so convened shall not be held after three months from the date of the deposit.

(4.) If at any such meeting a resolution requiring confirmation at another meeting is passed, the directors shall forthwith convene a further extraordinary general meeting for the purpose of considering the resolution and, if thought fit, of confirming it as a special resolution; and, if the directors do not convene the meeting within seven days from the date of the passing of the first resolution, the requisitionists, or a majority of them in value, may themselves convene the meeting.

(5.) Any meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors.

S. 52 of 1862.
Provisions as
to meetings
and votes.
p. 1098

67. In default of, and subject to, any regulations in the articles—

- (i) A meeting of a company may be called by seven days' notice in writing, served on every member in manner in which notices are required to be served by Table A. in the First Schedule to this Act;
- (ii) Five members may call a meeting:

(iii) Any person elected by the members present at a meeting may be chairman thereof:

(iv) Every member shall have one vote.

66. A company which is a member of another company may, by resolution of the directors, authorize any of its officials or any other person to act as its representative at any meeting of that other company, and the person so authorized shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company.

69.—(1.) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2.) A resolution shall be a special resolution when it has been—

(a) passed in manner required for the passing of an extraordinary resolution; and

(b) confirmed by a majority of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a subsequent general meeting, of which notice has been duly given, and held after an interval of not less than fourteen days, nor more than one month, from the date of the first meeting.

(3.) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed, a declaration of the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4.) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed a poll may be demanded, if demanded by three persons for the time being entitled according to the articles to vote, unless the articles of the company require a demand by such number of such persons, not in any case exceeding five, as may be specified in the articles.

(5.) When a poll is demanded in accordance with this section, in computing the majority on the poll reference shall be had to the number of votes to which each member is entitled by the articles of the company.

(6.) For the purposes of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles.

70.—(1.) A copy of every special and extraordinary resolution shall within fifteen days from the confirmation of the special resolution, or from the passing of the extraordinary resolution, as the case may be, be printed and forwarded to the registrar of companies, who shall record the same.

(2.) Where articles have been registered, a copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the confirmation of the resolution.

(3.) Where articles have not been registered, a copy of every special resolution shall be forwarded in print to any member at his request, on payment of one shilling or such less sum as the company may direct.

(4.) If a company makes default in printing or forwarding a copy of a special or extraordinary resolution to the registrar it shall be liable to a fine not exceeding two pounds for every day during which the default continues.

(5.) If a company makes default in embodying in or annexing to a copy of its articles or in forwarding in print to a member when required by this section a copy of a special resolution, it shall be liable to a fine not exceeding one pound for each copy in respect of which default is made.

(6.) Every director and manager of a company who knowingly and wilfully authorizes or permits any default by the company in complying with the requirements of this section shall be liable to the like penalty as is imposed by this section on the company for that default.

71.—(1.) Every company shall cause minutes of all proceedings of general meetings and (where there are directors or managers) of its directors or managers to be entered in books kept for that purpose.

(2.) Any such minute if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

S. 24 of 1867.
Representation of companies at meetings of other companies of which they are members
Ss. 51, 129 of 1862.

Definitions of extraordinary and special resolution.

p. 1092

S. 53 of 1862.
Registration and copies of special resolutions.
pp. 613, 614

S. 67 of 1862.
Minutes of proceedings of meetings and directors.
p. 745

(3.) Until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly held and convened, and all proceedings had thereat to have been duly had, and all appointments of directors, managers, or liquidators, shall be deemed to be valid.

Appointment, Qualification, &c. of Directors.

S. 2 of 1900.
Restrictions
on appoint-
ment or
advertisement
of director.

p. 6

72.—(1.) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company, or in any statement in lieu of prospectus filed by or on behalf of a company, unless, before the registration of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorized in writing—

- (i) Signed and filed with the registrar of companies a consent in writing to act as such director; and
- (ii) Either signed the memorandum for a number of shares not less than his qualification (if any), or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any).

(2.) On the application for registration of the memorandum and articles of a company the applicant shall deliver to the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding fifty pounds.

(3.) This section shall not apply to a private company nor to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business.

S. 3 of 1900.
Qualification
of director.
p. 718 et seq.

73.—(1.) Without prejudice to the restrictions imposed by the last foregoing section, it shall be the duty of every director who is by the regulations of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the regulations of the company.

(2.) The office of director of a company shall be vacated, if the director does not within two months from the date of his appointment, or within such shorter time as may be fixed by the regulations of the company, obtain his qualification, or if after the expiration of such period or shorter time he ceases at any time to hold his qualification; and a person vacating office under this section shall be incapable of being re-appointed director of the company until he has obtained his qualification.

(3.) If after the expiration of the said period or shorter time any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding five pounds for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director.

S. 67 of 1862.
Validity of acts
of directors.

p. 743

S. 45 of 1862.
List of
directors to
be sent to
registrar.
p. 607

74. The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

75.—(1.) Every company shall keep at its registered office a register containing the names and addresses and the occupations of its directors or managers, and send to the Registrar of Companies a copy thereof, and from time to time notify to the registrar any change among its directors or managers.

(2.) If default is made in compliance with this section, the company shall be liable to a fine not exceeding five pounds for every day during which the default continues; and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

Contracts, &c.

S. 37 of 1867.
Form of
contracts.
p. 333 et seq.

76.—(1.) Contracts on behalf of a company may be made as follows (that is to say):—

- (i) Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under

the common seal of the company, and may in the same manner be varied or discharged:

- (ii) Any contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged:

- (iii) Any contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(2.) All contracts made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto, their heirs, executors, or administrators as the case may be.

(3.) Any deed to which a company is a party shall be held to be validly executed in Scotland on behalf of the company if it is executed in terms of the provisions of this Act or is sealed with the common seal of the company and subscribed on behalf of the company by two of the directors and the secretary of the company, and such subscription on behalf of the company shall be equally binding whether attested by witnesses or not.

77. A bill of exchange or promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority.

78. A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in the United Kingdom; and every deed signed by such attorney, on behalf of the company, and under his seal, shall bind the company, and have the same effect as if it were under its common seal.

79.—(1.) A company whose objects require or comprise the transaction of business in foreign countries may, if authorized by its articles, have for use in any territory, district, or place not situate in the United Kingdom, an official seal, which shall be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district, or place where it is to be used.

(2.) A company having such an official seal may, by writing under its common seal, authorize any person appointed for the purpose in any territory, district, or place not situate in the United Kingdom, to affix the same to any deed or other document to which the company is party in that territory, district, or place.

(3.) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period, if any, mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4.) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5.) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

Prospectus

80.—(1.) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(2.) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorized in writing, shall be filed for registration with the registrar of companies on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3.) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4.) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

S. 47 of 1862.
Bill of exchange
and promissory
notes.

S. 55 of 1862.
Execution of
deeds abroad
p. 757

Act of 1862.
Power for
company to
have official
seal for use
abroad.
p. 757

S. 9 of 1900
s. 3 of 1907.
Filing of
prospectus
p. 179

S. 10 of 1900,
s. 2 of 1907.
Specific
requirements
as to partic-
ulars of
prospectus.
p. 167

(5.) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding five pounds for every day from the date of the issue of the prospectus until a copy thereof is so filed.

81.—(1.) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state—

- (a) The contents of the memorandum, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company; and
- (b) the number of shares, if any, fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and
- (c) the names, descriptions, and addresses of the directors or proposed directors; and
- (d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount, if any, paid on the shares so allotted; and
- (e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued; and
- (f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm the members of the firm shall not be treated as separate vendors; and
- (g) the amount (if any) paid or payable as purchase-money in cash, shares, or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill; and
- (h) the amount (if any) paid within the two preceding years, or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission: Provided that it shall not be necessary to state the commission payable to sub-underwriters; and
- (i) the amount or estimated amount of preliminary expenses; and
- (j) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and
- (k) the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract entered into more than two years before the date of issue of the prospectus; and
- (l) the names and addresses of the auditors (if any) of the company; and
- (m) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or, otherwise for services rendered by him or by the firm in connexion with the promotion or formation of the company; and

(n) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively.

(2.) For the purposes of this section every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

(a) the purchase-money is not fully paid at the date of issue of the prospectus; or

(b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or

(c) the contract depends for its validity or fulfilment on the result of that issue.

(3.) Where any of the property to be acquired by the company is to be taken on lease, this section shall apply as if the expression "vendor" included the lessor, and the expression "purchase-money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

(4.) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(5.) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum or the signatories thereto, and the number of shares subscribed for by them.

(6.) In the event of non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—

(a) as regards any matter not disclosed, he was not cognizant thereof; or

(b) the non-compliance arose from an honest mistake of fact on his part:

Provided that in the event of non-compliance with the requirements contained in paragraph m of sub-section (1) of this section no director or other person shall incur any liability in respect of the non-compliance unless it be proved that he had knowledge of the matters not disclosed.

(7.) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons, but subject as aforesaid, this section shall apply to any prospectus whether issued on or with reference to the formation of a company or subsequently.

(8.) The requirements of this section as to the memorandum and the qualification, remuneration, and interest of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

(9.) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

82. (1.) A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar of companies a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorized in writing, in the form and containing the particulars set out in the Second Schedule to this Act.

(2.) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the first day of July nineteen hundred and eight.

83. A company shall not previously to the statutory meeting vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the statutory meeting.

84. (1.) Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorized the naming of him and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorized the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the

S. 1 of 1907.
Obligations of companies where no prospectus is issued.

p. 262

S. 11 of 1900, s. 1 of 1907.
Restriction on alteration of terms mentioned in prospectus or statement in lieu of prospectus.

pp. 161, 332

S. 3 of 1900, s. 33 of 1907.

Liability for

statements in prospectus. faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

- a) With respect to every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe, that the statement was true; and
- b) With respect to every untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation. Provided that the director, person named as director, promoter, or person who authorized the issue of the prospectus, shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it; and
- (c) With respect to every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document: or unless it is proved—
 - (i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
 - (ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or
 - (iii) that after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2.) Where a company existing on the eighteenth day of August one thousand eight hundred and ninety, has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein, unless he has authorized the issue of the prospectus, or has adopted or ratified it.

(3.) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorized or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorized the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs, and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any action or legal proceedings brought against him in respect thereof.

(4.) Every person who, by reason of his being a director, or named as a director, or as having agreed to become a director, or of his having authorized the issue of the prospectus, becomes liable to make any payment under this section may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(5.) For the purposes of this section—

The expression "promoter" means a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company:

The expression "expert" includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him.

Allotment.

85.—(1.) No allotment shall be made of any share capital of a company offered to the public for subscription, unless the following conditions have been complied with, namely:—

(a) the amount (if any) fixed by the memorandum or articles and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; or

(b) if no amount is so fixed and named, then the whole amount of the share capital so offered for subscription, has been subscribed, and the sum payable on application for the amount so fixed and named, or for the whole amount offered for subscription, has been paid to and received by the company.

(2.) The amount so fixed and named and the whole amount aforesaid shall be reckoned exclusively of any amount payable otherwise than in cash, and is in this Act referred to as the minimum subscription.

(3.) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

(4.) If the conditions aforesaid have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and, if any such money is not so repaid within forty-eight days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per centum per annum from the expiration of the forty-eighth day:

Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

(5.) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6.) This section, except sub-section (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

(7.) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say) —

(a) the amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment; or

(b) if no amount is so fixed and named, then the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash,

has been subscribed and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

This sub-section shall not apply to a private company or to a company which has allotted any shares or debentures before the first day of July nineteen hundred and eight.

86.—(1.) An allotment made by a company to an applicant in contravention of the provisions of the last foregoing section shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

(2.) If any director of a company knowingly contravenes or permits or authorizes the contravention of any of the provisions of the last foregoing section with respect to allotment he shall be liable to compensate the company and the allottee respectively for any loss, damages, or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover any such loss, damages, or costs shall not be commenced after the expiration of two years from the date of the allotment.

87.—(1.) A company shall not commence any business or exercise any borrowing powers unless —

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and

S. 1 of 1900
Restriction as to allotment.
p. 9

S. 1 of 1900
Effect of irregular allotment.
pp. 16, 17, 51

S. 6 of 1900
Restrictions on commencement of business.
p. 20

- b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription, or in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash; and
- (c) there has been filed with the registrar of companies a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with; and
- (d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar of companies a statement in lieu of prospectus.

(2.) The registrar of companies shall, on the filing of this statutory declaration, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled:

Provided that in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

pp. 201, 332

(3.) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4.) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5.) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding fifty pounds for every day during which the contravention continues.

p. 332

(6.) Nothing in this section shall apply to a private company, or to a company registered before the first day of January nineteen hundred and one, or to a company registered before the first day of July nineteen hundred and eight which does not issue a prospectus inviting the public to subscribe for its shares.

S. 7 of 1900.

Return as to allotments.

pp. 64, 610

88. (1.) Whenever a company limited by shares makes any allotment of its shares, the company shall within one month thereafter file with the registrar of companies—

(a) a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses, and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; and

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(2.) Where such a contract as above mentioned is not reduced to writing, the company shall within one month after the allotment file with the registrar of companies the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing, and those particulars shall be deemed to be an instrument within the meaning of the Stamp Act, 1891, and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section twelve of that Act.

54 & 55 Vict.
c. 39.

(3.) If default is made in complying with the requirements of this section, every director, manager, secretary, or other officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding fifty pounds for every day during which the default continues:

Provided that, in case of default in filing with the registrar of companies within one month after the allotment any document required to be filed by this section, the company, or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such period as the Court may think proper.

Commissions and Discounts.

89. — (1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is authorized by the articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorized, and if the amount or rate per cent. of the commission paid or agreed to be paid is

(a) In the case of shares offered to the public for subscription, disclosed in the prospectus; or

(b) In the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar of companies, and, where a circular or notice, not being a prospectus, inviting subscription for the shares is issued, also disclosed in that circular or notice.

(2) Save as aforesaid, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

90. Where a company has paid any sums by way of commission in respect of any shares or debentures, or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed, or so much thereof as has not been written off, shall be stated in every balance sheet of the company until the whole amount thereof has been written off.

Payment of Interest out of Capital.

91. Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the work or building, or the provision of plant:

Provided that

- (1) No such payment shall be made unless the same is authorized by the articles or by special resolution;
- (2) No such payment, whether authorized by the articles or by special resolution, shall be made without the previous sanction of the Board of Trade;
- (3) Before sanctioning any such payment the Board of Trade may, at the expense of the company, appoint a person to inquire and report to them as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry;
- (4) The payment shall be made only for such period as may be determined by the Board of Trade, and such period shall in no case extend beyond the close of the half year next after the half year during which the works or buildings have been actually completed or the plant provided:

S. 89 of 1909.
S. 8 of 1907.
Power to pay
certain com-
missions, and
prohibition
of payment
of all other
commissions,
discounts, &c.
p. 379

S. 7 of 1907.
Statement in
balance sheet
as to com-
missions and
discounts.

S. 9 of 1907.
Power of
company to
pay interest
out of capital
in certain
cases.
p. 371

- (5.) The rate of interest shall in no case exceed four per cent. per annum or such lower rate as may for the time being be prescribed by Order in Council:
- (6.) The payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid:
- (7.) The accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate:
- (8.) Nothing in this section shall affect any company to which the Indian Railways Act, 1894, as amended by any subsequent enactment, applies.

17 & 58 Vict
c. 12

Certificates of Shares, &c.

S. 5 of 1907.
Limitation
of time for
issue of
certificates
p. 1139

92.—(1.) Every company shall, within two months after the allotment of any of its shares, debentures, or debenture stock, and within two months after the registration of the transfer of any such shares, debentures, or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures, or debenture stock otherwise provide.

(2.) If default is made in complying with the requirements of this section, the company, and every director, manager, secretary, and other officer of the company who is knowingly a party to the default, shall be liable to a fine not exceeding five pounds for every day during which the default continues.

Information as to Mortgages, Charges, &c.

S. 14 of 1900,
s. 10 of 1907.
Registration
of mortgages
and charges
in England
and Ireland.
p. 616

93.—(1.) Every mortgage or charge created after the first day of July nineteen hundred and eight by a company registered in England or Ireland and being either—

- (a) a mortgage or charge for the purpose of securing any issue of debentures; or
- (b) a mortgage or charge on uncalled share capital of the company; or
- (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or
- (d) a mortgage or charge on any land, wherever situate, or any interest therein:

or

(e) a mortgage or charge on any book debts of the company; or

(f) a floating charge on the undertaking or property of the company,

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable:

Provided that

- (i) in the case of a mortgage or charge created out of the United Kingdom comprising solely property situate outside the United Kingdom, the delivery to and the receipt by the registrar of a copy of the instrument by which the mortgage or charge is created or evidenced, verified in the prescribed manner, shall have the same effect for the purposes of this section as the delivery and receipt of the instrument itself, and twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in the United Kingdom, shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be delivered to the registrar; and
- (ii) where the mortgage or charge is created in the United Kingdom but comprises property outside the United Kingdom, the instrument creating or purporting to create the mortgage or charge may be sent for registration notwithstanding that further proceedings may be necessary to

make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and

(iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts; and

(iv) the holding of debentures entitling the holder to a charge on land shall not be deemed to be an interest in land.

(2.) The registrar shall keep, with respect to each company, a register in the prescribed form of all the mortgages and charges created by the company after the first day of July nineteen hundred and eight and requiring registration under this section, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

(3.) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled *pari passu* is created by a company, it shall be sufficient if there are delivered to or received by the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars:

- (a) the total amount secured by the whole series; and
- (b) the dates of the resolutions authorizing the issue of the series and the date of the covering deed, if any, by which the security is created or defined; and
- (c) a general description of the property charged; and
- (d) the names of the trustees, if any, for the debenture holders;

together with the deed containing the charge, or, if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register:

Provided that, where more than one issue is made of debentures in the series, there shall be sent to the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

(4.) Where any commission, allowance, or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be sent for registration under this section shall include particulars as to the amount or rate per cent. of the commission, discount, or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

(5.) The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with.

(6.) The company shall cause a copy of every certificate of registration given under this section to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered:

Provided that nothing in this sub-section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

(7.) It shall be the duty of the company to send to the registrar for registration the particulars of every mortgage or charge created by the company and of the issues of debentures or series, requiring registration under this section, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

8. The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one shilling for each inspection.

9. Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under this section to be kept at the registered office of the company: Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient.

S. 41 of 1907.
Registration
of enforce-
ment of
security

94.—(1.) If any person obtains an order for the appointment of a receiver or manager of the property of a company, or appoints such a receiver or manager under any powers contained in any instrument, he shall within seven days from the date of the order or of the appointment under the powers contained in the instrument give notice of the fact to the registrar of companies, and the registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

2. If any person makes default in complying with the requirements of this section he shall be liable to a fine not exceeding five pounds for every day during which the default continues.

S. 41 of 1907.
Filing of
accounts of
receivers and
managers

95. (1.) Every receiver or manager of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall, once in every half year while he remains in possession, and also on ceasing to act as receiver or manager, file with the registrar of companies an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall also on ceasing to act as receiver or manager file with the registrar notice to that effect, and the registrar shall enter the notice in the register of mortgages and charges.

(2.) Every receiver or manager who makes default in complying with the provisions of this section shall be liable to a fine not exceeding fifty pounds.

S. 45 of 1907
Rectification
of register
of mortgages.

96. A judge of the High Court, on being satisfied that the omission to register a mortgage or charge within the time hereinbefore required, or that the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the judge just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified.

S. 46 of 1907
Entry of
satisfaction

97. The registrar of companies may, on evidence being given to his satisfaction that the debt for which any registered mortgage or charge was given has been paid or satisfied, order that a memorandum of satisfaction be entered on the register, and shall if required furnish the company with a copy thereof.

S. 47 of 1907.
Index to register
of mortgages
and charges.

98. The registrar of companies shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the mortgages or charges registered with him under this Act.

S. 48 of 1907
Penalties

99.—(1.) If any company makes default in sending to the registrar of companies for registration the particulars of any mortgage or charge created by the company, and of the issues of debentures of a series, requiring registration with the registrar under the foregoing provisions of this Act, then, unless the registration has been effected on the application of some other person, the company, and every director, manager, secretary, or other person who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds for every day during which the default continues.

2. Subject as aforesaid, if any company makes default in complying with any of the requirements of this Act as to the registration with the registrar of any mortgage or charge created by the company, the company and every director, manager, and other officer of the company, who knowingly and wilfully authorized or permitted the default shall, without prejudice to any other liability, be liable on summary conviction to a fine not exceeding one hundred pounds.

If any person knowingly and wilfully authorizes or permits the delivery of any debenture or certificate of debenture stock requiring registration with the registrar under the foregoing provisions of this Act without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other

liability, be liable on summary conviction to a fine not exceeding one hundred pounds.

100.—(1.) Every limited company shall keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge, and (except in the case of securities to bearer the names of the mortgagees or persons entitled thereto).

(2.) If any director, manager, or other officer of the company knowingly and wilfully authorizes or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding fifty pounds.

101.—(1.) The copies of instruments creating any mortgage or charge requiring registration under this Act with the registrar of companies, and the register of mortgages kept in pursuance of the last foregoing section, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding one shilling for each inspection, as the company may prescribe.

(2.) If inspection of the said copies or register is refused, any officer of the company refusing inspection, and every director and manager of the company authorizing or knowingly and wilfully permitting the refusal, shall be liable to a fine not exceeding five pounds, and a further fine not exceeding two pounds for every day during which the refusal continues; and, in addition to the above penalty as respects companies registered in England or Ireland, any judge of the High Court sitting in chambers, or the judge of the Court exercising the stannaries jurisdiction in the case of companies subject to that jurisdiction, may by order compel an immediate inspection of the copies or register.

102.—(1.) Every register of holders of debentures of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting in pose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of sixpence for every one hundred words required to be copied.

(2.) A copy of any trust deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust deed of the sum of one shilling or such less sum as may be prescribed by the company, or, where the trust deed has not been printed, on payment of sixpence for every one hundred words required to be copied.

(3.) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding five pounds, and to a further fine not exceeding two pounds for every day during which the refusal continues, and every director, manager, secretary, or other officer of the company who knowingly authorizes or permits the refusal shall incur the like penalty.

Debentures and Floating Charges

103. A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

104.—(1.) Where either before or after the passing of this Act a company has redeemed any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns), shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place.

S. 43 of 1862

Company register mortgages

S. 10 of 1862

Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages

S. 18 of 1907

Right of debenture holders to inspect the register of debentures and to have copies of trust deed

S. 14 of 1907

Perpetual debentures

S. 15 of 1907

Power to re-issue redeemed debentures in certain cases

and upon such a re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

2. Where, with the object of keeping debentures alive for the purpose of re-issue, they have either before or after the passing of this Act been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

3. Where a company has either before or after the passing of this Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the amount of the company having ceased to be in debit whilst the debentures remained deposited.

4. The re-issuance of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the passing of this Act, shall be treated as the issue of a new debenture for the purposes of stamp duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued.

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered that the debenture was not duly stamped; but in any such case the company shall be liable to pay the proper stamp duty and penalty.

5. Nothing in this section shall prejudice—

(a) the operation of any judgment or order of a Court of competent jurisdiction pronounced or made before the seventh day of March nineteen hundred and seven as between the parties to the proceedings in which the judgment was pronounced or the order made, and any appeal from any such judgment or order shall be decided as if this Act had not been passed; or

(b) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same.

105. A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

106. Notwithstanding anything contained in the statute of the Scots Parliament of 1696, chapter twenty-five, debentures to bearer issued in Scotland are assumed to be valid and binding according to their terms.

107. (1.) Where, in the case of a company registered in England or Ireland either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding-up are under the provisions of Part IV. of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2.) The periods of time mentioned in the said provisions of Part IV. of this Act shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3.) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors.

[The above section represents the Preferential Payments in Bankruptcy Act, 1897 (60 & 61 Vict. c. 3).]

Statement to be published by Banking and certain other Companies.

S. 44 of 1862.
Certain companies to publish statement in schedule.

108.—(1.) Every company being a limited banking company or an insurance company or a deposit, provident, or benefit society shall, before it commences business, and also on the first Monday in February and the first Tuesday in August in every year during which it carries on business, make a statement in the form marked C. in the First Schedule to this Act, or as near thereto as circumstances will admit,

2.) A copy of the statement shall be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

(3.) Every member and every creditor of the company shall be entitled to a copy of the statement, on payment of a sum not exceeding sixpence.

(4.) If default is made in compliance with this section, the company shall be liable to a fine not exceeding five pounds for every day during which the default continues; and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

(5.) For the purposes of this Act a company that carries on the business of insurance in common with any other business or businesses shall be deemed to be an insurance company.

(6.) This section shall not apply to any life insurance company nor any other assurance company to which the provisions of the Life Assurance Companies Acts, 1870 to 1872, as to the annual statements to be made by such a company, apply with or without modifications, if the company complies with those provisions.

18 A 34 Act.
C. 11
18 A 35 Vol. 2
P. 8
18 A 36 Vol. 1
C. 41

Inspection and Audit.

100.—(1.) The Board of Trade may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Board direct.

i. In the case of a banking company having a share capital, on the application of members holding not less than one-third of the shares issued:

ii. In the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued:

iii. In the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members.

(2.) The application shall be supported by such evidence as the Board of Trade may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in requiring, the investigation; and the Board of Trade may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.

(3.) It shall be the duty of all officers and agents of the company to produce to the inspectors all books and documents in their custody or power.

(4.) An inspector may examine on oath the officers and agents of the company in relation to its business, and may administer an oath accordingly.

(5.) If any officer or agent refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding five pounds in respect of each offence.

(6.) On the conclusion of the investigation the inspectors shall report their opinion to the Board of Trade, and a copy of the report shall be forwarded by the Board to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them.

The report shall be written or printed, as the Board direct.

7. All expenses of and incidental to the investigation shall be defrayed by the applicants, unless the Board of Trade direct the same to be paid by the company, which the Board is hereby authorized to do.

110.—(1.) A company may by special resolution appoint inspectors to investigate its affairs.

(2.) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the Board of Trade, except that, instead of reporting to the Board, they shall report in such manner and to such persons as the company in general meeting may direct.

(3.) Officers and agents of the company shall incur the like penalties in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Board of Trade.

111. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report.

S. 56 of 1862
Investigation
of affairs of
company by
Board of
Trade
inspectors

S. 60 of 1862
Power of
company
to appoint
inspectors

S. 61 of 1862
Report of
inspectors to
be evidence

S. 19 of 1907.
Appointment
and remun-
eration of
auditors.
p. 773

112.—(1.) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(2.) If an appointment of auditors is not made at an annual general meeting, the Board of Trade may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(3.) A director or officer of the company shall not be capable of being appointed auditor of the company.

(4.) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a shareholder to the company not less than fourteen days before the annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to the shareholders, either by advertisement or in any other mode allowed by the articles, not less than seven days before the annual general meeting.

Provided that if, after notice of the intention to nominate an auditor has been so given, an annual general meeting is called for a date fourteen days or less after the notice has been given, the notice, though not given within the time required by this provision, shall be deemed to have been properly given for the purposes thereof, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this provision, be sent or given at the same time as the notice of the annual general meeting.

(5.) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the shareholders in general meeting, in which case the shareholders at that meeting may appoint auditors.

(6.) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors, if any, may act.

(7.) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors.

S. 19 of 1907.
Powers and
duties of
auditors.
p. 774

113.—(1.) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

(2.) The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office, and the report shall state—

a) whether or not they have obtained all the information and explanations they have required; and

b) whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

(3.) The balance sheet shall be signed on behalf of the board by two of the directors of the company or, if there is only one director, by that director, and the auditors' report shall be attached to the balance sheet, or there shall be inserted at the foot of the balance sheet a reference to the report, and the report shall be read before the company in general meeting, and shall be open to inspection by any shareholder.

Any shareholder shall be entitled to be furnished with a copy of the balance sheet and auditors' report at a charge not exceeding sixpence for every hundred words.

(4.) If any copy of a balance sheet which has not been signed as required by this section is issued, circulated, or published, or if any copy of a balance sheet is issued, circulated, or published without either having a copy of the auditors' report attached thereto or containing such reference to that report as is required by this section, the company, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds.

(5.) In the case of a banking company registered after the fifteenth day of August eighteen hundred and twenty-nine—

(a) if the company has branch banks beyond the limits of Europe, it shall be

- sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in the United Kingdom; and
- (b) the balance sheet must be signed by the secretary or manager (if any), and where there are more than three directors of the company by at least three of those directors, and where there are not more than three directors by all the directors.

114.—(1.) Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance sheets of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company.

(2.) This section shall not apply to a private company, nor to a company registered before the first day of July nineteen hundred and eight.

Carrying on Business with less than the legal Minimum of Members.

115. If at any time the number of members of a company is reduced, in the case of a private company, below two, or, in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months, and is cognisant of the fact that it is carrying on business with fewer than two members, or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be sued for the same, without joinder in the action of any other member.

Service and Authentication of Documents.

116. A document may be served on a company by leaving it at or sending it by post to the registered office of the company.

117. A document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorized officer of the company, and need not be under its common seal.

Tables and Forms.

118.—(1.) The forms in the Third Schedule to this Act or forms as near thereto as circumstances admit shall be used in all matters to which those forms refer.

(2.) The Board of Trade may alter any of the tables and forms in the First Schedule to this Act, so that it does not increase the amount of fees payable to the registrar in the said schedule mentioned, and may alter or add to the forms in the said Third Schedule.

(3.) Any such table or form, when altered, shall be published in the London Gazette, and thenceforth shall have the same force as if it were included in one of the Schedules to this Act, but no alteration made by the Board of Trade in Table A in the said First Schedule shall affect any company registered before the alteration, or repeal, as respects that company, any portion of that Table.

Arbitration.

119.—(1.) A company may by writing under its common seal agree to refer and may refer to arbitration, in accordance with the Railway Companies Arbitration Act, 1859, any existing or future difference between itself and any other company or person.

(2.) Companies parties to the arbitration may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

(3.) All the provisions of the Railway Companies Arbitration Act, 1859, shall apply to arbitrations between companies and persons in pursuance of this Act, and in the construction of those provisions "the companies" shall include companies under this Act.

S. 23 of 1907
Rights of preference shareholders, &c., as to receipt and inspection of reports, &c.

S. 48 of 1862
Prohibition of carrying on business with fewer than seven members in the case of a private company, two members

S. 62 of 1867
Service of documents on company
S. 44 of 1867
Authentication of documents

S. 71 of 1862
Application and alteration of tables and forms

S. 72 of 1862
Arbitration between companies and others
2 & 23 Vict.
c. 59

Power to Compromise.

8. 2 of 1870.
Power to com-
promise with
creditors and
members.
p. 1492

120.—(1.) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.

(2.) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3.) In this section the expression "company" means any company liable to be wound up under this Act.

Meaning of "Private Company."

8. 1 of 1907
Meaning of
"private
company."
p. 910

121.—(1.) For the purposes of this Act the expression "private company" means a company which by its articles—

(a) restricts the right to transfer its shares; and

(b) limits the number of its members (exclusive of persons who are in the employ-
ment of the company) to fifty; and

(c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

(2.) A private company may, subject to anything contained in the memorandum or articles, by passing a special resolution and by filing with the registrar of companies such a statement in lieu of prospectus as the company, if a public company, would have had to file before allotting any of its shares or debentures, together with such a statutory declaration as the company, if a public company, would have had to file before commencing business, turn itself into a public company.

(3.) Where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this section, be treated as a single member.

PART IV.

WINDING UP.

Preliminary.

Modes of
winding up

122.—(1.) The winding up of a company may be either—

(i) by the Court; or

(ii) voluntary; or

(iii) subject to the supervision of the Court.

(2.) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these modes.

Contributories.

8. 38 of 1862.
Liability as
contributories
of present
and past
members.

123.—(1.) In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges, and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following (that is to say):—

(i) A past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up;

(ii) A past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;

- (iii) A past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act :
- iv In the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member :
- v In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up :
- vi Nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract :
- (vii) A sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall not be deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.
- (2.) In the winding-up of a limited company, any director or manager, whether past or present, whose liability is, in pursuance of this Act, unlimited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding-up a member of an unlimited company : Provided that —
- (i) A past director or manager shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding-up :
- (ii) A past director or manager shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office :
- (iii) Subject to the articles of the company, a director or manager shall not be liable to make such further contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up.
- (3.) In the winding-up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him.

124. The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

125. The liability of a contributory shall create a debt (in England and Ireland of the nature of a specialty) accruing due from him at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability.

126.—(1.) If a contributory dies either before or after he has been placed on the list of contributories, his personal representatives and his heirs and devisees, shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly.

(2.) Where the personal representatives are placed on the list of contributories, the heirs or devisees need not be added, but, except in the case of heirs or devisees of any such real estate in England, they may be added as and when the Court thinks fit.

(3.) If the personal representatives make default in paying any money ordered to be paid by them, proceedings may be taken for administering the personal and real estates of the deceased contributory, or either of them, and of compelling payment thereof of the money due.

127. If a contributory becomes bankrupt, either before or after he has been placed on the list of contributories, then

- (1.) his trustee in bankruptcy shall represent him for all the purposes of the winding up, and shall be a contributory accordingly, and may be called on

S. 74 of 1862

Definition of contributory

S. 75 of 1862

Nature of liability of contributory

S. 76 of 1862

Contributories in case of death of member

S. 75 of 1862

Contributories in case of bankruptcy of member

to admit to proof against the estate of the bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any money due from the bankrupt in respect of his liability to contribute to the assets of the company; and

(2.) there may be proved against the estate of the bankrupt the estimated value of his liability to future calls as well as calls already made.

S. 78 of 1862.

Provision as to married women.

15 & 46 Vict.

c. 15

44 & 45 Vict.

c. 21.

128.—(1.) The husband of a female contributory married before the date of the commencement of the Married Women's Property Act, 1882, or the Married Women's Property (Scotland) Act, 1881, as the case may be, shall, during the continuance of the marriage, be liable, as respects any liability attaching to any shares acquired by her before that date, to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be a contributory accordingly.

(2.) Subject as aforesaid, nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882, or the Married Women's Property (Scotland) Act, 1881.

Winding up by Court.

S. 79 of 1862.

Circumstances in which company may be wound up by Court.

129. A company may be wound up by the Court—

- (i) if the company has by special resolution resolved that the company be wound up by the Court;
- (ii) if default is made in filing the statutory report or in holding the statutory meeting;
- (iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- (iv) if the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven;
- (v) if the company is unable to pay its debts;
- (vi) if the Court is of opinion that it is just and equitable that the company should be wound up.

S. 80 of 1862.

Company when deemed unable to pay its debts.

130. A company shall be deemed to be unable to pay its debts—

- (i) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at its registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
- (ii) if, in England or Ireland, execution or other process issued on a judgment decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- (iii) if, in Scotland, the inducie of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest have expired without payment being made; or
- (iv) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

S. 1 of 1890.

Jurisdiction to wind up companies in England.

131.—(1.) The Courts having jurisdiction to wind up companies registered in England shall be the High Court, the Chancery Courts of the counties palatine of Lancaster and Durham, and the County Courts.

(2.) Where the amount of the share capital of a company paid up or credited as paid up exceeds ten thousand pounds, a petition to wind up the company shall be presented to the High Court, or, in the case of a company whose registered office is situate within the jurisdiction of either of the palatine courts aforesaid, either to the High Court or to the palatine court having jurisdiction.

(3.) Where the amount of the share capital of a company paid up or credited as paid up does not exceed ten thousand pounds, and the registered office of the company is situated within the jurisdiction of a County Court having jurisdiction under this Act, a petition to wind up the company shall be presented to that County Court.

(4.) Where a company is formed for working mines within the stannaries and is not shown to be actually working mines beyond the limits of the stannaries, or to be engaged in any other undertaking beyond those limits, or to have entered into

a contract for such working or undertaking, a petition to wind up the company shall be presented to the Court exercising the stannaries jurisdiction whatever may be the amount of the capital of the company and wherever the registered office of the company is situate.

(5.) The Lord Chancellor may by order exclude a County Court from having jurisdiction under this Act, and for the purposes of that jurisdiction may attach its district, or any part thereof, to the High Court or any other County Court, and may revoke or vary any such order or any like order made under the Companies (Winding Up) Act, 1890.

In exercising his powers under this section the Lord Chancellor shall provide that a County Court shall not have jurisdiction under this Act unless it has for the time being jurisdiction in bankruptcy.

An order made under this provision shall not affect any jurisdiction or powers vested in any County Court under or by virtue of the Stannaries Jurisdiction (Abolition) Act, 1896.

(6.) Every Court in England having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court, and every prescribed officer of the Court shall perform any duties which an officer of the High Court may discharge by order of the judge thereof or otherwise in relation to the winding up of a company.

(7.) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.

(8.) For the purposes of this section the expression "registered office" means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

132. Subject to general rules and to orders of transfer made under the authority of the Supreme Court of Judicature Act, 1873, and the Acts amending it, the jurisdiction to wind up companies of the High Court in England under this Act shall, as the Lord Chancellor may from time to time by general order direct, be exercised, either generally or in specified classes of cases, either by such judge or judges of the Chancery Division of the High Court as the Lord Chancellor may assign to exercise that jurisdiction, or by the judge who, for the time being, exercises the bankruptcy jurisdiction of the High Court.

133.—(1.) The winding up of a company by the Court in England or any proceedings in the winding up may at any time and at any stage, and either with or without application from any of the parties thereto, be transferred from one Court to another Court, or may be retained in the Court in which the proceedings were commenced, although it may not be the Court in which they ought to have been commenced.

(2.) The powers of transfer given by the foregoing provisions of this section may, subject to and in accordance with general rules, be exercised by the Lord Chancellor or by any judge of the High Court having jurisdiction under this Act, or, as regards any case within the jurisdiction of any other Court, by the judge of that Court.

(3.) If any question arises in any winding up proceeding in a County Court which all the parties to the proceeding, or which one of them and the judge of the Court, desire to have determined in the first instance in the High Court, the judge shall state the facts in the form of a special case for the opinion of the High Court, and thereupon the special case and the proceedings, or such of them as may be required, shall be transmitted to the High Court for the purposes of the determination.

134. The Court having jurisdiction to wind up companies registered in Ireland shall be the High Court:

Provided that where the High Court in Ireland makes an order for winding up a company it may, if it thinks fit, direct that all subsequent proceedings in the winding up be had in the Court of bankruptcy having jurisdiction in the place in which the registered office of the company is situate; and thereupon those proceedings shall be taken in that Court of bankruptcy accordingly, and that Court shall, for the purposes of the winding up, have all the powers of the High Court in Ireland.

135. The Court having jurisdiction to wind up companies registered in Scotland shall be the Court of Session in other division thereof, or, in the event of a remit to a permanent Lord Ordinary, that Lord Ordinary during session, and in time of vacation the Lord Ordinary on the bills.

S. 3 & 34 Vict.

c. 64

S. 60 Vict.

c. 45

S. 2 of 1890

Conduct of winding-up business in High Court in England S. 36 & 37 Vict. c. 66.

S. 3 of 1890

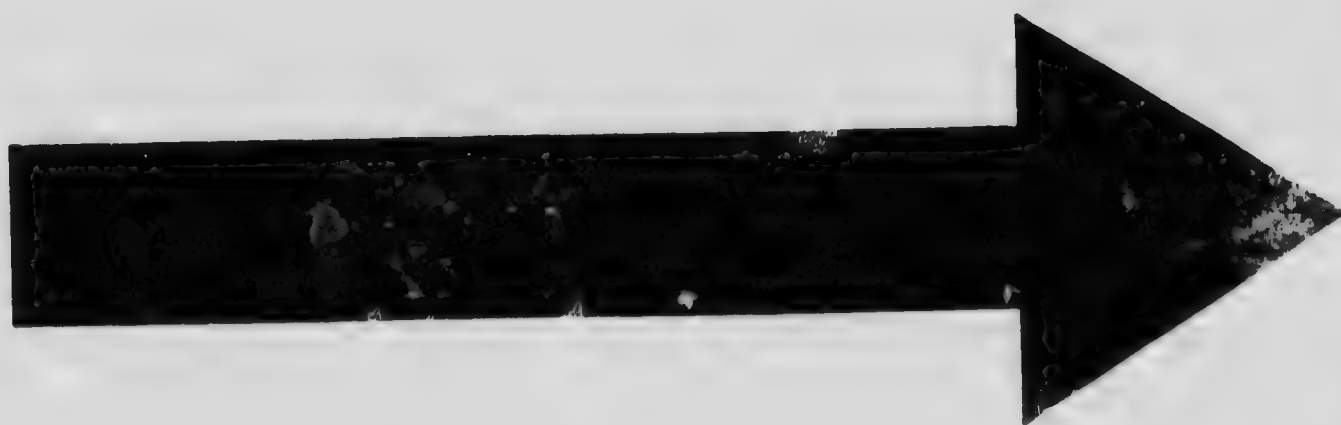
Transfer of proceedings.

S. 81 of 1862

Jurisdiction to wind up companies in Ireland

S. 81 of 1862.

Jurisdiction to wind up companies in Scotland.



S. 6 of 1886.
Power in
Scotland to
remit winding
up to Lord
Ordinary.

S. 82 of 1862.
Provisions
as to applica-
tions for
winding up.

136. Where the Court in Scotland makes a winding-up order, it may, if it thinks fit, at any time direct all subsequent proceedings in the winding up to be taken before one of the permanent Lords Ordinary, and remit the winding up to him accordingly, and thereupon that Lord Ordinary shall, for the purposes of the winding up, have all the powers and jurisdiction of the Court:

Provided that the Lord Ordinary may report to the division of the Court any matter which may arise in the course of the winding up.

137.—(1.) An application to the Court for the winding up of a company shall be by petition, presented subject to the provisions of this section either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately: Provided that

(a) A contributory shall not be entitled to present a petition for winding up a company unless—

(i) either the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven; or

(ii) the shares in respect of which he is a contributory, or some of them either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder; and

(b) A petition for winding up a company on the ground of default in filing the statutory report, or in holding the statutory meeting, shall not be presented by any person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held; and

(c) The Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable, and until a *prima facie* case for winding up has been established to the satisfaction of the Court.

(2.) Where a company is being wound up voluntarily or subject to supervision in England, a petition may be presented by the official receiver attached to the Court, as well as by any other person authorized in that behalf under the other provisions of this section, but the Court shall not make a winding-up order on the petition unless it is satisfied that the voluntary winding up or winding up subject to supervision cannot be continued with due regard to the interests of the creditors or contributories.

(3.) Where under the provisions of this Part of this Act any person as being the husband of a female contributory is himself a contributory, and a share has during the whole or any part of the six months been held by or registered in the name of the wife, or by or in the name of a trustee for the wife or for the husband, the share shall, for the purposes of this section, be deemed to have been held by and registered in the name of the husband.

S. 82 of 1862.
Effect of
winding-up
order.

S. 84 of 1862.
Commencement
of winding-up
by Court.

S. 85 of 1862.
Power to stay
or restrain
proceedings
against
company.

S. 86 of 1862.
Powers of
Court on
hearing
petition.

138. An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

139. A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

140. At any time after the presentation of a petition for winding up, and before a winding-up order has been made, the company, or any creditor or contributory, may—

(a) where any action or proceeding against the company is pending in the High Court or Court of Appeal in England or Ireland, apply to the Court in which the action or proceeding is pending for a stay of proceedings therein; and

(b) where any other action or proceeding is pending against the company, apply to the Court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding;

and the Court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

141.—(1.) On hearing the petition, the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it deems just, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been

mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2.) Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.

142. When a winding-up order has been made, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

143. On the making of a winding-up order, a copy of the order must forthwith be forwarded by the company to the registrar of companies, who shall make a minute thereof in his books relating to the company.

144. The Court may at any time after an order for winding up, on the application of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

145. The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

Official Receiver.

146.—(1.) For the purposes of this Act so far as it relates to the winding up of companies by the Court in England, the term "official receiver" shall mean the official receiver, if any, attached to the Court for bankruptcy purposes, or, if there is more than one such official receiver, then such one of them as the Board of Trade may appoint, or, if there is no such official receiver, then an officer appointed for the purpose by the Board of Trade.

(2.) Any such officer shall for the purpose of his duties under this Act be styled the official receiver.

147.—(1.) Where the Court in England has made a winding-up order, there shall be made out and submitted to the official receiver a statement as to the affairs of the company in the prescribed form, verified by affidavit, and showing the particulars of its assets, debts, and liabilities, the names, residences, and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the official receiver may require.

(2.) The statement shall be submitted and verified by one or more of the persons who are at the time of the winding-up order the directors and by the person who is at that time the secretary or other chief officer of the company, or by such of the persons being or having been directors or officers of the company, or having taken part in the formation of the company at any time within one year before the winding-up order, as the official receiver, subject to the direction of the Court, may require to submit and verify the same.

(3.) The statement shall be submitted within fourteen days from the date of the order, or within such extended time as the official receiver or the Court may for special reasons appoint.

(4.) Any person making or concurring in making the statement and affidavit required by this section shall be allowed, and shall be paid by the official receiver, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the official receiver may consider reasonable, subject to an appeal to the Court.

(5.) If any person, without reasonable excuse, makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding ten pounds for every day during which the default continues.

(6.) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom. But any person untruthfully so stating himself to be a creditor or contributory shall be guilty of a contempt of Court and shall be punishable accordingly on the application of the liquidator or of the official receiver.

148.—(1.) Where the Court in England has made a winding-up order, the

P.

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Report by

S. 87 of 1862

Actions stayed on winding-up order.

S. 88 of 1862

Copy of order to be forwarded to registrar.

S. 89 of 1862

Power of Court to stay winding-up.

S. 91 of 1862

Court may have regard to wishes of creditors or contributories

S. 4 of 1890.

Appointment of official receiver

S. 7 of 1890.

Statement of company's affairs to be submitted to official receiver.

S. 8 of 1890.

official receiver.

official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the Court—

- (a) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and
 - (b) if the company has failed, as to the causes of the failure; and whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.
- (2.) The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court.

Liquidators.

S. 92 of 1862.
Appointment, remuneration, and title of liquidators.

149.—(1.) For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a liquidator or liquidators.

(2.) The Court may make such an appointment provisionally at any time after the presentation of a petition and before (where the proceedings are in England) the making of an order for winding up, or (where the proceedings are in Scotland or Ireland) the first appointment of liquidators.

(3.) Where the proceedings are in England—

(a) If a provisional liquidator is appointed before the making of a winding-up order, the official receiver or any other fit person may be appointed:

(b) On a winding-up order being made the official receiver shall by virtue of his office become the provisional liquidator and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such:

(c) When a person other than the official receiver is appointed liquidator he shall not be capable of acting as liquidator until he has notified his appointment to the registrar of companies and given security in the prescribed manner to the satisfaction of the Board of Trade.

(4.) If more than one liquidator is appointed by the Court, the Court shall declare whether any act by this Act required or authorized to be done by the liquidator is to be done by all or any one or more of the persons appointed.

(5.) In a winding-up in Scotland or Ireland the Court may determine whether any and what security is to be given by a liquidator on his appointment.

(6.) A liquidator appointed by the Court may resign or, on cause shown, be removed by the Court.

(7.) A vacancy in the office of a liquidator appointed by the Court shall be filled by the Court.

In a winding-up in England the official receiver shall by virtue of his office be the liquidator during the vacancy.

(8.) Where a person other than the official receiver is appointed liquidator, he shall receive such salary or remuneration by way of percentage or otherwise as the Court may direct; and, if more such persons than one are appointed liquidators, their remuneration shall be distributed among them in such proportions as the Court directs.

(9.) A liquidator shall be described as follows (that is to say):—

(a) in a winding-up in England, where a person other than the official receiver is liquidator, by the style of the liquidator, and, where the official receiver is liquidator, by the style of the official receiver and liquidator, and

(b) in a winding-up in Scotland or Ireland, by the style of the official liquidator,

of the particular company in respect of which he is appointed, and not by his individual name.

(10.) The acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.

S. 92 of 1862.
Custody of company's property.

150.—(1.) In a winding-up by the Court the liquidator shall take into his custody, or under his control, all the property and things in action to which the company is or appears to be entitled.

(2.) In a winding-up by the Court in Scotland or Ireland, if and so long as there is no liquidator, all the property of the company shall be deemed to be in the custody of the Court.

151.—(1.) The liquidator in a winding-up by the Court shall have power, in the case of a winding-up in England with the sanction either of the Court or of the committee of inspection, and in the case of a winding-up in Scotland or Ireland with the sanction of the Court—

S. 95 of 1862
Powers of liquidator

- (a) to bring or defend any action or other legal proceeding in the name and on behalf of the company;
 - (b) to carry on the business of the company, so far as may be necessary for the beneficial winding-up thereof;
 - (c) in the case of a winding-up in England, to employ a solicitor or other agent to take any proceedings or do any business which the liquidator is unable to take or do himself; but the sanction in this case must be obtained before the employment, except in cases of urgency, and in those cases it must be shown that no undue delay took place in obtaining the sanction;
 - (d) in the case of a winding-up in Scotland or Ireland, to appoint a solicitor or law agent to assist him in the performance of his duties.
- (2.) The liquidator in a winding-up by the Court shall have power, but (subject to the provisions of this section) in the case of a winding-up in Scotland or Ireland only with the sanction of the Court—

- (a) To sell the real and personal property, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;
- (b) To do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal;
- (c) To prove, rank, and claim in the bankruptcy, insolvency, or sequestration of any contributory, for any balance against his estate, and to receive dividends in the bankruptcy, insolvency, or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors;
- (d) To draw, accept, make, and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made, or indorsed by or on behalf of the company in the course of its business;
- (e) To raise on the security of the assets of the company any money requisite;
- (f) To take out in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company; and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself;
- (g) To do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

(3.) The exercise by the liquidator in a winding-up by the Court in England of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

(4.) In the case of a winding-up in Scotland or Ireland the Court may provide by any order that the liquidator may exercise any of the above powers, except the power to appoint a solicitor or law agent, without the sanction or intervention of the Court.

(5.) Where a liquidator is provisionally appointed by the Court, the Court may limit and restrict his powers by the order appointing him.

(6.) In a winding-up by the Court in Scotland the liquidator shall, subject to rules made under this Act, have the same powers as a trustee on a bankrupt estate.

152.—(1.) When a winding-up order has been made by the Court in England, the official receiver shall summon separate meetings of the creditors and contributories of the company for the purpose of—

S. 6 of 1890.
Meetings of creditors and contributories in English winding-up.

- (a) determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the official receiver; and

(b) determining whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of the committee if appointed.

(2.) The Court may make any appointment and order required to give effect to any such determination, and, if there is a difference between the determinations of the meetings of the creditors and contributories in respect of any of the matters mentioned in the foregoing provisions of this section, the Court shall decide the difference and make such order thereon as the Court may think fit.

(3.) In case a liquidator is not appointed by the Court the official receiver shall be the liquidator of the company.

S. 4 of 1890.
Liquidator to give information to official receiver.

153. Where in the winding-up of a company by the Court in England a person other than the official receiver is appointed liquidator he shall give the official receiver such information and such access to and facilities for inspecting the books and documents of the company, and generally such aid as may be requisite for enabling that officer to perform his duties under this Act.

S. 11 of 1890.
Payments of liquidator in English winding-up into bank.

154.—(1.) Every liquidator of a company which is being wound up by the Court in England shall, in such manner and at such times as the Board of Trade, with the concurrence of the Treasury, direct, pay the money received by him to the Companies Liquidation Account at the Bank of England, and the Board shall furnish him with a certificate of receipt of the money so paid:

Provided that, if the committee of inspection satisfy the Board of Trade that for the purpose of carrying on the business of the company or of obtaining advances, or for any other reason, it is for the advantage of the creditors or contributories that the liquidator should have an account with any other bank, the Board shall, on the application of the committee of inspection, authorize the liquidator to make his payments into and out of such other bank as the committee may select, and thereupon those payments shall be made in the prescribed manner.

(2.) If any such liquidator at any time retains for more than ten days a sum exceeding fifty pounds, or such other amount as the Board of Trade in any particular case authorize him to retain, then, unless he explains the retention to the satisfaction of the Board, he shall pay interest on the amount so retained in excess at the rate of twenty per cent. per annum, and shall be liable to disallowance of all or such part of his remuneration as the Board may think just, and to be removed from his office by the Board, and shall be liable to pay any expenses occasioned by reason of his default.

(3.) A liquidator of a company which is being wound up by the Court in England shall not pay any sums received by him as liquidator into his private banking account.

S. 20 of 1890.
Audit of liquidator's accounts in English winding-up.

155.—(1.) Every liquidator of a company which is being wound up by the Court in England shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, send to the Board of Trade, or as they direct, an account of his receipts and payments as liquidator.

(2.) The account shall be in a prescribed form, shall be made in duplicate, and shall be verified by a statutory declaration in the prescribed form.

(3.) The Board shall cause the account to be audited and for the purpose of the audit the liquidator shall furnish the Board with such vouchers and information as the Board may require, and the Board may at any time require the production of and inspect any books or accounts kept by the liquidator.

(4.) When the account has been audited, one copy thereof shall be filed and kept by the Board, and the other copy shall be filed with the Court, and each copy shall be open to the inspection of any creditor, or of any person interested.

(5.) The Board shall cause the account when audited or a summary thereof to be printed, and shall send a printed copy of the account or summary by post to every creditor and contributory.

S. 21 of 1890.
Books to be kept by liquidator in English winding-up.

156. Every liquidator of a company which is being wound up by the Court in England shall keep, in manner prescribed, proper books in which he shall cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect any such books.

S. 22 of 1890.
Release of liquidators in England.

157.—(1.) When the liquidator of a company which is being wound up by the Court in England has realised all the property of the company, or so much thereof as can, in his opinion, be realised without needlessly protracting the liquidation, and has distributed a final dividend, if any, to the creditors, and adjusted the rights of the contributories among themselves, and made a final return, if any, to the contributories, or has resigned, or has been removed from his office, the Board of

Trade shall, on his application, cause a report on his accounts to be prepared, and, on his complying with all the requirements of the Board, shall take into consideration the report, and any objection which may be urged by any creditor, or contributory, or person interested against the release of the liquidator, and shall either grant or withhold the release accordingly, subject nevertheless to an appeal to the High Court.

(2.) Where the release of a liquidator is withheld the Court may, on the application of any creditor, or contributory, or person interested, make such order as it thinks just, charging the liquidator with the consequences of any act or default which he may have done or made contrary to his duty.

(3.) An order of the Board of Trade releasing the liquidator shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the company, or otherwise in relation to his conduct as liquidator, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.

(4.) Where the liquidator has not previously resigned or been removed, his release shall operate as a removal of him from his office.

158.—(1.) Subject to the provisions of this Act, the liquidator of a company which is being wound up by the Court in England shall, in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection, and any directions given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection.

(2.) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, either at the meeting appointing the liquidator or otherwise, may direct, or whenever requested in writing to do so by one tenth in value of the creditors or contributories as the case may be.

(3.) The liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the winding-up.

(4.) Subject to the provisions of this Act, the liquidator shall use his own discretion in the management of the estate and its distribution among the creditors.

(5.) If any person is aggrieved by any act or decision of the liquidator, that person may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just.

159.—(1.) The Board of Trade shall take cognizance of the conduct of liquidators of companies which are being wound up by the Court in England, and, if a liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by statute, rules, or otherwise with respect to the performance of his duties, or if any complaint is made to the Board by any creditor or contributory in regard thereto, the Board shall inquire into the matter, and take such action thereon as they may think expedient.

(2.) The Board may at any time require any liquidator of a company which is being wound up by the Court in England to answer any inquiry in relation to any winding-up in which he is engaged, and may, if the Board think fit, apply to the Court to examine him or any other person on oath concerning the winding-up.

(3.) The Board may also direct a local investigation to be made of the books and vouchers of the liquidator.

Committee of Inspection, Special Manager, Receiver.

160.—(1.) A committee of inspection appointed in pursuance of this Act shall consist of creditors and contributories of the company or persons holding general powers of attorney from creditors or contributories in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the Court.

(2.) The committee shall meet at such times as they from time to time appoint, and, failing such appointment, at least once a month; and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

Ss. 23, 24 of 1890.

Exercise and control of liquidator's powers in England.

S. 25 of 1890.

Control of Board of Trade over liquidators in England.

S. 9 of 1890.

Committee of inspection in English winding-up.

(3.) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present.

(4.) Any member of the committee may resign by notice in writing signed by him and delivered to the liquidator.

(5.) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant.

(6.) Any member of the committee may be removed by an ordinary resolution at a meeting of creditors (if he represents creditors), or of contributories (if he represents contributories) of which seven days' notice has been given, stating the object of the meeting.

(7.) On a vacancy occurring in the committee the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, to fill the vacancy, and the meeting may, by resolution, re-appoint the same or appoint another creditor or contributory to fill the vacancy.

(8.) The continuing members of the committee, if not less than two, may act notwithstanding any vacancy in the committee.

(9.) If there is no committee of inspection, any act or thing or any direction or permission by this Act authorized or required to be done or given by the committee may be done or given by the Board of Trade on the application of the liquidator.

S. 5 of 1890.

Power in
England to
appoint
special
manager.

161.—(1.) Where the official receiver becomes the liquidator of a company, whether provisionally or otherwise, he may, if satisfied that the nature of the estate or business of the company, or the interests of the creditors or contributories generally, require the appointment of a special manager of the estate or business of the company other than himself, apply to the Court to, and the Court may on such application, appoint a special manager thereof to act during such time as the Court may direct, with such powers, including any of the powers of a receiver or manager, as may be entrusted to him by the Court.

(2.) The special manager shall give such security and account in such manner as the Board of Trade direct.

(3.) The special manager shall receive such remuneration as may be fixed by the Court.

S. 4 (6) of 1890.

Power in Eng-
land to appoint
official receiver
as receiver for
debenture
holders or
creditors.

162. Where an application is made to the Court to appoint a receiver on behalf of the debenture holders or other creditors of a company which is being wound up by the Court in England, the official receiver may be so appointed.

Ordinary Powers of Court.

S. 98 of 1862.

Settlement of
list of con-
tributories
and applica-
tion of assets.

163.—(1.) As soon as may be after making a winding-up order, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities.

(2.) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable to the debts of others.

S. 100 of 1862.

Power to re-
quire delivery
of property.

164. The Court may, at any time after making a winding-up order, require any contributory for the time being settled on the list of contributories, and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to the liquidator any money, property, or books and papers in his hands to which the company is *primâ facie* entitled.

S. 101 of 1862.

Power to order
payment of
debts by
contributory.

165.—(1.) The Court may, at any time after making a winding-up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

(2.) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him or to the

estate which he represents from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and may, in the case of a limited company, make to any director or manager whose liability is unlimited or to his estate the like allowance.

(3.) But in the case of any company, whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

166.—(1.) The Court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

(2.) In making a call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

167.—(1.) The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the same into the Bank of England or any branch thereof to the account of the liquidator instead of to the liquidator, and any such order may be enforced in the same manner as if it had directed payment to the liquidator.

(2.) All monies so paid or delivered into the Bank of England or any branch thereof in pursuance of a winding-up by the Court shall be subject in all respects to the order of the Court.

168.—(1.) An order made by the Court on a contributory shall (subject to any right of appeal) be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.

(2.) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceedings, except proceedings against the real estate of a deceased contributory, in which case the order shall be only *prima facie* evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made.

169.—The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.

170. The Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

171. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges, and expenses incurred in the winding-up in such order of priority as the Court thinks just.

172.—(1.) When the affairs of a company have been completely wound up, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

(2.) The order shall be reported by the liquidator to the registrar of companies who shall make in his books a minute of the dissolution of the company.

(3.) If the liquidator makes default in complying with the requirements of this section he shall be liable to a fine not exceeding five pounds for every day during which he is in default.

173. General rules may be made for enabling or requiring all or any of the powers and duties conferred and imposed on the Court in England by this Act, in respect of the matters following, to be exercised or performed by the liquidator as an officer of the Court, and subject to the control of the Court; that is to say, the powers and duties of the Court in respect of—

- (a) holding and conducting meetings to ascertain the wishes of creditors and contributories;
- (b) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets;
- (c) requiring delivery of property or documents to the liquidator;
- (d) making calls;
- (e) fixing a time within which debts and claims must be proved:

S. 102 of 1862.

Power of Court to make calls.

S. 103 of 1862.

Power to order payment into bank.

S. 106 of 1862.

Order on contributory conclusive evidence.

S. 107 of 1862.

Power to exclude creditors not proving in time.

S. 109 of 1862.

Adjustment of rights of contributories.

S. 110 of 1862.

Power to order costs.

S. 111 of 1862.

Dissolution of company.

S. 13 of 1890.

Delegation to liquidator of certain powers of Court in England.

Provided that the liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without either the special leave of the Court or the sanction of the committee of inspection.

Extraordinary Powers of Court.

S. 115 of 1862. **174.**—(1.) The Court may, after it has made a winding-up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs, or property of the company.

Power to
summon
persons
suspected
of having
property
of company.

(2.) The Court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(3.) The Court may require him to produce any books and papers in his custody or power relating to the company; but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to that lien.

(4.) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause him to be apprehended, and brought before the Court for examination.

S. 8 of 1890.
Power in
England to
order public
examination
of promoters,
directors, &c.

175.—(1.) When an order has been made in England for winding up a company by the Court, and the official receiver has made a further report under this Act stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since its formation, the Court may, after consideration of the report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director, or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director or officer thereof.

(2.) The official receiver shall take part in the examination, and for that purpose may, if specially authorized by the Board of Trade in that behalf, employ a solicitor with or without counsel.

(3.) The liquidator, where the official receiver is not the liquidator, and any creditor or contributory, may also take part in the examination either personally or by solicitor or counsel.

(4.) The Court may put such questions to the person examined as the Court thinks fit.

(5.) The person examined shall be examined on oath, and shall answer all such questions as the Court may put or allow to be put to him.

(6.) A person ordered to be examined under this section shall at his own cost, before his examination, be furnished with a copy of the official receiver's report, and may at his own cost employ a solicitor with or without counsel, who shall be at liberty to put to him such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him: Provided that if he is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as in its discretion it may think fit.

(7.) Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him, and shall be open to the inspection of any creditor or contributory at all reasonable times.

(8.) The Court may, if it thinks fit, adjourn the examination from time to time.

(9.) An examination under this section may, if the Court so directs, and subject to general rules, be held before any judge of County Courts, or before any officer of the Supreme Court, being an official referee, master, or registrar in bankruptcy, or before any district registrar of the High Court named for the purpose by the Lord Chancellor, or, in the case of companies being wound up by a palatine court,

before a registrar of that Court, and the powers of the Court under this section as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination is held.

176. The Court, at any time either before or after making a winding-up order, on proof of probable cause for believing that a contributory is about to quit the United Kingdom, or otherwise to abscond, or to remove or conceal any of his property for the purpose of evading payment of calls, or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested, and his books and papers and moveable personal property to be seized, and him and them to be safely kept until such time as the Court may order. S. 118 of 1862. Power to arrest absconding contributory.

177. Any powers by this Act conferred on the Court shall be in addition to and not in restriction of any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums. S. 119 of 1862. Powers of Court cumulative.

Enforcement of and Appeal from Orders.

178.—(1.) Orders made by the High Court in England or Ireland under this Act may be enforced in the same manner as orders made in any action pending therein. S. 120 of 1862. Power to enforce orders.

(2.) For the purposes of this Part of this Act the Court exercising the stannaries jurisdiction shall, in addition to its ordinary powers, have the same power of enforcing any orders made by it as the High Court in England has in relation to matters within its jurisdiction; and, for the last-mentioned purposes, the jurisdiction of the judge of the Court exercising the stannaries jurisdiction shall be deemed to be co-extensive in local limits with the jurisdiction of the High Court in England.

179. Where an order, interlocutor, or decree has been made in Scotland for winding-up a company by the Court, it shall be competent to the Court, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls, and of the amount due by each contributory, and of the date when the same became due, to pronounce forthwith a decree against those contributories for payment of the sums so certified to be due, with interest from the said date till payment, at the rate of five per cent. per annum in the same way and to the same effect as if they had severally consented to registration for execution, on a charge of six days, of a legal obligation to pay those calls and interest; and the decree may be extracted immediately, and no suspensio thereof shall be competent, except on caution or consignation, unless with special leave of the Court. S. 121 of 1862. Order for calls on contributories in Scotland.

180.—(1.) Any order made by the Court in England for or in the course of winding-up a company shall be enforced in Scotland and Ireland in the Courts that would respectively have jurisdiction in respect of that company if registered in Scotland or Ireland, and in the same manner in all respects as if the order had been made by those Courts. S. 122 of 1862. Enforcement of orders throughout United Kingdom.

(2.) In like manner orders, interlocutors, and decrees made by the Court in Scotland for or in the course of winding-up a company shall be enforced in England and Ireland, and orders made by the Court in Ireland for or in the course of winding-up a company shall be enforced in England and Scotland, by the Courts which would respectively have jurisdiction in respect of that company if registered in that part of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if the order had been made by those Courts.

(3.) Where any order, interlocutor, or decree made by one Court is required to be enforced by another Court, an office copy of the order, interlocutor, or decree shall be produced to the proper officer of the Court required to enforce the same, and the production of an office copy shall be sufficient evidence of the order, interlocutor, or decree, and thereupon the last-mentioned Court shall take the requisite steps in the matter for enforcing the order, interlocutor, or decree, in the same manner as if it had been made by that Court.

181.—(1.) Subject to rules of Court, an appeal from any order or decision made or given in the winding-up of a company by the Court under this Act shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court in cases within its ordinary jurisdiction. S. 124 of 1862. Appeals from order.

(2.) Provided, in regard to orders or judgments pronounced in Scotland by the Lord Ordinary on the Bills in vacation, that—

- (i) No order or judgment under the provisions of this Act specified in the First Part of the Fourth Schedule to this Act shall be subject to review, reduction, suspension, or stay of execution; and
- (ii) Every other order or judgment (except as hereinafter mentioned) shall be subject to review only by reclaiming note, in common form, presented within fourteen days from the date of the order or judgment:

Provided that orders or judgments under the provisions of this Act specified in the Second Part of the Fourth Schedule to this Act shall, from the dates of those orders or judgments, and notwithstanding any reclaiming note against them, be carried out and receive effect until the reclaiming note is dismissed by the Court.

(3.) Provided also, in regard to orders or judgments pronounced in Scotland by a permanent Lord Ordinary to whom a winding-up has been remitted, that any such order or judgment shall be subject to review only by reclaiming note in common form, presented within fourteen days from the date of the order or judgment, but, should a reclaiming note not be presented and moved during session, the provisions of this section in regard to orders or judgments pronounced by the Lord Ordinary on the Bills in vacation shall apply to the order or judgment.

(4.) Nothing in this section shall affect the provisions of this Act in reference to decrees in Scotland for payment of calls in the winding-up of companies, whether voluntarily or by or subject to the supervision of the Court.

Voluntary Winding Up.

S. 129 of 1862.

Circumstances in which company may be wound up voluntarily.

182. A company may be wound up voluntarily—

- (1.) When the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;
- (2.) If the company resolves by special resolution that the company be wound up voluntarily;
- (3.) If the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

S. 130 of 1862.
Commencement of voluntary winding-up.

S. 131 of 1862.
Effect of voluntary winding-up on status of company.

S. 132 of 1862.
Notice of resolution to wind up voluntarily.

S. 133 of 1862.
Consequences of voluntary winding-up.

183. A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing the winding-up.

184. When a company is wound up voluntarily the company shall, from the commencement of the winding-up, cease to carry on its business, except so far as may be required for the beneficial winding-up thereof:

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

185. When a company has resolved by special or extraordinary resolution to wind up voluntarily, it shall give notice of the resolution by advertisement in the Gazette.

186. The following consequences shall ensue on the voluntary winding-up of a company:—

- (i) The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and, subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company;
- (ii) The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them;
- (iii) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof;
- (iv) The liquidator may, without the sanction of the Court, exercise all powers by this Act given to the liquidator in a winding up by the Court;
- (v) The liquidator may exercise the powers of the Court under this Act of settling a list of contributories, and of making calls, and shall pay the

debts of the company, and adjust the rights of the contributories among themselves :

- (vi) The list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories :
- (vii) When several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined at the time of their appointment, or in default of such determination by any number not less than two :
- (viii) If from any cause whatever there is no liquidator acting, the Court may, on the application of a contributory, appoint a liquidator :
- (ix) The Court may, on cause shown, remove a liquidator, and appoint another liquidator.

187.—(1.) The liquidator in a voluntary winding-up shall, within twenty-one days after his appointment, file with the registrar of companies a notice of his appointment in the form prescribed by the Board of Trade. S. 26 of 1907
Notice by liquidator of his appointment

(2.) If the liquidator fails to comply with the requirements of this section he shall be liable to a fine not exceeding five pounds for every day during which the default continues.

188.—(1.) Every liquidator appointed by a company in a voluntary winding-up shall, within seven days from his appointment, send notice by post to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held on a date, not being less than fourteen nor more than twenty-one days after his appointment, and at a place and hour, to be specified in the notice, and shall also advertise notice of the meeting once in the Gazette and once at least in two local newspapers circulating in the district where the registered office or principal place of business of the company was situate. S. 27 of 1907.
Rights of creditors in a voluntary winding-up

(2.) At the meeting to be held in pursuance of the foregoing provisions of this section the creditors shall determine whether an application shall be made to the Court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, and, if the creditors so resolve, an application may be made accordingly to the Court at any time, not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose at the meeting.

(3.) On any such application the Court may make an order either for the removal of the liquidator appointed by the company and for the appointment of some other person as liquidator or for the appointment of some other person to act as liquidator jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection either together with or without any such appointment of a liquidator or such other order as, having regard to the interests of the creditors and contributories of the company, may seem just.

(4.) No appeal shall lie from any order of the Court upon an application under this section.

(5.) The Court shall make such order as to the costs of the application as it may think fit, and if it is of opinion that, having regard to the interests of the creditors in the liquidation, there were reasonable grounds for the application, may order the costs of the application to be paid out of the assets of the company, notwithstanding that the application is dismissed or otherwise disposed of adversely to the applicant.

189.—(1.) If a vacancy occurs by death, resignation, or otherwise in the office of liquidator appointed by the company in a voluntary winding up, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy. S. 140 of 1862.
Power to fill vacancy in office of liquidator.

(2.) For that purpose a general meeting may be convened by any contributory or, if there were more liquidators than one, by the continuing liquidators.

(3.) The meeting shall be held in manner prescribed by the articles, or in such manner as may, on application by any contributory or by the continuing liquidators, be determined by the Court.

190.—(1.) A company about to be, or in course of being, wound up voluntarily may, by extraordinary resolution, delegate to its creditors, or to any committee of them, the power of appointing liquidators or any of them, and of supplying vacancies among the liquidators, or enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised. S. 135 of 1862.
Delegation of authority to appoint liquidators.

(2.) Any act done by creditors in pursuance of any such delegated power shall have the same effect as if it had been done by the company.

S. 136 of 1862.
Arrangement
when binding
on creditors.

191.—(1.) Any arrangement entered into between a company about to be, or in the course of being, wound up voluntarily and its creditors shall, subject to any right of appeal under this section, be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if assented to by three-fourths in number and value of the creditors.

(2.) Any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the Court against it, and the Court may thereupon, as it thinks just, amend, vary, or confirm the arrangement.

S. 161 of 1862.
Power of
liquidator to
accept shares,
&c. as con-
sideration
for sale of
property of
company.

192.—(1.) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company (in this section called the transferee company), the liquidator of the first-mentioned company (in this section called the transferor company) may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company.

(2.) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3.) If any member of the transferor company who did not vote in favour of the special resolution at either of the meetings held for passing and confirming the same expresses his dissent therefrom in writing addressed to the liquidator, and left at the registered office of the company within seven days after the confirmation of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in manner provided by this section.

(4.) If the liquidator elects to purchase the member's interest the purchase money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5.) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for winding up the company, or for appointing liquidators; but, if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court.

(6.) For the purposes of an arbitration under this section the provisions of the Companies Clauses Consolidation Act, 1845, or, in the case of a winding-up in Scotland, the Companies Clauses Consolidation (Scotland) Act, 1845, with respect to the settlement of disputes by arbitration, shall be incorporated with this Act; and in the construction of those provisions this Act shall be deemed to be the special Act, and "the company" shall mean the transferor company, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, or, if there is more than one liquidator, then of any two or more of the liquidators.

S. & 9 Vict.
c. 16.
S. & 9 Vict.
c. 17.

S. 138 of 1862.
Power to
apply to
Court.

193.—(1.) Where a company is being wound up voluntarily the liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding-up, or to exercise, as respects the enforcing of calls, or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.

(2.) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the Court thinks fit, or may make such other order on the application as the Court thinks just.

S. 139 of 1862.
Power of
liquidator to
call general
meeting.

194.—(1.) Where a company is being wound up voluntarily, the liquidator may summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution, or for any other purposes he may think fit.

(2.) In the event of the winding-up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding-up, and of each succeeding year, or as soon thereafter as may be convenient, and shall lay before the meeting an

account of his acts and dealings and of the conduct of the winding-up during the preceding year.

195.—(1.) In the case of every voluntary winding-up, as soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding-up, showing how the winding-up has been conducted and the property of the company has been disposed of; and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.

(2.) The meeting shall be called by advertisement in the Gazette, specifying the time, place, and object thereof, and published one month at least before the meeting.

(3.) Within one week after the meeting, the liquidator shall make a return to the registrar of companies of the holding of the meeting, and of its date, and in default of so doing shall be liable to a fine not exceeding five pounds for every day during which the default continues.

(4.) The registrar, on receiving the return, shall forthwith register it, and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved:

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5.) It shall be the duty of the person on whose application an order of the Court under this section is made, within seven days after the making of the order, to file with the registrar an office copy of the order, and if that person fails so to do, he shall be liable to a fine not exceeding five pounds for every day during which the default continues.

196. All costs, charges, and expenses properly incurred in the voluntary winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims.

197. The voluntary winding-up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court, if the Court is of opinion, in the case of an application by a creditor, that the rights of the creditor or, in the case of an application by a contributory, that the rights of the contributories will be prejudiced by a voluntary winding-up.

198. Where a company is being wound up voluntarily, and an order is made for winding-up by the Court, the Court may, if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding-up.

Winding Up subject to Supervision of Court.

199. When a company has by special or extraordinary resolution resolved to wind up voluntarily, the Court may make an order that the voluntary winding-up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others to apply to the Court, and generally on such terms and conditions as the Court thinks just.

200. A petition for the continuance of a voluntary winding-up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over actions, be deemed to be a petition for winding-up by the Court.

201. The Court may, in deciding between a winding-up by the Court and a winding-up subject to supervision, in the appointment of liquidators, and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

202.—(1.) Where an order is made for a winding-up subject to supervision, the Court may by the same or any subsequent order appoint any additional liquidator.

(2.) A liquidator appointed by the Court under this section shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if he had been appointed by the company.

(3.) The Court may remove any liquidator so appointed by the Court, or any liquidator continued under the supervision order, and fill any vacancy occasioned by the removal, or by death or resignation.

203.—(1.) Where an order is made for a winding-up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his

S. 142 of 1862.

Final meeting and dissolution.

S. 144 of 1862

Costs of voluntary liquidation

S. 145 of 1862

Saving for rights of creditors and contributories

S. 146 of 1862

Power of Court to adopt proceedings of voluntary winding-up.

S. 147 of 1862.

Power to order winding-up subject to supervision.

S. 148 of 1862

Effect of petition for winding-up subject to supervision

S. 149 of 1862.

Court may have regard to wishes of creditors and contributories.

S. 150 of 1862.

Power for Court to appoint or remove liquidators.

S. 151 of 1862.

Effect of supervision order.

powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

(2.) A winding-up subject to the supervision of the Court is not a winding-up by the Court for the purpose of the following provisions of this Act, namely, those contained in sections one hundred and forty-seven, one hundred and forty-eight, one hundred and forty-nine, except sub-section (10), one hundred and fifty-two, one hundred and fifty-three, one hundred and fifty-four, one hundred and fifty-five, one hundred and fifty-six, one hundred and fifty-seven, one hundred and fifty-eight, one hundred and fifty-nine, one hundred and sixty, one hundred and sixty-one, one hundred and sixty-two, one hundred and seventy-three, and one hundred and seventy-five, but, subject as aforesaid, an order for a winding-up subject to supervision, shall for all purposes, including the staying of actions and other proceedings, the making and enforcement of calls, the power in Scotland to remit the winding-up to a permanent Lord Ordinary, and the exercise of all other powers, be deemed to be an order for winding-up by the Court.

S. 152 of 1862.

Appointment of voluntary liquidator as liquidator in winding-up by Court in Scotland or Ireland.

204. Where an order has been made in Scotland or Ireland for winding up a company subject to supervision, and an order is afterwards made for winding-up by the Court, the Court may by the last-mentioned or by any subsequent order appoint any person who is then liquidator, either provisionally or permanently, and either with or without any other person, to be liquidator in the winding-up by the Court.

Supplemental Provisions.

Ss. 131—153 of 1862.

Avoidance of transfers, &c. after commencement of winding-up.

205.—(1.) In the case of voluntary winding-up, every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company made after the commencement of the winding-up, shall be void.

(2.) In the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including things in action) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding-up, shall, unless the Court otherwise orders, be void.

S. 158 of 1862.

Debts of all descriptions to be proved.

206. In every winding-up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of bankruptcy) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value.

Judicature Act, 1875, s. 10.

Application of bankruptcy rules in winding-up of insolvent English and Irish companies.

207. In the winding-up of an insolvent company registered in England or Ireland the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in England or Ireland, as the case may be, with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up, and make such claims against the company as they respectively are entitled to by virtue of this section.

S. 4 of 1886.

Ranking of claims in Scotland.

19 & 20 Vict. c. 79.

208. In the winding-up of a company registered in Scotland, the general and special rules in regard to voting and ranking for payment of dividends provided by sections forty-nine to sixty-six of the Bankruptcy (Scotland) Act, 1856, or any other rules in regard thereto which may be in force for the time being in the sequestration of the estates of bankrupts in Scotland, shall, so far as is consistent with this Act, apply to creditors of the company voting in matters relating to the winding-up, and ranking for payment of dividends; and for this purpose sequestration shall be taken to mean winding up, trustee to mean liquidator, and sheriff to mean the Court.

S. 1 of 51 & 52

Vict. c. 62.

Preferential payments.

209.—(1.) In a winding-up there shall be paid in priority to all other debts—

(a) All parochial or other local rates due from the company at the date hereinafter mentioned, and having become due and payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed on the company up to the fifth day of April next before that date, and not exceeding in the whole one year's assessment;

- (b) All wages or salary of any clerk or servant in respect of services rendered to the company during four months before the said date, not exceeding fifty pounds; and
- (c) All wages of any workman or labourer not exceeding twenty-five pounds, whether payable for time or for piece work, in respect of services rendered to the company during two months before the said date: Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service up to the said date; and
- (d) Unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts (not exceeding in any individual case one hundred pounds) due in respect of compensation under the Workmen's Compensation Act, 1906, the liability whereof accrued before the said date, subject nevertheless to the provisions of section five of that Act.
- (2.) The foregoing debts shall—
- (a) Rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and
- (b) In the case of a company registered in England or Ireland, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.
- (3.) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding-up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.
- (4.) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding-up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof:
- Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made.
- (5.) The date hereinbefore in this section referred to is—
- (a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding-up order; and
- (b) in any other case, the date of the commencement of the winding-up.

210.—(1.) Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

(2.) For the purposes of this section the presentation of a petition for winding-up in the case of a winding-up by or subject to the supervision of the Court, and a resolution for winding-up in the case of a voluntary winding-up, shall be deemed to correspond with the act of bankruptcy in the case of an individual.

(3.) Any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void to all intents.

211. Where any company (being a company registered in England or Ireland) is being wound up by or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents.

212. Where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding-up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in con-

S. 164 of 1862.
Fraudulent preference.

S. 163 of 1862.
Advance of certain attachments, executions, &c. in case of company registered in England or Ireland.
S. 13 of 1907.
Effect of floating charge.
Columbian Fire Proving Co., In re. (1910) 2 Ch. 120.

S. 3 of 1886.

Effect in case of company registered in Scotland of diligence within 60 days of winding-up by or subject to supervision of Court.

19 & 20 Vict.
c. 79.

S. 159 of 1862.

General scheme of liquidation may be sanctioned.

sideration for, the charge, together with interest on that amount at the rate of five per cent. per annum.

213. In the winding-up, by or subject to the supervision of the Court, of a company registered in Scotland, the following provisions shall have effect:—

- (1.) The winding-up shall, in the case of a winding-up by the Court as at its commencement, and in the case of a winding-up subject to supervision as at the date of the presentation of the petition on which the supervision order is pronounced, be equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding; and no arrestment or poinding of the funds or effects of the company, executed on or after the sixtieth day prior to the commencement of the winding-up by the Court, or to the presentation of the petition on which a supervision order is made, as the case may be, shall be effectual; and those funds or effects, or the proceeds of those effects, if sold, shall be made forthcoming to the liquidator: Provided that any arrester or pointer before the date of the winding-up, or of the petition, as the case may be, who is thus deprived of the benefit of his diligence, shall have preference out of those funds or effects for the expense *bond fide* incurred by him in such diligence;
- (2.) The winding-up shall, as at the respective dates aforesaid, be equivalent to a decree of adjudication of the heritable estates of the company for payment of the whole debts of the company, principal and interest, accumulated at the said dates respectively, subject to such preferable heritable rights and securities as existed at the said dates and are valid and unchallengeable, and the right to poind the ground hereinafter provided;
- (3.) The provisions of sections one hundred and twelve to one hundred and seventeen, and of section one hundred and twenty, of the Bankruptcy (Scotland) Act, 1856, shall, so far as is consistent with this Act, apply to the realization of heritable estates affected by such heritable rights and securities as aforesaid; and for the purposes of this Act the words "sequestration" and "trustee" occurring in those sections shall mean respectively "winding up" and "liquidator"; and the expression "the Lord Ordinary or the Court" shall mean "the Court" as defined by this Act with respect to Scotland;
- (4.) No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the respective dates aforesaid shall, except to the extent hereinafter provided, be available in any question with the liquidator: Provided that no creditor who holds a security over the heritable estate preferable to the right of the liquidator shall be prevented from executing a poinding of the ground after the respective dates aforesaid, but that poinding shall in competition with the liquidator be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of that term.

214.—(1.) The liquidator may, with the sanction following (that is to say)—

- (a) in the case of a winding-up by the Court in England with the sanction either of the Court or of the committee of inspection;
 - (b) in the case of a winding-up by the Court in Scotland or Ireland, and in the case of any winding-up subject to supervision, with the sanction of the Court; and
 - (c) in the case of a voluntary winding-up, with the sanction of an extraordinary resolution of the company,
- do the following things or any of them:—
- (i) Pay any classes of creditors in full;
 - (ii) Make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;
 - (iii) Compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory, or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding-up of the company, on such terms as may be agreed, and take any

security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

2.) In the case of a winding-up by the Court in England the exercise by the liquidator of the powers of this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

215.—(1.) Where in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator, or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the Court thinks just.

(2.) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

3.) Where in the case of a winding-up in England an order for payment of money is made under this section, the order shall be deemed to be a final judgment within the meaning of paragraph (g) of sub-section (1) of section four of the Bankruptcy Act, 1883.

(4.) So much of this section as refers to promoters, and to property of a company other than money, shall not apply to a winding-up in Scotland or Ireland.

216. If any director, officer, or contributory of any company being wound up destroys, mutilates, alters, or falsifies any books, papers, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or document belonging to the company with intent to defraud or deceive any person, he shall be guilty of a misdemeanour, and be liable to imprisonment for any term not exceeding two years, with or without hard labour.

217.—(1.) If it appears to the Court in the course of a winding-up by or subject to the supervision of the Court that any past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible, the Court may on the application of any person interested in the winding-up, or of its own motion, direct the liquidator to prosecute for the offence, and may order the costs and expenses to be paid out of the assets of the company.

(2.) If it appears to the liquidator in the course of a voluntary winding-up that any past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible, the liquidator, with the previous sanction of the Court, may prosecute the offender, and all expenses properly incurred by him in the prosecution shall be payable out of the assets of the company in priority to all other liabilities.

218. If any person, on examination on oath authorized under this Act, or in any affidavit or deposition in or about the winding up of any company or otherwise in or about any matter arising under this Act, wilfully and corruptly gives false evidence, he shall be liable to the penalties for wilful perjury.

219.—(1.) Where by this Act the Court is authorized, in relation to winding-up, to have regard to the wishes of creditors or contributories, as proved to it by any sufficient evidence, the Court may, if it thinks fit, for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held, and conducted in such manner as the Court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the Court.

(2.) In the case of creditors, regard shall be had to the value of each creditor's debt.

(3.) In the case of contributories, regard shall be had to the number of votes conferred on each contributory by the articles.

220. Where any company is being wound up, all books and papers of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded.

221. After an order for a winding-up by or subject to the supervision of the Court, the Court may make such order for inspection by creditors and contributories of the company of its books and papers as the Court thinks just, and any books

S. 165 of 1862.

Power of Court to assess damages against delinquent directors, &c.

16 & 47 Vict. c. 52.

S. 166 of 1862.

Penalty for falsification of books.

S. 167 of 1862.

Prosecution of delinquent directors, &c.

S. 169 of 1862.

Penalty on perjury.

Ss. 91, 149 of 1862.

Meetings to ascertain wishes of creditors or contributories.

S. 154 of 1862.

Books of company to be evidence.

S. 156 of 1862.

Inspection of books.

and papers in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.

S. 155 of 1862.

Disposal of
books and
papers of
company.

222.—(1.) When a company has been wound up and is about to be dissolved, the books and papers of the company and of the liquidators may be disposed of as follows (that is to say):—

(a) In the case of a winding-up by or subject to the supervision of the Court in such way as the Court directs;

(b) In the case of a voluntary winding-up in such way as the company by extraordinary resolution directs.

(2.) After five years from the dissolution of the company no responsibility shall rest on the company, or the liquidators, or any person to whom the custody of the books and papers has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein.

S. 31 of 1907.

Power of
Court to
declare dis-
solution of
company void.

223.—(1.) Where a company has been dissolved, the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

(2.) It shall be the duty of the person on whose application the order was made, within seven days after the making of the order, to file with the registrar of companies an office copy of the order, and if that person fails so to do he shall be liable to a fine not exceeding five pounds for every day during which the default continues.

S. 15 of 1890.

Information
as to pending
liquidations
in England.

224.—(1.) Where a company is being wound up in England, if the winding-up is not concluded within one year after its commencement, the liquidator shall, at such intervals as may be prescribed, until the winding-up is concluded, send to the registrar of companies a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation.

(2.) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement, and to receive a copy thereof or extract therefrom; but any person untruthfully so stating himself to be a creditor or contributory shall be guilty of a contempt of Court, and shall be punishable accordingly on the application of the liquidator or of the official receiver.

(3.) If a liquidator fails to comply with the requirements of this section he shall be liable to a fine not exceeding fifty pounds for each day during which the default continues.

(4.) If it appears from any such statement or otherwise that a liquidator has in his hands or under his control any money representing unclaimed or undistributed assets of the company which have remained unclaimed or undistributed for six months after the date of their receipt, the liquidator shall forthwith pay the same to the Companies Liquidation Account at the Bank of England, and shall be entitled to the prescribed certificate of receipt for the money so paid, and that certificate shall be an effectual discharge to him in respect thereof.

(5.) For the purpose of ascertaining and getting in any money payable into the Bank of England in pursuance of this section, the like powers may be exercised, and by the like authority, as are exercisable under section one hundred and sixty-two of the Bankruptcy Act, 1883, for the purpose of ascertaining and getting in the sums, funds, and dividends referred to in that section.

(6.) Any person claiming to be entitled to any money paid into the Bank of England in pursuance of this section may apply to the Board of Trade for payment of the same, and the Board may, on a certificate by the liquidator that the person claiming is entitled, make an order for the payment to that person of the sum due.

(7.) Any person dissatisfied with the decision of the Board of Trade in respect of any claim made in pursuance of this section may appeal to the High Court.

S. 125 of 1862.

Judicial
notice of
signature of
officers.

225. In all proceedings under this Part of this Act, all Courts, judges, and persons judicially acting, and all officers, judicial or ministerial, of any Court, or employed in enforcing the process of any Court, shall take judicial notice of the signature of any officer of the High Court in England or Ireland, or of the Court of Session in Scotland, or of the registrar of the Court exercising the stamp duties jurisdiction, and also of the official seal or stamp of the several offices of the High Court in England or Ireland, Court of Session, or Court exercising the stamp duties juris-

diction, appended to or impressed on any document made, issued or signed under the provisions of this Part of this Act, or any official copy thereof.

226.—(1.) The judges of the County Courts in England who sit at places more than twenty miles from the General Post Office, and the judge exercising the bankruptcy jurisdiction of the High Court in Ireland and the assistant barristers and recorders in Ireland, and the sheriffs of counties in Scotland, shall be commissioners for the purpose of taking evidence under this Act, where a company is wound up in any part of the United Kingdom, and the Court may refer the whole or any part of the examination of any witnesses under this Act to any person hereby appointed commissioner, although he is out of the jurisdiction of the Court that made the winding-up order.

(2.) Every commissioner shall, in addition to any powers which he might lawfully exercise as a judge of a county court, judge of the High Court, assistant barrister or recorder, or sheriff, have in the matter so referred to him all the same powers of summoning and examining witnesses, of requiring the production or delivery of documents, of punishing defaults by witnesses, and of allowing costs and expenses to witnesses, as the Court which made the winding-up order.

(3.) The examination so taken shall be returned or reported to the Court which made the order in such manner as that Court directs.

227.—(1.) The Court may direct the examination in Scotland of any person for the time being in Scotland, whether a contributory of the company or not, in regard to the trade, dealings, affairs, or property of any company in course of being wound up, or of any person being a contributory of the company, so far as the company may be interested therein by reason of his being a contributory; and the order or commission to take the examination shall be directed to the sheriff of the county in which the person to be examined is residing or happens to be for the time; and the sheriff shall summon that person to appear before him at a time and place to be specified in the summons for examination on oath as a witness or as a haver, and to produce any books or papers called for which are in his possession or power.

(2.) The sheriff may take the examination either orally or on written interrogatories, and shall report the same in writing in the usual form to the Court; and shall transmit with the report the books and papers produced, if the originals thereof are required and specified by the order or commission, or otherwise copies thereof or extracts therefrom authenticated by the sheriff.

(3.) If any person so summoned fails to appear at the time and place specified, or refuses to be examined or to make the production required, the sheriff shall proceed against him as a witness or haver duly cited and failing to appear or refusing to give evidence or make production may be proceeded against by the law of Scotland.

(4.) The sheriff shall be entitled to such and the like fees, and the witness shall be entitled to such and the like allowances, as sheriffs when acting as commissioners under appointment from the Court of Session and as witnesses and havers are entitled to in the like cases according to the law and practice of Scotland.

(5.) If any objection is stated to the sheriff by the witness, either on the ground of his incompetency as a witness, or as to the production required, or on any other ground, the sheriff may, if he thinks fit, report the objection to the Court, and suspend the examination of the witness until it has been disposed of by the Court.

228.—(1.) Any affidavit required to be sworn under the provisions or for the purposes of this Part of this Act may be sworn in Great Britain or Ireland or elsewhere within the dominions of His Majesty, before any Court, judge, or person lawfully authorized to take and receive affidavits or before any of His Majesty's consuls or vice-consuls in any place outside His Majesty's dominions.

(2.) All Courts, judges, justices, commissioners, and persons acting judicially shall take judicial notice of the seal or stamp or signature (as the case may be) of any such Court, judge, person, consul, or vice-consul attached, appended, or subscribed to any such affidavit, or to any other document to be used for the purposes of this Part of this Act.

229.—(1.) An account, called the Companies Liquidation Account, shall be kept by the Board of Trade with the Bank of England, and all moneys received by the Board in respect of proceedings under this Act in connexion with the winding up of companies in England shall be paid to that account.

(2.) All payments out of money standing to the credit of the Board of Trade in the Companies Liquidation Account shall be made by the Bank of England in the prescribed manner.

230.—(1.) Whenever the cash balance standing to the credit of the Companies Liquidation Account is in excess of the amount which in the opinion of the Board

S. 126 of 1862.
Special commission for receiving evidence.

S. 127 of 1862.
Court may order examination of persons in Scotland.

S. 128 of 1862.
Affidavits, &c. in United Kingdom and Colonies.

S. 11 of 1890.
Companies Liquidation Account defined.

S. 16 of 1890.
Investment

of surplus
funds on
general
account.

of Trade is required for the time being to answer demands in respect of companies' estates, the Board shall notify the excess to the Treasury, and shall pay over the whole or any part of that excess as the Treasury may require, to the Treasury, to such account as the Treasury may direct, and the Treasury may invest the sums paid over, or any part thereof, in Government securities, to be placed to the credit of the said account.

(2.) Where any part of the money so invested is, in the opinion of the Board of Trade, required to answer any demands in respect of companies' estates, the Board shall notify to the Treasury the amount so required, and the Treasury shall thereupon repay to the Board such sum as may be required to the credit of the Companies Liquidation Account, and for that purpose may direct the sale of such part of the said securities as may be necessary.

(3.) The dividends on investments under this section shall be paid to such account as the Treasury may direct, and regard shall be had to the amount thus derived in fixing the fees payable in respect of proceedings in the winding up of companies in England.

Ss. 17, 18
of 1890.

Separate
accounts of
particular
estates.

231.—(1.) An account shall be kept by the Board of Trade of the receipts and payments in the winding up of each company in England, and, when the cash balance standing to the credit of the account of any company is in excess of the amount which, in the opinion of the committee of inspection, is required for the time being to answer demands in respect of that company's estate, the Board shall, on the request of the committee, invest the amount not so required in Government securities, to be placed to the credit of the said account for the benefit of the company.

(2.) When any part of the money so invested is, in the opinion of the committee of inspection, required to answer any demands in respect of the estate of the company, the Board of Trade shall, on the request of the committee, raise such sum as may be required by the sale of such part of the said securities as may be necessary.

(3.) The dividends on investments under this section shall be paid to the credit of the company.

(4.) When the balance at the credit of any company's account in the hands of the Board of Trade exceeds two thousand pounds, and the liquidator gives notice to the Board that the excess is not required for the purposes of the liquidation, the company shall be entitled to interest on the excess at the rate of two per cent. per annum.

S. 19 of 1890.

Certain
receipts and
fees to be
applied in
aid of
expenditure.
Officers and
remuneration.

232. The Treasury may issue to the Board of Trade in aid of the votes of Parliament, out of the receipts arising in respect of the winding up of companies in England from fees, for stamps, and dividends on investments by the Treasury under this Act, any sums which may be necessary to meet the charges estimated by the Board in respect of salaries and expenses under this Act in relation to the winding up of companies in England.

233.—(1.) The Board of Trade may, with the approval of the Treasury, appoint such additional officers as may be required by the Board for the execution as respects England of this Part of this Act, and may remove any person so appointed.

(2.) The Board of Trade, with the concurrence of the Treasury, shall direct whether any and what remuneration is to be allowed to any officer of, or person attached to, the Board performing any duties under this Part of this Act in relation to the winding up of companies in England, and may vary, increase, or diminish that remuneration as they think fit.

(3.) The Lord Chancellor, with the concurrence of the Treasury, shall direct whether any and what remuneration is to be allowed to any person (other than an officer of the Board of Trade) performing any duties under this Act in relation to the winding up of companies in England, and may vary, increase, or diminish that remuneration as he thinks fit.

S. 28 of 1890.

Annual
accounts of
English
winding-up.
38 & 39 Vict.
c. 77.

234.—(1.) The Treasury shall annually cause to be prepared and laid before both Houses of Parliament an account for the year ending with the thirty-first day of March, showing the receipts and expenditure during that year in respect of proceedings under this Act in relation to the winding up of companies in England, and the provisions of section twenty-eight of the Supreme Court of Judicature Act, 1875, shall apply to the account as if the account had been required by that section.

(2.) The accounts of the Board of Trade under this Act in relation to the winding up of companies in England shall be audited in such manner as the

Treasury direct, and, for the purpose of the account to be laid before Parliament, the Board shall make such returns and give such information as the Treasury direct.

235. The officers of the Courts acting in the winding up of companies in England shall make to the Board of Trade such returns of the business of their respective Courts and offices, at such times and in such manner and form as may be prescribed, and from those returns the Board shall cause books to be prepared which shall, under the regulations of the Board, be open for public information and searches.

S. 29 of 1890.
Returns by
officers in
English
winding-up.

236.—(1.) All documents purporting to be orders or certificates made or issued by the Board of Trade for the purposes of this Act and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorized in that behalf by the President of the Board, shall be received in evidence and deemed to be such orders or certificates without further proof unless the contrary is shown.

S. 30 of 1890.
Proceedings
of Board of
Trade.

(2.) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board, shall be conclusive evidence of the fact so certified.

Rules and Fees.

237.—(1.) The Lord Chancellor may, with the concurrence of the President of the Board of Trade, make general rules for carrying into effect the objects of this Act so far as relates to the winding up of companies in England.

S. 26 of 1890
Rules and
fees for
winding up
in England

(2.) All general rules made under this section shall be laid before Parliament within three weeks after they are made, if Parliament is then sitting, and, if Parliament is not sitting, within three weeks after the beginning of the next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act.

(3.) There shall be paid in respect of proceedings under this Act in relation to the winding up of companies in England such fees as the Lord Chancellor may, with the sanction of the Treasury, direct, and the Treasury may direct by whom and in what manner the same are to be collected and accounted for, and to what account they are to be paid.

(4.) All rules made and directions given by the Lord Chancellor under this section shall be adopted by the authority for the time being empowered to make rules for regulating the practice or procedure in the Chancery Court of the county palatine of Lancaster, but as so adopted shall have effect with the substitution of the words "vice-chancellor" for the word "judge," and of the word "registrar" for the word "master," and of the words "chambers of the registrar" for the words "chambers of the judge" and "judge's chambers," and any directions as to the remuneration to be allowed to officers of that Court in respect of proceedings under this Act shall be subject to the sanction of the Chancellor of the Duchy and County Palatine of Lancaster.

(5.) The authority having power to make rules or give directions under this section may, by any such rules or directions, repeal, alter, or amend any rules made and directions given by the like authority under the Companies (Winding-Up) Act, 1890, which are in force at the commencement of this Act.

53 & 54 Vict
c. 63.

238.—(1.) Subject to the provisions of this Act with respect to rules and fees in relation to the winding up of companies in England, rules of procedure for the purposes of this Act, including rules as to costs and fees, may be made.

S. 171 of 1862.
Powers to
make rules
of procedure.

(a) As regards the High Court in England, by the authority having power to make rules for the Supreme Court in England:

(b) As regards the Court of Session, by act of sederunt:

(c) As regards the High Court in Ireland, by the authority having power to make rules for the Supreme Court in Ireland:

(d) As regards the Court exercising the *stannaries* jurisdiction, by the authority having power to make rules for County Courts in England.

(2.) The authority having power to make rules under this section may by any such rules repeal, alter, or amend any rules made by the like authority under the Companies Act, 1862, or any Act amending the same, which are in force at the commencement of this Act.

25 & 26 Vict.
c. 89.

Special Provisions as to Stannaries.

S. 34 of 32 &
33 Vict.
c. 19, s. 34.
Attachment
of debt due to
contributory
on winding up
in stannaries
Court.

239. When several companies are in course of liquidation by or under the superintendence of the Court exercising the stannaries jurisdiction and acting under that jurisdiction, if it appears to the judge that a person who is a contributory of one of the companies is also a creditor claiming a debt against one of the other companies, the judge may (if after inquiry he thinks fit direct that the debt, when allowed, shall be attached, and payment thereof to the creditor suspended for a time certain as a security for payment of any calls that are or may in course of liquidation become due from him to the company of which he is a contributory; and the amount thereof shall be applied to such payment in due course:

Provided that such an order of attachment shall not prejudice any claim which the company so indebted to the creditor may have against him by way of set off, counterclaim, or otherwise, or any lawful claim of lien or specific charge on the debt in favour of any third person.

S. 2 of 50 & 51
Vict. c. 43.
Preferential
payments in
stannaries
cases.

240. In the application to companies within the stannaries of the provisions of this Act with respect to preferential payments, the following modifications shall be made:—

- (1.) In the case of a clerk or servant of such a company, the priority with respect to wages and salary given by this Act shall be given to the extent of three months only, instead of four months, and shall not extend to the principal agent, manager, purser, or secretary;
- (2.) All wages in relation to the mine of a miner, artisan, or labourer employed in or about the mine, including all earnings by a miner arising from any description of piece or other work, or as a tributer or otherwise, but not exceeding an amount equal to three months' wages, shall be included amongst the payments which are, under this Act, to be made in priority to other debts;
3. Wages of any miner, artisan, or labourer unpaid at the commencement of the winding-up, and, subject to the provisions of section five of the Workmen's Compensation Act, 1906, all amounts (not exceeding in any individual case one hundred pounds, due in respect of compensation under that Act payable to a miner or the dependants of a miner the liability whereof accrued before the commencement of the winding-up, shall, to the extent aforesaid, be paid by the liquidator forthwith in priority to all costs, except (in the case of a winding-up by the Court) such costs of and incidental to the making of the winding-up order as in the opinion of the Court have been properly incurred, and to all claims by mortgagees, execution creditors, or any other persons, except the claims of clerks and servants in respect of their wages or salary, and, subject as aforesaid, the Court may, by order, charge the whole or any part of the assets of the company, in priority to all claims and to all existing mortgages or charges thereon, with the payment of a sum sufficient to discharge the said wages and amounts due in respect of compensation, with interest at a rate not exceeding five per cent. per annum, and this charge may be made in favour of any person who is willing to advance the requisite amount or any part thereof; and as soon as the said sum has been so advanced, the said wages and amounts due in respect of compensation shall be paid without delay so far as the amount advanced extends, and in such order of payment as the Court directs.

S. Edw. 7,
c. 58.

Provisions
as to mine
club funds.

241.—(1.) On the winding-up of a company within the stannaries, contributions of the miners, artisans, or labourers for the purpose of a mine club, or accident, or sick, or benefit fund shall not be deemed to be, or be applied as, part of the assets of the company in liquidation of the debts of the company or otherwise, but shall be accounted for by the purser or any other person in possession of the fund to the liquidator, and shall be recoverable by him, and be applied in accordance with the rules of the club.

2. Where the company is being wound up voluntarily, the liquidator or any person claiming to be entitled to any such contributions or fund may apply to the Court for directions, or to determine any question arising in the matter in the same manner as if the company were being wound up by the Court.

Removal of Defunct Companies from Register.

242.—(1.) Where the registrar of companies has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

(2.) If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received, and that if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the Gazette with a view to striking the name of the company off the register.

(3.) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer, he may publish in the Gazette, and send to the company by post, a notice that at the expiration of three months from the date of that notice the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4.) If, in any case where a company is being wound up, the registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months after notice by the registrar demanding the returns has been sent by post to the company, or to the liquidator at his last known place of business, the registrar may publish in the Gazette and send to the company a like notice as is provided in the last preceding sub-section.

(5.) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Gazette, and on the publication in the Gazette of this notice the company shall be dissolved: Provided that the liability (if any) of every director, managing officer, and member of the company shall continue and may be enforced as if the company had not been dissolved.

(6.) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court on the application of the company or member or creditor may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

(7.) A letter or notice under this section may be addressed to the company at its registered office, or, if no office has been registered, to the care of some director or officer of the company, or, if there is no director or officer of the company whose name and address are known to the registrar of companies, may be sent to each of the persons who subscribed the memorandum, addressed to him at the address mentioned in the memorandum.

S. 26 of 1900
Registrar
may strike
defunct
company off
register

PART V.

REGISTRATION OFFICE AND FEES.

243.—(1.) For the purposes of the registration of companies under this Act, there shall be offices in England, Scotland, and Ireland, at such places as the Board of Trade think fit.

(2.) The Board of Trade may appoint such registrars, assistant registrars, clerks, and servants as the Board think necessary for the registration of companies under this Act, and may make regulations with respect to their duties; and may remove any persons so appointed.

S. 174 of 1862
Registration
offices in
England,
Scotland,
and Ireland.

(3.) The salaries of the persons appointed under this section shall be fixed by the Board of Trade with the concurrence of the Treasury, and shall be paid out of money provided by Parliament.

(4.) The Board of Trade may require that the office of the registrar of the Court exercising in respect of the winding up of companies the stamp duties jurisdiction shall be one of the offices for the registration of companies within that jurisdiction.

(5.) The Board may direct a seal or seals to be prepared for the authentication of documents required for or connected with the registration of companies.

(6.) Any person may inspect the documents kept by the registrar on payment of such fees as may be appointed by the Board of Trade, not exceeding one shilling for each inspection: and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar, on payment for the certificate, certified copy, or extract, of such fees as the Board of Trade may appoint, not exceeding five shillings for a certificate of incorporation, and not exceeding sixpence for each folio of a certified copy or extract, or in Scotland for each sheet of two hundred words.

(7.) A copy of or extract from any document kept and registered at any of the offices for the registration of companies in England, Scotland, or Ireland, certified to be a true copy under the hand of the registrar or an assistant registrar (whose official position it shall not be necessary to prove) shall in all legal proceedings be admissible in evidence as of equal validity with the original document.

(8.) Whenever any act is by this Act directed to be done to or by the registrar of companies, it shall, until the Board of Trade otherwise directs, be done in England to or by the existing registrar of joint stock companies, or in his absence to or by such person as the Board may for the time being authorize; in Scotland to or by the existing registrar of joint stock companies in Scotland; and in Ireland to or by the existing assistant registrar of joint stock companies for Ireland, or to or by such person as the Board may for the time being authorize in Scotland or Ireland, in the absence of the registrar or assistant registrar; but, in the event of the Board altering the constitution of the existing registry offices or any of them, any such act shall be done to or by such officer and at such place with reference to the local situation of the registered offices of the companies to be registered as the Board may appoint.

S. 17 of 1862.
Fees.

244.--(1.) There shall be paid to the registrar in respect of the several matters mentioned in Table B. in the First Schedule to this Act the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct.

(2.) All fees paid to the registrar in pursuance of this Act shall be paid into the Exchequer.

PART VI.

APPLICATION OF ACT TO COMPANIES FORMED AND REGISTERED UNDER FORMER COMPANIES ACTS.

S. 176 of 1862.
Application of Act to companies formed under former Companies Acts.

245. In the application of this Act to existing companies, it shall apply in the same manner in the case of a limited company, other than a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by shares; in the case of a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by guarantee; and in the case of a company other than a limited company, as if the company had been formed and registered under this Act as an unlimited company.

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the Joint Stock Companies Acts, or under the Companies Act, 1862, as the case may be.

Application of Act to companies registered under former Companies Acts.

246. This Act shall apply to every company registered but not formed under the Joint Stock Companies Acts, or the Companies Act, 1862, in the same manner as it is hereinafter in this Act declared to apply to companies registered but not formed under this Act:

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the Joint Stock Companies Acts, or the Companies Act, 1862, as the case may be.

247. This Act shall apply to every unlimited company registered in pursuance of the Companies Act, 1879, as a limited company, in the same manner as it applies to an unlimited company registered in pursuance of this Act as a limited company:

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered as a limited company under the Companies Act, 1879.

248. A company registered under the Joint Stock Companies Acts may cause its shares to be transferred in manner hitherto in use, or in such other manner as the company may direct.

S. 246 of 1862
Application of
Act to companies
re-registered
under Com-
panies Act, 1879
42 & 43 Vict.
c. 79.
S. 179 of 1862
Mode of trans-
ferring shares

PART VII.

COMPANIES AUTHORIZED TO REGISTER UNDER THIS ACT

249. (1.) With the exceptions and subject to the provisions mentioned and contained in this section,—

- (i) any company consisting of seven or more members, which was in existence on the second day of November eighteen hundred and sixty-two, including any company registered under the Joint Stock Companies Acts; and
- ii any company formed after the date aforesaid, whether before or after the commencement of this Act, in pursuance of any Act of Parliament other than this Act, or of letters patent, or being a company within the statutes, or being otherwise duly constituted by law, and consisting of seven or more members;

may at any time register under this Act as an unlimited company, or as a company limited by shares, or as a company limited by guarantee; and the registration shall not be invalid by reason that it has taken place with a view to the company being wound up.

2. Provided as follows:

- a A company having the liability of its members limited by Act of Parliament or letters patent, and not being a joint stock company as hereinafter defined, shall not register in pursuance of this section;
- b A company having the liability of its members limited by Act of Parliament or letters patent shall not register in pursuance of this section as an unlimited company, or as a company limited by guarantee;
- c A company that is not a joint stock company as hereinafter defined shall not register in pursuance of this section as a company limited by shares;
- d A company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person or by proxy (in cases where proxies are allowed by the regulation of the company) at a general meeting summoned for the purpose;
- e Where a company not having the liability of its members limited by Act of Parliament or letters patent is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person or by proxy at the meeting;
- f Where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceased to be a member, and of the costs and expenses of winding-up, and for the adjustment of the rights of the contributors among themselves, such amount as may be required, not exceeding a specified amount.

(3. In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the regulations of the company.

(4.) A company registered under the Companies Act, 1862, shall not be registered in pursuance of this section.

250. For the purposes of this Part of this Act, as far as relates to registration of companies as companies limited by shares, a joint stock company means a company having a permanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or

S. 179 of 1862.
Companies
capable
of being
registered.
PP. 634 62

S. 181 of 1862.
Definition of
joint stock
company.

divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons; and such a company when registered with limited liability under this Act shall be deemed to be a company limited by shares.

S. 6 of 1879.
Liability of
bank of issue
unlimited in
respect of
notes.

251.—1. A bank of issue registered under this Act as a limited company shall not be entitled to limited liability in respect of its notes; and the members thereof shall be liable in respect of its notes in the same manner as if it had been registered as unlimited; but if, in the event of the company being wound up, the general assets are insufficient to satisfy the claims of both the note-holders and the general creditors, then the members, after satisfying the remaining demands of the note-holders, shall be liable to contribute towards payment of the debts of the general creditors a sum equal to the amount received by the note-holders out of the general assets.

2. For the purposes of this section the expression "the general assets" means the funds available for payment of the general creditor as well as the note-holder.

(3.) Any bank of issue registered under this Act as a limited company may state on its notes that the limited liability does not extend to its notes, and that the members of the company are liable in respect of its notes in the same manner as if it had been registered as an unlimited company.

S. 183 of 1862.
Requirements
for registra-
tion by joint
stock com-
panies.

252. Before the registration in pursuance of this Part of this Act of a joint stock company there shall be delivered to the registrar the following documents (that is to say):—

- (1.) A list showing the names, addresses, and occupations of all persons who on a day named in the list, not being more than six clear days before the day of registration, were members of the company, with the addition of the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its number;
- (2.) A copy of any Act of Parliament, royal charter, letters patent, deed of settlement, contract of copartnership, cost book regulations, or other instrument constituting or regulating the company; and
- (3.) If the company is intended to be registered as a limited company, a statement specifying the following particulars; (that is to say):—
 - (a) The nominal share capital of the company and the number of shares into which it is divided, or the amount of stock of which it consists;
 - (b) The number of shares taken and the amount paid on each share;
 - (c) The name of the company, with the addition of the word "limited" as the last word thereof; and
 - (d) In the case of a company intended to be registered as a company limited by guarantee, the resolution declaring the amount of the guarantee.

S. 184 of 1862.
Requirements
for registra-
tion by other
than joint
stock com-
panies.

253. Before the registration in pursuance of this Part of this Act of any company not being a joint stock company, there shall be delivered to the registrar—

- (1.) A list showing the names, addresses, and occupations of the directors or other managers (if any) of the company; and
- (2.) A copy of any Act of Parliament, letters patent, deed of settlement, contract of copartnership, cost book regulations, or other instrument constituting or regulating the company; and
- (3.) In the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

S. 186 of 1862.
Authentication
of statements
of existing
companies.

254. The lists of members and directors and any other particulars relating to the company required to be delivered to the registrar shall be verified by a statutory declaration of any two or more directors or other principal officers of the company.

S. 187 of 1862.
Registrar may
require evidence
as to nature of
company.

255. The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether any company proposing to be registered is or is not a joint stock company as hereinbefore defined.

S. 188 of 1862.
On registration
of banking
company with
limited liability,
notice to be given
to customers.

256.—(1.) Where a banking company which was in existence on the seventh day of August eighteen hundred and sixty-two proposes to register as a limited company, it shall, at least thirty days before so registering, give notice of its intention so to register to every person who has a banking account with the company, either by delivery of the notice to him, or by posting it to him at, or delivering it at, his last known address.

(2.) If the company omits to give the notice required by this section, then as between the company and the person for the time being interested in the account in respect of which the notice ought to have been given, and so far as respects the

account down to the time at which notice is given, but not further or otherwise. the certificate of registration with limited liability shall have no operation.

257. No fees shall be charged in respect of the registration in pursuance of this Part of this Act of a company if it is not registered as a limited company, or if before its registration as a limited company the liability of the shareholders was limited by some other Act of Parliament or by letters patent.

258. When a company registers in pursuance of this Part of this Act with limited liability, the word "limited" shall form and be registered as part of its name.

259. On compliance with the requirements of this Part of this Act with respect to registration, and on payment of such fees, if any, as are payable under Table B. in the first schedule to this Act, the registrar shall certify under his hand that the company applying for registration is incorporated as a company under this Act, and in the case of a limited company, that it is limited, and thereupon the company shall be incorporated, and shall have perpetual succession and a common seal, with power to hold lands; and any banking company in Scotland so incorporated shall be deemed to be a bank incorporated, constituted, or established by or under Act of Parliament.

260. All property, real and personal (including things in action), belonging to or vested in the company at the date of its registration in pursuance of this Part of this Act, shall on registration pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

261. Registration of a company in pursuance of this part of this Act shall not affect the rights or liabilities of the company in respect of any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of, the company before registration.

262. All actions and other legal proceedings which at the time of the registration of a company in pursuance of this Part of this Act are pending by or against the company, or the public officer or any member thereof, may be continued in the same manner as if the registration had not taken place; nevertheless execution shall not issue against the effects of any individual member of the company on any judgment, decree, or order obtained in any such action or proceeding; but, in the event of the property and effects of the company being insufficient to satisfy the judgment, decree, or order, an order may be obtained for winding up the company.

263. When a company is registered in pursuance of this Part of this Act—

- i All provisions contained in any Act of Parliament, deed of settlement, contract of copartnership, cost book regulations, letters patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles;
- ii All the provisions of this Act shall apply to the company, and the members, contributories, and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject as follows: (that is to say:—
 - a) The regulations in Table A. in the First Schedule to this Act shall not apply unless adopted by special resolution;
 - (b) The provisions of this Act relating to the numbering of shares shall not apply to any joint stock company whose shares are not numbered;
 - (c) Subject to the provisions of this section the company shall not have power to alter any provision contained in any Act of Parliament relating to the company;
 - (d) Subject to the provisions of this section the company shall not have power, without the sanction of the Board of Trade, to alter any provision contained in any letters patent relating to the company;
 - (e) The company shall not have power to alter any provision contained in a royal charter or letters patent with respect to the objects of the company;

S. 188 of 1862.

Exemption of certain companies from payment of fees

S. 190 of 1862

Addition of "limited" to name.

S. 191 of 1862.

Certificate of registration of existing companies

S. 193 of 1862

Vesting of property on registration.

S. 194 of 1862

Saving for existing liabilities.

S. 195 of 1862.

Continuation of existing actions.

S. 196 of 1862.

Effect of registration under Act

(f) In the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted before registration, who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability; or to pay or contribute to the payment of the costs and expenses of winding-up the company, so far as relates to such debts or liabilities as aforesaid; and every contributory shall be liable to contribute to the assets of the company, in the course of the winding-up, all sums due from him in respect of any such liability as aforesaid; and, in the event of the death, bankruptcy, or insolvency, of any contributory, or marriage of any female contributory, the provisions of this Act with respect to the personal representatives, heirs, and devisees of deceased contributories, to the trustees of bankrupt or insolvent contributories, and to the liabilities of husbands and wives respectively, shall apply:

(iii) The provisions of this Act with respect to—

(a) the registration of an unlimited company as limited:

(b) the powers of an unlimited company on registration as a limited company to increase the nominal amount of its share capital and to provide that a portion of its share capital shall not be capable of being called up except in the event of winding up;

(c) the power of a limited company to determine that a portion of its share capital shall not be capable of being called up except in the event of winding up:

shall apply notwithstanding any provisions contained in any Act of Parliament, royal charter, deed of settlement, contract of copartnership, cost book regulations, letters patent, or other instrument constituting or regulating the company:

(iv) Nothing in this section shall authorize the company to alter any such provisions contained in any deed of settlement, contract of copartnership, cost book regulations, letters patent, or other instrument constituting or regulating the company, as would, if the company had originally been formed under this Act, have been required to be contained in the memorandum and are not authorized to be altered by this Act:

(v) Nothing in this Act shall derogate from any power of altering its constitution or regulations which may by virtue of any Act of Parliament, deed of settlement, contract of copartnership, letters patent, or other instrument constituting or regulating the company, be vested in the company.

S. 1 of 1890.

Power to substitute memorandum and articles for deed of settlement.

p. 1310

264.—(1.) Subject to the provisions of this section, a company registered in pursuance of this Part of this Act may by special resolution alter the form of its constitution by substituting a memorandum and articles for a deed of settlement.

(2.) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall so far as applicable apply to an alteration under this section with the following modifications:—

(a) There shall be substituted for the printed copy of the altered memorandum required to be delivered to the registrar of companies a printed copy of the substituted memorandum and articles; and

b. On the registration of the alteration being certified by the registrar the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company's deed of settlement shall cease to apply to the company.

3. An alteration under this section may be made either with or without any alteration of the objects of the company under this Act.

(4.) In this section the expression "deed of settlement" includes any contract of copartnership or other instrument constituting or regulating the company, not being an Act of Parliament, a royal charter, or letters patent.

S. 197 of 1862.

Power of Court to stay or restrain proceedings.

265. The provisions of this Act with respect to staying and restraining actions and proceedings against a company at any time after the presentation of a petition for winding-up and before the making of a winding-up order shall, in the case of a company registered in pursuance of this Part of this Act, where the application

to stay or restrain is by a creditor, extend to actions and proceedings against any contributory of the company.

266. Where an order has been made for winding-up a company registered in pursuance of this Part of this Act no action or proceeding shall be commenced or proceeded with against the company or any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

S. 198 of 1862.

Actions stayed on winding-up order.

PART VIII.

WINDING-UP OF UNREGISTERED COMPANIES.

267. For the purposes of this Part of this Act the expression "unregistered company" shall not include a railway company incorporated by Act of Parliament (except in so far as is provided by the Abandonment of Railways Act, 1850, and the Abandonment of Railways Act, 1869, and any Acts amending them), nor a company registered under the Joint Stock Companies Acts, or under the Companies Act, 1862, or under this Act, but, save as aforesaid, shall include any partnership, association, or company consisting of more than seven members, and any trustee savings bank certified under the Trustees Savings Banks Act, 1863, and any limited partnership.

S. 199 of 1862.

Meaning of unregistered company.

13 & 14 Vict. c. 83.

32 & 33 Vict. c. 114.

26 & 27 Vict. c. 87.

S. 199 of 1862.

Winding-up of unregistered companies.

268.—(1.) Subject to the provisions of this Part of this Act, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding-up shall apply to an unregistered company, with the following exceptions and additions:

- (i) An unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding-up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate; or if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom where it has a principal place of business; and the principal place of business situate in that part of the United Kingdom in which proceedings are being instituted, shall, for all the purposes of the winding-up, be deemed to be the registered office of the company;
- (ii) No unregistered company shall be wound up under this Act voluntarily or subject to supervision;
- (iii) The circumstances in which an unregistered company may be wound up are as follows: (that is to say):
 - (a) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs;
 - (b) If the company is unable to pay its debts;
 - (c) If the Court is of opinion that it is just and equitable that the company should be wound up;
- (iv) An unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts:
 - (a) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty pounds then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary or some director, manager, or principal officer of the company, or by otherwise serving in such manner as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks after the service of the demand neglected to pay the sum, or to secure or compound for the satisfaction of the creditor;
 - (b) If any action or other proceeding has been instituted against any member for any debt or demand due, or claimed to be due, from the company, or from him in his character of member, and notice in writing of the institution of the action or proceeding having been served on the company by leaving the same at its principal place of business, or by delivering it to the secretary, or some director, manager, or principal officer of the company, or by otherwise serving the same in such manner as the Court may approve or direct, the company has not within ten days after service of the notice paid, secured, or compounded for the

debt or demand, or procured the action or proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against the action or proceeding, and against all costs, damages, and expenses to be incurred by him by reason of the same:

(c) If in England or Ireland execution or other process issued on a judgment, decree, or order obtained in any Court in favour of a creditor against the company, or any member thereof as such, or any person authorized to be sued as nominal defendant on behalf of the company, is returned unsatisfied:

(d) If in Scotland the inducie of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made:

e If it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts:

- (v) The Court having jurisdiction to wind up a railway company under the Abandonment of Railways Act, 1850, and the Abandonment of Railways Act, 1869, and the Acts amending them, shall be the High Court in England or Ireland, or the Court of Session in Scotland according as the railway was authorized to be made in England, Ireland, or Scotland, and the special provisions of those Acts shall apply to the winding-up with the substitution of references to this Act for references to the Companies Acts, 1862 and 1867:

Provided that, subject to general rules and to orders of transfer made, as respects England, under the authority of the Supreme Court of Judicature Act, 1873, and, as respects Ireland, under the authority of the Supreme Court of Judicature (Ireland) Act, 1877, the jurisdiction of the High Court in England or Ireland under this provision shall be exercised by the Chancery Division of that Court:

- (vi) A petition for winding up a trustee savings bank may be presented by the National Debt Commissioners, or by a commissioner appointed under the Trustee Savings Banks Act, 1887, as well as by any person authorized under the other provisions of this Act to present a petition for winding up a company:
- (vii) In the case of a limited partnership the provisions of this Act with respect to winding up shall apply with such modifications (if any) as may be provided by rules made by the Lord Chancellor with the concurrence of the President of the Board of Trade, and with the substitution of general partners for directors.

(2.) Nothing in this Part of this Act shall affect the operation of any enactment which provides for any partnership, association, or company, being wound up, or being wound up as a company or as an unregistered company, under any enactment repealed by this Act, except that references in any such first-mentioned enactment to any such repealed enactment shall be read as references to the corresponding provision (if any) of this Act.

S. 200 of 1862.

Contribu-
tories in
winding-up
of unregis-
tered com-
pany.

269.—(1. In the event of an unregistered company being wound up every person shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to pay or contribute to the payment of the costs and expenses of winding-up the company, and every contributory shall be liable to contribute to the assets of the company all sums due from him in respect of any such liability as aforesaid:

Provided that, in the case of an unregistered company within the statutes, a past member shall not be liable to contribute to the assets of the company if he has ceased to be a member for two years or more either before the mine ceased to be worked or before the date of the winding-up order.

(2.) In the event of the death, bankruptcy, or insolvency, of any contributory, or marriage of any female contributory, the provisions of this Act with respect to the personal representatives, heirs, and devisees of deceased contributories, to the trustees of bankrupt or insolvent contributories, and to the liabilities of husbands and wives respectively, shall apply.

S. 201 of 1862.
Power of Court
to stay or
restrain pro-
ceedings.

270. The provisions of this Act with respect to staying and restraining actions and proceedings against a company at any time after the presentation of a petition for winding-up and before the making of a winding-up order shall, in the case of

an unregistered company, where the application to stay or restrain is by a creditor, extend to actions and proceedings against any contributory of the company.

271. Where an order has been made for winding-up an unregistered company, no action or proceeding shall be proceeded with or commenced against any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

S. 202 of 1862.
Actions stayed on winding up order.

272. If an unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may by the winding-up order, or by any subsequent order, direct that all or any part of the property, real and personal including things in action, belonging to the company, or to trustees on its behalf, is to vest in the liquidator by his official name, and thereupon the property or the part thereof specified in the order shall vest accordingly; and the liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official name any action or other legal proceeding relating to that property, or necessary to be brought or defended for the purposes of effectually winding up the company and recovering its property.

S. 203 of 1862.
Directions as to property in certain cases.

273. The provisions of this Part of this Act with respect to unregistered companies shall be in addition to and not in restriction of any provisions hereinbefore in this Act contained with respect to winding up companies by the Court, and the Court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part of this Act.

S. 204 of 1862.
Provisions of Part of Act cumulative.

PART IX.

COMPANIES ESTABLISHED OUTSIDE THE UNITED KINGDOM.

274.—(1. Every company incorporated outside the United Kingdom which establishes a place of business within the United Kingdom shall within one month from the establishment of the place of business file with the registrar of companies—

S. 35 of 1907.
Requirements as to companies established outside the United Kingdom.
p. 118

- (a) a certified copy of the charter, statutes, or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;
- (b) a list of the directors of the company;
- (c) the names and addresses of some one or more persons resident in the United Kingdom authorized to accept on behalf of the company service of process and any notices required to be served on the company;

and, in the event of any alteration being made in any such instrument or in the directors or in the names or addresses of any such persons as aforesaid, the company shall within the prescribed time file with the registrar a notice of the alteration.

(2.) Any process or notice required to be served on the company shall be sufficiently served if addressed to any person whose name has been so filed as aforesaid and left at or sent by post to the person so named.

(3.) Every company to which this section applies shall in every year file with the registrar such a statement in respect of the company's financial position as would, if it were a company formed and registered under this Act and having a share capital, be required under this Act to be made in the annual summary.

(4.) Every company to which this section applies, and which uses the word "Limited" as part of its name, shall—

- (a) in every prospectus inviting subscriptions for its shares or debentures in the United Kingdom state the country in which the company is incorporated; and
- (b) conspicuously exhibit on every place where it carries on business in the United Kingdom the name of the company and the country in which the company is incorporated; and
- (c) have the name of the company and of the country in which the company is incorporated mentioned in legible characters in all bill-heads and letter paper, and in all notices, advertisements, and other official publications of the company.

(5.) If any company to which this section applies fails to comply with any of the requirements of this section the company, and every officer or agent of the company, shall be liable to a fine not exceeding fifty pounds, or, in the case of a continuing offence, five pounds for every day during which the default continues.

(6.) For the purposes of this section—

The expression "certified" means certified in the prescribed manner to be a true copy or a correct translation;

The expression "place of business" includes a share transfer or share registration office;

The expression "director" includes any person occupying the position of director, by whatever name called; and

The expression "prospectus" means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of the company.

(7.) There shall be paid to the registrar for registering any document required by this section to be filed with him a fee of five shillings or such smaller fee as may be prescribed.

Cap. 12 of
S. Edw. 7.
Power of com-
panies incor-
porated in
British posses-
sions to hold
lands.

275. A company incorporated in a British possession which has filed with the registrar of companies the documents and particulars specified in paragraphs (a), (b), and (c) of sub-section (1) of the last foregoing section shall have the same power to hold lands in the United Kingdom as if it were a company incorporated under this Act.

PART X.

SUPPLEMENTAL.

Legal Proceedings, Offences, &c.

S. 49 of 1907.
Prosecution
of offences.

276.—(1.) All offences under this Act made punishable by any fine may be prosecuted under the Summary Jurisdiction Acts.

(2.) In Scotland all prosecutions for offences or fines under the provisions of this Act relating to—

- a the appointment of directors;
- b the restrictions on commencement of business by a company;
- c returns as to allotments;
- d false statements in respect of which a penalty is provided by this Part of this Act;
- e the filing of copies of a prospectus, an order revoking the dissolution, or an order sanctioning the reorganisation of the share capital of a company;
- f the filing of notice of appointment of a liquidator or of the accounts of a receiver or manager;
- g general meetings;
- h companies established outside the United Kingdom;
- i the issue of debentures and certificates of shares and debenture stock;
- j the issue, circulation, and publication of balance sheets;
- k unqualified persons acting as directors;
- l the inspection of registers of debenture holders and the furnishing of copies of trust deeds;

shall be at the instance of the Lord Advocate or a procurator fiscal as the Lord Advocate may direct.

S. 66 of 1862.
Applications
of fines.

277. The Court imposing any fine under this Act may direct that the whole or any part thereof be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding the person on whose information or at whose suit the fine is recovered, and subject to any such direction all fines under this Act shall, notwithstanding anything in any other Act, be paid into the Exchequer.

S. 69 of 1862.
Costs in actions
by certain
limited
companies.

278. Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

S. 32 of 1907.
Power of

279. If in any proceeding against a director, or person occupying the position of director, of a company for negligence or breach of trust it appears to the Court

hearing the case that the director or person is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think proper.

280.—(1) In the case of a company subject to the stannaries jurisdiction, the Court exercising the stannaries jurisdiction shall have and exercise the like jurisdiction and powers, as well on the common law as on the equity side thereof, as the Court of the vice-warden of the stannaries possessed before the commencement of the Stannaries Court (Abolition) Act, 1896, by custom, usage, or statute in the case of unincorporated companies, but only so far as is consistent with the provisions of this Act and with the constitution of companies as prescribed or required by this Act.

2. For the purpose of giving fuller effect to that jurisdiction, all process issuing out of the said Court, and all orders, rules, demands, notices, warrants, and summonses required or authorized by the practice of the Court to be served on any company, whether registered or not registered, or on any member or contributory thereof, or on any officer, agent, director, manager, or servant thereof, may be served in any part of England without any special order of the Judge for that purpose, or by such special order may be served in any part of the British Islands, on such terms and conditions as the Court may think fit:

Provided that no such service of process out of the limits of the stannaries in any suit or plaint on the common law side of the Court shall be effected without the special order of the judge made on a statement of the nature and object of the suit or plaint.

3. All decrees, orders, and judgments of the said Court may be enforced in the same manner in which decrees, orders, and judgments of the Court of the vice-warden of the stannaries could before its abolition have been by law enforced, whether within or beyond the stannaries.

281. If any person in any return, report, certificate, balance sheet, or other document, required by or for the purposes of any of the provisions of this Act specified in the Fifth Schedule hereto, wilfully makes a statement false in any material particular, knowing it to be false, he shall be guilty of a misdemeanor, and shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, with or without hard labour, and on summary conviction to imprisonment for a term not exceeding four months, with or without hard labour, and in either case to a fine in lieu of or in addition to such imprisonment as aforesaid:

Provided that the fine imposed on summary conviction shall not exceed one hundred pounds.

282. If any person or persons trade or carry on business under any name or title of which "Limited" is the last word, that person or those persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding five pounds for every day upon which that name or title has been used.

Report by Board of Trade.

283. The Board of Trade shall cause a general annual report of matters within this Act to be prepared and laid before both Houses of Parliament.

Authentication of Documents issued by Board of Trade.

284. Any approval, sanction, or licence, or revocation of licence, which under this Act may be given or made by the Board of Trade may be under the hand of a secretary or assistant secretary of the Board, or of any person authorized in that behalf by the President of the Board.

Interpretation, &c.

285. In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them (that is to say):—

"Existing company" means a company formed and registered under the Joint Stock Companies Acts, or under the Companies Act, 1862:

Court to grant relief in certain cases.

S. 68 of 1882
Jurisdiction of Stannaries Court.
59 & 60 Vic.
c. 45

S. 28 of 1900.
Penalty for false statement

S. 48 of 1907
Penalty for improper use of word "Limited"

S. 47 of 1901
Annual report by Board of Trade.

S. 16 of 1907
Authentication of documents issued by Board of Trade.

Ss. 129, 130 of 1862.
Interpretation.
1. 591

19 & 20 Vict.
c. 47.

- "Company" means a company formed and registered under this Act or an existing company;
- "Articles" means the articles of association of a company, as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in Table B. in the Schedule annexed to the Joint Stock Companies Act, 1856, or in Table A. in the First Schedule annexed to the Companies Act, 1862, or in that Table as altered in pursuance of section seventy-one of that Act, or in Table A. in the First Schedule to this Act;
- "Memorandum" means the memorandum of association of a company, as originally framed or as altered in pursuance of the provisions of this Act;
- "Document" includes summons, notice, order, and other legal process, and registers;
- "Share" means share in the share capital of the company, and includes stock except where a distinction between stock and shares is expressed or implied;
- "Debenture" includes debenture stock;
- "Books and papers" and "books or papers" include accounts, deeds, writings, and documents;
- "The registrar of companies," or, when used in relation to registration of companies, "the registrar," means the registrar or other officer performing under this Act the duty of registration of companies in England, Scotland, or Ireland, or in the stannaries, as the case requires;
- "The Court" used in relation to a company means the Court having jurisdiction to wind up the company;
- "Joint Stock Companies Acts" means the Joint Stock Companies Act, 1856, the Joint Stock Companies Acts, 1856, 1857, the Joint Stock Banking Companies Act, 1857, and the Act to enable Joint Stock Banking Companies to be formed on the principle of limited liability, or any one or more of those Acts, as the case may require; but does not include the Act passed in the eighth year of the reign of Her Majesty Queen Victoria, chapter one hundred and ten, intitled An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies;
- "The Gazette" means, as respects companies registered in England, the London Gazette; as respects companies registered in Scotland, the Edinburgh Gazette; and, as respects companies registered in Ireland, the Dublin Gazette;
- "Real and personal," as respects Scotland, means heritable and moveable;
- "General rules" means general rules made under this Act, and includes forms;
- "Prescribed" means, as respects the provisions of this Act relating to the winding-up of companies, prescribed by general rules, and as respects the other provisions of this Act, prescribed by the Board of Trade;
- "Company within the stannaries" means a company engaged in or formed for working mines within the stannaries;
- "The Court exercising the stannaries jurisdiction" used in relation to any proceedings means the County Court in which the jurisdiction formerly exercised by the Court of the vice-warden of the stannaries in respect of those proceedings is for the time being vested;
- "Director" includes any person occupying the position of director by whatever name called;
- "Prospectus" means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company.

Repeal of Acts and Transitional Provisions.

Repeal of
Acts and
 savings.

286.—(1. The Acts mentioned in the First Part of the Sixth Schedule to this Act are hereby repealed to the extent specified in the third column of that Part:

Provided that the repeal shall not affect—

- (a) The incorporation of any company registered under any enactment hereby repealed; nor
- (b) Table B. in the Schedule annexed to the Joint Stock Companies Act, 1856, or any part thereof, so far as the same applies to any company existing at the commencement of this Act; nor

(c) Table A. in the First Schedule annexed to the Companies Act, 1862, or any part thereof (either as originally contained in that Schedule or as altered in pursuance of section seventy-one of that Act) so far as the same applies to any company existing at the commencement of this Act; nor

d) The continuance in force of the enactments set out in the Second Part of the Sixth Schedule to this Act, being the enactments continued in force by section two hundred and five of the Companies Act, 1862.

2.) The mention of particular matters in this section or in any other section of this Act shall not prejudice the general application of section thirty-eight of the Interpretation Act, 1889, with regard to the effect of repeals.

287. The provisions of this Act with respect to winding up shall not apply to any company of which the winding-up has commenced before the commencement of this Act, but every such company shall be wound up in the same manner and with the same incidents as if this Act had not passed, and, for the purposes of the winding up, the Act or Acts under which the winding-up commenced shall be deemed to remain in full force.

288. Every conveyance, mortgage, or other deed, made before the commencement of this Act in pursuance of any enactment hereby repealed, shall be of the same force as if this Act had not passed, and for the purposes of that deed the repealed enactment shall be deemed to remain in full force.

289.—(1.) The offices existing at the commencement of this Act in England, Scotland, and Ireland for registration of joint stock companies shall be continued as if they had been established under this Act.

2.) Registers of companies kept in any such existing offices shall respectively be deemed part of the registers of companies to be kept under this Act.

(3.) The existing registrars, assistant registrars, officers, clerks, and servants in those offices shall during the pleasure of the Board of Trade hold the offices and receive the salaries hitherto held and received by them, but subject to any regulations of the Board of Trade with regard to the execution of their duties.

4.) The existing official receivers and officers of the Board of Trade appointed for the execution of the Companies (Winding Up) Act, 1890, shall during the pleasure of the Board of Trade hold the offices and receive the salaries or remuneration hitherto held and received by them.

5.) Persons, other than officers of the Board of Trade, performing any duties under the Companies (Winding Up) Act, 1890, and receiving therefor any salary or remuneration by the direction of the Lord Chancellor, shall during his pleasure receive the salaries or remuneration hitherto received by them.

(6.) The Companies Liquidation Account under this Act shall be deemed to be in continuation of the Companies Liquidation Account under the Companies (Winding Up) Act, 1890.

290. Until revoked and except as varied under the powers of this Act, the general rules and orders, and scales of fees, under the Companies (Winding Up) Act, 1890, in force at the commencement of this Act, and the rules of Court in force at the commencement of this Act in England, Scotland, and Ireland respectively with respect to the procedure for reduction of capital, and to winding up companies, and the practice and procedure for winding up companies in England, Scotland, and Ireland respectively in force at the commencement of this Act, shall, so far as they are not inconsistent with this Act, continue in force.

291. Where any enactment repealed by this Act is mentioned or referred to in any document, that document shall be read as if the corresponding provision of any of this Act were therein mentioned or referred to and substituted for the repealed enactment.

292. Nothing in this Act shall affect the power of a company to alter its memorandum under the provisions of section three of the Mortgage Debenture Act, 1865.

293. Nothing in this Act shall affect the provisions of the Life Assurance Companies Acts, 1870 to 1872, except that references in those Acts to any provision of the Companies Act, 1862, shall be read as references to the corresponding provision of this Act.

294. Nothing in this Act shall affect the provisions of section five of the Trade Union Act, 1871, except that the reference in that section to the Companies Acts, 1862 and 1867, shall be read as a reference to this Act.

52 & 53 Vict.
c. 63.

Saving of
pending pro-
ceedings for
winding up.

S. 208 of 1862.
Saving of
deeds.

S. 174 of 1862.
Former regis-
tration officers,
registrars,
official
receivers, &c.
continued.

Saving for
existing rules
of procedure,
&c.

Substitution of
provisions of
this Act for
provisions of
repealed Acts.
Saving for
24 & 25 Vict.
c. 78, s. 3

Saving for Life
Assurance Com-
panies Acts.
31 & 34 Vict.
c. 61.
34 & 35 Vict.
c. 59.
35 & 36 Vict.
c. 41.

Saving for
34 & 35 Vict.
c. 31, s. 5.

Short title.	295. This Act may be cited as the Companies (Consolidation) Act, 1908.
Commencement of Act	296. This Act shall come into operation on the first day of April nineteen hundred and nine.

SCHEDULES.

FIRST SCHEDULE.

TABLE A.

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES.

Preliminary.

1. In these regulations, unless the context otherwise requires, expressions defined in the Companies (Consolidation) Act, 1908, or any statutory modification thereof in force at the date at which these regulations become binding on the company, shall have the meanings so defined; and words importing the singular shall include the plural, and *vice versa*, and words importing the masculine gender shall include females, and words importing persons shall include bodies corporate.

Business.

2. The directors shall have regard to the restrictions on the commencement of business imposed by section eighty-seven of the Companies (Consolidation) Act, 1908, if, and so far as, those restrictions are binding upon the company.

Shares.

3. Subject to the provisions, if any, in that behalf of the memorandum of association of the company, and without prejudice to any special rights previously conferred on the holders of existing shares in the company, any share in the company may be issued with such preferred, deferred, or other special rights, or such restrictions, whether in regard to dividend, voting, return of share capital, or otherwise, as the company may from time to time by special resolution determine.

4. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall *mutatis mutandis* apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class.

5. No share shall be offered to the public for subscription except upon the terms that the amount payable on application shall be at least five per cent. of the nominal amount of the share; and the directors shall, as regards any allotment of shares, duly comply with such of the provisions of sections eighty-five and eighty-eight of the Companies (Consolidation) Act, 1908, as may be applicable thereto.

6. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the common seal of the company specifying the share or shares held by him and the amount paid up thereon, provided that in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint holders shall be sufficient delivery to all.

See sections
10, 11, 67,
263, 285, and
p. 789

7. If a share certificate is defaced, lost, or destroyed, it may be renewed on payment of such fee, if any, not exceeding one shilling, and on such terms, if any, as to evidence and indemnity as the directors think fit.

8. No part of the funds of the company shall be employed in the purchase of, or in loans upon the security of, the company's shares.

Lien.

9. The company shall have a lien on every share not being a fully-paid share for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully-paid shares) standing registered in the name of a single person, for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause. The company's lien, if any, on a share shall extend to all dividends payable thereon.

10. The company may sell, in such manner as the directors think fit, any shares on which the company has a lien, but no sale shall be made unless some sum in respect of which the lien exists, is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled by reason of his death or bankruptcy to the share.

11. The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares) prior to the sale, be paid to the person entitled to the shares at the date of the sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

Calls on Shares.

12. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payment) pay to the company at the time or times so specified the amount called on his shares.

13. The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five pounds per cent. per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

15. The provisions of these regulations as to payment of interest shall apply in the case of nonpayment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the sum had become payable by virtue of a call duly made and notified.

16. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

17. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares held by him; and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the member paying the sum in advance and the directors.

Transfer and Transmission of Shares.

18. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain

a holder of the share until the name of the transferee is entered in the register of members in respect thereof.

19. Shares in the company shall be transferred in the following form, or in any usual or common form which the directors shall approve:

I, A. B., of _____, in consideration of the sum of £ _____ paid to me by C. D. of _____ hereinafter called "the said transferee" do hereby transfer to the said transferee the share [or shares] numbered _____ in the undertaking called the _____ Company Limited, to hold unto the said transferee, his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the execution hereof; and I, the said transferee, do hereby agree to take the said share [or shares] subject to the conditions aforesaid. As witness our hands, the _____ day of _____

Witness to the signatures of, &c.

20. The directors may decline to register any transfer of shares, not being fully-paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognize any instrument of transfer unless

a a fee not exceeding two shillings and sixpence is paid to the company in respect thereof, and

b the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

21. The executors or administrators of a deceased sole holder of a share shall be the only persons recognized by the company as having any title to his share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognized by the company as having any title to the share.

22. Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share, or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy.

23. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

Forfeiture of Shares.

24. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

25. The notice shall name a further day (not earlier than the expiration of fourteen days from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that in the event of non-payment at or before the time appointed the shares in respect of which the call was made will be liable to be forfeited.

If the requirements of any such notice as aforesaid are not complied with, then in respect of which the notice has been given may at any time thereafter, if the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

27. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

28. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company receive payment in full of the nominal amount of the shares.

29. A statutory declaration in writing, that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share, and that declaration, and the receipt of the company for the consideration, if any, given for the share on the sale or disposition thereof shall constitute a good title to the share, and the person to whom the share is sold or disposed of shall be registered as the holder of the share and shall not be bound to see to the application of the purchase money, if any, nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

30. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

Conversion of Shares into Stock.

31. The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock, and may with the like sanction reconvert any stock into paid-up shares of any denomination.

32. The holders of stock may transfer the same, or any part thereof, in the same manner, and subject to the same regulations, as, and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit: but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose.

33. The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges, and advantages as regards dividends, voting at meetings of the company, and other matters as if they held the shares from which the stock arose, but no such privilege or advantage except participation in the dividends and profits of the company shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

34. Such of the regulations of the company (other than those relating to share warrants) as are applicable to paid-up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stock-holder."

Share Warrants.

35. The company may issue share warrants, and accordingly the directors may in their discretion, with respect to any share which is fully paid up, on application in writing signed by the person registered as holder of the share, and authenticated by such evidence, if any, as the directors may from time to time require as to the identity of the person signing the request, and on receiving the certificate, if any, of the share, and the amount of the stamp duty on the warrant and such fee as the directors may from time to time require, issue under the company's seal a warrant, duly stamped, stating that the bearer of the warrant is entitled to the shares therein specified, and may provide by coupons, or otherwise for the payment of dividends, or other moneys, on the shares included in the warrant.

36. A share warrant shall entitle the bearer to the shares included in it, and the shares shall be transferred by the delivery of the share warrant, and the provisions of the regulations of the company with respect to transfer and transmission of shares shall not apply thereto.

37. The bearer of a share warrant shall, on surrender of the warrant to the company for cancellation, and on payment of such sum as the directors may from time to time prescribe, be entitled to have his name entered as a member in the register of members in respect of the shares included in the warrant.

38. The bearer of a share warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the expiration of two clear days from the time of deposit, as if his name were inserted in the register of members as the holder of the shares included in the deposited warrant. Not more than one person shall be recognized as depositor of the share warrant. The company shall, on two days' written notice, return the deposited share warrant to the depositor.

39. Subject as herein otherwise expressly provided, no person shall, as bearer of a share warrant, sign a requisition for calling a meeting of the company, or attend, or vote, or exercise any other privilege of a member at a meeting of the company, or be entitled to receive any notices from the company; but the bearer of a share warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the register of members as the holder of the shares included in the warrant, and he shall be a member of the company.

40. The directors may from time to time make rules as to the terms on which, if they shall think fit, a new share warrant or coupon may be issued by way of renewal in case of detachment, loss, or destruction.

Alteration of Capital.

41. The directors may, with the sanction of an extraordinary resolution of the company, increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

42. Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and, after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article.

43. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture, and otherwise as the shares in the original share capital.

44. The company may, by special resolution—

- a) Consolidate and divide its share capital into shares of larger amount than its existing shares;
- b) By subdivision of its existing shares, or any of them, divide the whole, or any part, of its share capital into shares of smaller amount than is fixed by the memorandum of association, subject, nevertheless, to the provisions of paragraph (d), of sub-section (1) of section forty-one of the Companies (Consolidation) Act, 1908;
- c) Cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person;
- d) Reduce its share capital in any manner and with, and subject to, any incident authorized, and consent required, by law.

General Meetings.

45. The statutory general meeting of the company shall be held within the period required by section sixty-five of the Companies (Consolidation) Act, 1908.

46. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's

incorporation occurs, and at such place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the directors.

47. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

48. The directors may, whenever they think fit, convene an extraordinary general meeting, and extraordinary general meetings shall also be convened on such requisition, or, in default, may be convened by such requisitionists, as provided by section sixty-six of the Companies (Consolidation) Act, 1908. If at any time there are not within the United Kingdom sufficient directors capable of acting to form a quorum, any director or any two members of the company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors.

Proceedings at General Meeting.

49. Seven days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given, specifying the place, the day, and the hour of meeting and, in case of special business, the general nature of that business shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the regulations of the company, entitled to receive such notices from the company; but the non-receipt of the notice by any member shall not invalidate the proceedings at any general meeting.

50. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, the consideration of the accounts, balance sheets, and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

51. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, three members personally present shall be a quorum.

52. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the members present shall be a quorum.

53. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

54. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

55. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

56. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is demanded before or on the declaration of the result of the show of hands demanded by at least three members, and, unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution.

57. If a poll is duly demanded it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

58. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote.

59. A poll demanded on the election of a chairman, or on a question of adjournment, shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

Votes of Members.

60. On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder.

61. In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

62. A member of unsound mind, or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee, *curator bonis*, or other person in the nature of a committee or *curator bonis* appointed by that Court, and any such committee, *curator bonis*, or other person may, on a poll, vote by proxy.

63. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

64. On a poll votes may be given either personally or by proxy.

65. The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorized in writing, or, if the appointor is a corporation, either under the common seal, or under the hand of an officer or attorney so authorized. No person shall act as a proxy unless either he is entitled on his own behalf to be present and vote at the meeting at which he acts as proxy, or he has been appointed to act at that meeting as proxy for a corporation.

66. The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed or a notarially certified copy of that power or authority shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

67. An instrument appointing a proxy may be in the following form, or in any other form which the directors shall approve:—

“ — Company, Limited.

“ I, —, of —, in the county of —, being a member of the — Company, Limited, hereby appoint —, of —, as my proxy, to vote for me and on my behalf at the [ordinary or extraordinary, as the case may be] general meeting of the company to be held on the — day of —, and at any adjournment thereof.

“ Signed this — day of —.”

Directors.

68. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association.

69. The remuneration of the directors shall from time to time be determined by the company in general meeting.

70. The qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with the provisions of section seventy-three of the Companies (Consolidation) Act, 1908.

Powers and Duties of Directors.

71. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by the Companies (Consolidation) Act, 1908, reserved to the company in general meeting.

tion) Act, 1908, or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

72. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another), as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors; but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

73. The amount of the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

74. The directors shall duly comply with the provisions of the Companies (Consolidation) Act, 1908, or any statutory modification thereof for the time being in force, and in particular with the provisions relating to the registration of the particulars of mortgages and charges affecting the property of the company, or created by it, and to keeping a register of the directors, and to sending to the registrar of companies an annual list of members, and a summary of particulars relating thereto, and notice of any consolidation or increase of share capital, or conversion of shares into stock, and copies of special resolutions, and a copy of the register of directors and notifications of any changes therein.

75. The directors shall cause minutes to be made in books provided for the purpose—

- (a) of all appointments of officers made by the directors;
 - (b) of the names of the directors present at each meeting of the directors and of any committee of the directors;
 - (c) of all resolutions and proceedings at all meetings of the company, and of the directors, and of committees of directors;
- and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

The Seal.

76. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose; and those two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

Disqualifications of Directors.

77. The office of director shall be vacated, if the director—

- (a) ceases to be a director by virtue of section seventy-three of the Companies (Consolidation) Act, 1908; or
- (b) holds any other office of profit under the company except that of managing director or manager; or
- (c) becomes bankrupt; or
- (d) is found lunatic or becomes of unsound mind; or
- (e) is concerned or participates in the profits of any contract with the company;

Provided, however, that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with or done any work for the company of which he is director; but a director shall not vote in respect of any such contract or work, and if he does so vote his vote shall not be counted.

Rotation of Directors.

78. At the first ordinary meeting of the company the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest to one-third, shall retire from office.

79. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

80. A retiring director shall be eligible for re-election.

81. The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto.

82. If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall be deemed to have been re-elected at the adjourned meeting.

83. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

84. Any casual vacancy occurring in the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

85. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director.

86. The company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

Proceedings of Directors.

87. The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors.

88. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall when the number of directors exceeds three be three.

89. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose.

90. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but, if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

91. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on them by the directors.

92. A committee may elect a chairman of their meetings, if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

93. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes the chairman shall have a second or casting vote.

94. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Dividends and Reserve.

95. The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors.

96. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

97. No dividend shall be paid otherwise than out of profits.

98. Subject to the rights of persons, if any, entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid up on any of the shares in the company dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the share.

99. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

100. If several persons are registered as joint holders of any share any one of them may give effectual receipts for any dividend payable on the share.

101. Notice of any dividend that may have been declared shall be given in manner hereinafter mentioned to the persons entitled to share therein.

102. No dividend shall bear interest against the company.

Accounts.

103. The directors shall cause true accounts to be kept

Of the sums of money received and expended by the company and the matter in respect of which such receipt and expenditure takes place, and

Of the assets and liabilities of the company.

104. The books of account shall be kept at the registered office of the company, or at such other place or places as the directors think fit, and shall always be open to the inspection of the directors.

105. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by statute or authorized by the directors or by the company in general meeting.

106. Once at least in every year the directors shall lay before the company in general meeting a profit and loss account for the period since the preceding account or (in the case of the first account) since the incorporation of the company, made up to a date not more than six months before such meeting.

107. A balance-sheet shall be made out in every year and laid before the company in general meeting made up to a date not more than six months before such

meeting. The balance-sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount which they recommend to be paid by way of dividend, and the amount, if any, which they propose to carry to a reserve fund.

108. A copy of the balance-sheet and report shall, seven days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereinafter.

Audit.

109. Auditors shall be appointed and their duties regulated in accordance with sections one hundred and twelve and one hundred and thirteen of the Companies (Consolidation) Act, 1908, or any statutory modification thereof for the time being in force.

Notices.

110. A notice may be given by the company to any member either personally or by sending it by post to him to his registered address, or (if he has no registered address in the United Kingdom) to the address, if any, within the United Kingdom supplied by him to the company for the giving of notices to him.

Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

111. If a member has no registered address in the United Kingdom and has not supplied to the company an address within the United Kingdom for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company, shall be deemed to be duly given to him on the day on which the advertisement appears.

112. A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder named first in the register in respect of the share.

113. A notice may be given by the company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or trustee of the bankrupt, or by any like description, at the address, if any, in the United Kingdom supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred.

114. Notice of every general meeting shall be given in some manner hereinbefore authorized to (a) every member of the company (including bearers of share warrants) except those members who (having no registered address within the United Kingdom) have not supplied to the company an address within the United Kingdom for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or bankruptcy of a member, who, but for his death or bankruptcy, would be entitled to receive notice of the meeting. No other persons shall be entitled to receive notices of general meetings.

See sections
214, 259.

TABLE B.

TABLE OF FEES to be paid to the REGISTRAR OF COMPANIES.

I By a Company having a Share Capital.

For registration of a company whose nominal share capital does not exceed 2,000 <i>l.</i>	£ s. d. 2 0 0
For registration of a company whose nominal share capital exceeds 2,000 <i>l.</i> , the following fees, regulated according to the amount of nominal share capital (that is to say);	£ s. d.
For every 1,000 <i>l.</i> of nominal share capital, or part of 1,000 <i>l.</i> , up to 5,000 <i>l.</i>	1 0 0

For every 1,000*l.* of nominal share capital, or part of £ *s.* *d.* £ *s.* *d.*
1,000*l.*, after the first 5,000*l.*, up to 100,000*l.* 0 5 0

For every 1,000*l.* of nominal share capital, or part of
1,000*l.*, after the first 100,000*l.* 0 1 0

For registration of any increase of share capital made after the first registration of the company, the same fees per 1,000*l.*, or part of a 1,000*l.*, as would have been payable if the increased share capital had formed part of the original share capital at the time of registration:

Provided that no company shall be liable to pay in respect of nominal share capital, on registration or afterwards, any greater amount of fees than 50*l.*, taking into account in the case of fees payable on an increase of share capital after registration the fees paid on registration.

For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.

For registering any document by this Act required or authorized to be registered, other than the memorandum or the abstract required to be filed with the registrar by a receiver or manager or the statement required to be sent to the registrar by the liquidator in a winding-up in England 0 5 0

For making a record of any fact by this Act required or authorized to be recorded by the registrar 0 5 0

II.—By a Company not having a Share Capital.

For registration of a company whose number of members, as stated in the articles, does not exceed 20 £ *s.* *d.*
2 0 0

For registration of a company whose number of members, as stated in the articles, exceeds 20, but does not exceed 100 5 0 0

For registration of a company whose number of members, as stated in the articles, exceeds 100, but is not stated to be unlimited, the above fee of 5*l.*, with an additional 5*s.* for every 50 members, or less number than 50 members after the first 100.

For registration of a company in which the number of members is stated in the articles to be unlimited 20 0 0

For registration of any increase on the number of members made after the registration of the company in respect of every 50 members, or less than 50 members, of that increase 0 5 0

Provided that no company shall be liable to pay on the whole a greater fee than 20*l.* in respect of its number of members, taking into account the fee paid on the first registration of the company.

For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.

For registering any document by this Act required or authorized to be registered, other than the memorandum or the abstract required to be filed with the registrar by a receiver or manager or the statement required to be sent to the registrar by the liquidator in a winding-up in England 0 5 0

For making a record of any fact by this Act required or authorized to be recorded by the registrar 0 5 0

See section
104

FORM C.

FORM OF STATEMENT to be published by BANKING AND INSURANCE COMPANIES,
and DEPOSIT, PROVIDENT, or BENEFIT SOCIETIES.

* The share capital of the company is —, divided into — shares of — each.
The number of shares issued is —.
Calls to the amount of — pounds per share have been made, under which the
sum of — pounds has been received.

The liabilities of the company on the first day of January (or July) were:

Debts owing to sundry persons by the company.

On judgment, —/.

On specialty, —/.

On notes or bills, —/.

On simple contracts, —/.

On estimated liabilities, —/.

The assets of the company on that day were:

Government securities (*stating them*).

Bills of exchange and promissory notes, —/.

Cash at the bankers, —/.

Other securities, —/.

* If the company has no share capital, the portion of the statement relating to capital and shares must be omitted.

See section
92, and
pp. 3, 262--
265, 279

SECOND SCHEDULE.

THE COMPANIES CONSOLIDATION ACT, 1908.

STATEMENT IN LIEU OF PROSPECTUS

filed by

Lawlers

pursuant to section eighty-two of the Companies Consolidation Act, 1908.

Presented for filing by

THE COMPANIES CONSOLIDATION ACT, 1908.

—, Limited.

STATEMENT IN LIEU OF PROSPECTUS.

The nominal share capital of the company is £—.

Divided into Shares of £— each.

.....
.....

Names, descriptions, and addresses of directors
or proposed directors.

Minimum subscription (if any) fixed by the
memorandum or articles of association on
which the company may proceed to allotment

Number and amount of shares and debentures
agreed to be issued as fully or partly paid-
up otherwise than in cash.

The consideration for the intended issue of
those shares and debentures.

1. shares of £— fully paid
2. shares upon which £—
per share credited as paid
3. debenture — £
4. Consideration.

Names and addresses of (a) vendors of property purchased or acquired, or proposed to be (b) purchased or acquired by the company.

Amount (in cash, shares, or debentures) payable to each separate vendor.

Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill.

Total purchase price .. £—

Cash £—

Shares £—

Debentures £—

Goodwill £—

(a) For definition of vendor, see Section 81 (2) of the Companies Consolidation Act, 1908.
(b) See Section 81 (3) of the Companies Consolidation Act, 1908.

Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company, or

Rate of the commission

Amount paid.
.. payable.

Rate per cent.

Estimated amount of preliminary expenses ..

£ ..

Amount paid or intended to be paid to any promoter.

Consideration for the payment.

Name of promoter.

Amount £—.

Consideration:—

Dates of, and parties to, every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than two years before the filing of this statement).

Time and place at which the contracts or copies thereof may be inspected.

Names and addresses of the auditors of the company (if any).

Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.

Whether the articles contain any provisions precluding holders of shares or debentures receiving and inspecting balance sheets or reports of the auditors or other reports.

Nature of the provisions.

Signatures of the persons above-named as directors or proposed directors, or of their agents authorized in writing.

—
—
—

THIRD SCHEDULE.

FORM A.

Section 118.

MEMORANDUM of ASSOCIATION of a Company limited by Shares.

1st. The name of the company is "The Eastern Steam Packet Company, Limited."

2nd. The registered office of the company will be situate in England.

3rd. The objects for which the company is established are, "the conveyance of passengers and goods in ships and boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th. The liability of the members is limited.

5th. The share capital of the company is two hundred thousand pounds, divided into one thousand shares of two hundred pounds each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.

Number of Shares
taken by
each Subscriber.

" 1. John Jones, of —, in the county of —, merchant..	200
" 2. John Smith, of —, in the county of —	25
" 3. Thomas Green, of —, in the county of —	30
" 4. John Thompson, of —, in the county of —	40
" 5. Caleb White, of —, in the county of —	15
" 6. Andrew Brown, of —, in the county of —	5
" 7. Caesar White, of —, in the county of —	10
Total shares taken	325

Dated the — day of — 19—.

Witness to the above signatures,

A. B., No. 13, Hute Street, Clerkenwell, London.

FORM B.

MEMORANDUM and ARTICLES of ASSOCIATION of a Company limited by Guarantee, and not having a Share Capital.

Memorandum of Association.

1st. The name of the company is "The Mutual London Marine Association, Limited."

2nd. The registered office of the company will be situate in England.

3rd. The objects for which the company is established are, "the mutual insurance of ships belonging to members of the company, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th. The liability of the members is limited.

5th. Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and the costs, charges, and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding ten pounds.

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses, and Descriptions of Subscribers.

- " 1. John Jones, of —, in the county of —, merchant.
- " 2. John Smith, of —, in the county of —.
- " 3. Thomas Green, of —, in the county of —.
- " 4. John Thompson, of —, in the county of —.
- " 5. Caleb White, of —, in the county of —.
- " 6. Andrew Brown, of —, in the county of —.
- " 7. Caesar White, of —, in the county of —.

Dated the — day of — 19—.

Witness to the above signatures,

A. B., No. 13, Hute Street, Clerkenwell, London.

ARTICLES OF ASSOCIATION to accompany preceding MEMORANDUM OF ASSOCIATION.

Number of Members.

1. The company, for the purpose of registration, is declared to consist of five hundred members.
2. The directors hereinafter mentioned may, whenever the business of the association requires it, register an increase of members.

Definition of Members.

3. Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

General Meetings.

4. The first general meeting shall be held at such time, not being less than one month nor more than three months after the incorporation of the company, and at such place, as the directors may determine.

5. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the directors.

6. The above-mentioned general meetings shall be called ordinary meetings: all other general meetings shall be called extraordinary.

7. The directors may, whenever they think fit, and shall, on a requisition made in writing by any five or more members, convene an extraordinary general meeting.

8. Any requisition made by the members must state the object of the meeting proposed to be called, and must be signed by the requisitionists and deposited at the registered office of the company.

9. On receipt of the requisition the directors shall forthwith proceed to convene a general meeting: if they do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists or any other five members, may themselves convene a meeting.

Proceedings at General Meetings.

10. Seven days' notice at the least, specifying the place, the day, and the hour of meeting, and in case of special business the general nature of the business, shall be given to the members in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting; but the non-receipt of such a notice by any member shall not invalidate the proceedings at any general meeting.

11. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance sheets, and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

12. No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of the business. The quorum shall be ascertained as follows (that is to say), if the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed thirty.

13. If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if convened on the requisition of the members, shall be dissolved; in any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned *ànc die*.

14. The chairman (if any) of the directors shall preside as chairman at every general meeting of the company.

15. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of that meeting.

16. The chairman may, with the consent of the meeting, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

17. At any general meeting, unless a poll is demanded by at least three members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the resolution.

18. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

Votes of Members.

19. Every member shall have one vote and no more.

20. If any member is a lunatic or idiot he may vote by his committee, *curator bonis*, or other legal curator.

21. No member shall be entitled to vote at any meeting unless all moneys due from him to the company have been paid.

22. On a poll votes may be given either personally or by proxy. A proxy shall be appointed in writing under the hand of the appointor, or if such appointor is a corporation, under its common seal.

23. No person shall act as a proxy unless he is a member, or unless he is appointed to act at the meeting as proxy for a corporation.

The instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

24. Any instrument appointing a proxy shall be in the following form:—

— Company, Limited.

—, of —, in the county of —, being a member of the — Company, Limited, hereby appoint —, of —, as my proxy, to vote for me and on my behalf at the [ordinary or extraordinary, as the case may be] general meeting of the company, to be held on the — day of —, and at any adjournment thereof.

Signed this — day of —.

Directors.

25. The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.

26. Until directors are appointed the subscribers of the memorandum of association shall for all the purposes of the Companies (Consolidation) Act, 1908, be deemed to be directors.

Powers of Directors.

27. The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not by the Companies (Consolidation) Act, 1908, or by any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

Election of Directors.

28. The directors shall be elected annually by the company in general meeting.

Business of Company.

[Here insert Rules as to mode in which business of Insurance is to be conducted.]

Audit.

29. Auditors shall be appointed and their duties regulated in accordance with sections one hundred and twelve and one hundred and thirteen of the Companies (Consolidation) Act, 1908, or any statutory modification thereof for the time being in force, and for this purpose the said sections shall have effect as if the word "members" were substituted for "shareholders," and as if "first general meeting" were substituted for "statutory meeting."

Notices.

30. A notice may be given by the company to any member either personally, or by sending it by post to him to his registered address.

31. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Names, Addresses, and Descriptions of Subscribers.

- 1. John Jones, of —, in the county of —, merchant
- 2. John Smith, of —, in the county of —,
- 3. Thomas Green, of —, in the county of —,
- 4. John Thompson, of —, in the county of —,
- 5. Caleb White, of —, in the county of —,
- 6. Andrew Brown, of —, in the county of —,
- 7. Caesar White, of —, in the county of —,

Dated the — day of —, 19—.

Witness to the above signatures,

A. B., No. 13, Hute Street, Clerkenwell, London.

FORM C.

MEMORANDUM and ARTICLES of Association of a Company limited by Guarantee and having a Share Capital.

Memorandum of Association.

- 1st. The name of the company is "The Highland Hotel Company, Limited."
- 2nd. The registered office of the company will be situate in Scotland.
- 3rd. The objects for which the company is established are "the facilitating travelling in the Highlands of Scotland by providing hotels and conveyances by sea and by land for the accommodation of travellers, and the doing all such other things as are incidental or conducive to the attainment of the above object."
- 4th. The liability of the members is limited.
- 5th. Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company, contracted

before he ceases to be a member, and the costs, charges, and expenses of winding-up the same and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding twenty pounds.

6th. The share capital of the company shall consist of five hundred thousand pounds, divided into five thousand shares of one hundred pounds each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Description of Subscribers.	Number of Shares taken by each Subscriber.
" 1. John Jones, of —, in the county of —	200
" 2. John Smith, of —, in the county of —	25
" 3. Thomas Green, of —, in the county of —	30
" 4. John Thompson, of —, in the county of —	40
" 5. Caleb White, of —, in the county of —	15
" 6. Andrew Brown, of —, in the county of —	5
" 7. Caesar White, of —, in the county of —	10
Total shares taken	325

Dated the — day of —, 19—.

Witness to the above signatures,

A. B., No. 13, Hute Street, Clerkenwell, London.

Articles of Association to accompany preceding Memorandum of Association.

1. The directors may, with the sanction of the company in general meeting, reduce the amount of shares in the company.

2. The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.

3. All the articles of Table A. of the Companies (Consolidation) Act, 1908, shall be deemed to be incorporated with these articles, and to apply to the company.

Names, Addresses, and Description of Subscribers.

- " 1. John Jones, of —, in the county of —, merchant.
- " 2. John Smith, of —, in the county of —.
- " 3. Thomas Green, of —, in the county of —.
- " 4. John Thompson, of —, in the county of —.
- " 5. Caleb White, of —, in the county of —.
- " 6. Andrew Brown, of —, in the county of —.
- " 7. Caesar White, of —, in the county of —.

Dated the — day of —, 19—.

Witness to the above signatures,

A. B., No. 13, Hute Street, Clerkenwell, London.

FORM D.

MEMORANDUM and ARTICLES of ASSOCIATION of an unlimited Company having a Share Capital.

Memorandum of Association.

- 1st. The name of the company is "The Patent Stereotype Company."
- 2nd. The registered office of the company will be situate in England.

3rd. The objects for which the company is established are "the working of a patent method of founding and casting stereotype plates, of which method John Smith, of London, is the sole patentee."

We, the several persons whose names are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Description of Subscribers.	Number of Shares taken by each Subscriber.
" 1. John Jones, of —, in the county of —	3
" 2. John Smith, of —, in the county of —	2
" 3. Thomas Green, of —, in the county of —	1
" 4. John Thompson, of —, in the county of —	2
" 5. Caleb White, of —, in the county of —	2
" 6. Andrew Brown, of —, in the county of —	1
" 7. Abel Brown, of —, in the county of —	1
Total shares taken	12

Dated the — day of —, 19—.

Witness to the above signatures.

A. B., No. 20, Bond Street, London.

Articles of Association to accompany the preceding Memorandum of Association.

1. The share capital of the company is two thousand pounds, divided into twenty shares of one hundred pounds each.
2. All the articles of Table A. of the Companies (Consolidation) Act, 1908, shall be deemed to be incorporated with these articles, and to apply to the company.

Names, Addresses, and Description of Subscribers.

- " 1. John Jones, of —, in the county of —, merchant.
- " 2. John Smith, of —, in the county of —.
- " 3. Thomas Green, of —, in the county of —.
- " 4. John Thompson, of —, in the county of —.
- " 5. Caleb White, of —, in the county of —.
- " 6. Andrew Brown, of —, in the county of —.
- " 7. Abel Brown, of —, in the county of —.

Dated the — day of —, 19—.

Witness to the above signatures.

A. B., No. 20, Bond Street, London.

Section 26.

FORM E. as required by Part II. of the Act.

SUMMARY of SHARE CAPITAL and SHARES of the — COMPANY, LIMITED, made up to the — day of —, 19— (being the fourteenth day after the date of the first ordinary general meeting in 19—).

Nominal share capital £— divided into (a) $\left\{ \begin{array}{l} \text{shares of £— each.} \\ \text{shares of £— each.} \end{array} \right.$

Total number of shares taken up (a) to the — day of —, 19— (which number must agree with the total shown in the list as held by existing members) —.

Number of shares issued subject to payment wholly in cash —.

Number of shares issued as fully paid up otherwise than in cash —.

Number of shares issued as partly paid up to the extent of — per share otherwise than in cash —.

(b) There has been called up on each of — shares £—.

There has been called up on each of — shares £—.

(b) There has been called up on each of — shares £—.

(c) Total amount of calls received, including payments on application and allotment £—.

Total amount (if any) agreed to be considered as paid on — shares which have been issued as fully paid up otherwise than in cash £—.

Total amount (if any) agreed to be considered as paid on — shares which have been issued as partly paid up to the extent of — per share £—.

Total amount of calls unpaid £—.

Total amount (if any) of sums paid by way of commission in respect of shares or debentures or allowed by way of discount since date of last summary £—.

Total amount (if any) paid on d) — shares forfeited £—.

Total amount of shares and stock for which share warrants are outstanding £—.

Total amount of share warrants issued and surrendered respectively since date of last summary £—.

Number of shares or amount of stock comprised in each share warrant —.

Total amount of debt due from the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar of companies, or which would require registration if created after the first day of July nineteen hundred and eight £—.

STATEMENT in the form of a balance sheet made up to the — day of —, 19—, containing the particulars of the capital, liabilities, and assets of the company.

(a) When there are shares of different kinds or amounts (e.g., Preference and Ordinary, or 10% or 5%) state the numbers and nominal values separately.

(b) Where various amounts have been called or there are shares of different kinds state them separately.

(c) Include what has been received on forfeited as well as on existing shares.

(d) State the aggregate number of shares forfeited (if any).

The Return must be signed at the end by the manager or secretary of the company.

Presented for filing by —.

COMPANIES (CONSOLIDATION) ACT, 1908.

Act of 1908 1621

List of persons holding shares in the — Company, Limited, on the — day of —, 19—, and of persons who have held shares therein at any time since the date of the last return, showing their Names and Addresses, and an Account of the Shares so held.

NAMES, ADDRESSES, AND OCCUPATIONS.						ACCOUNT OF SHARES.				
Folio in Register Ledger containing particulars.	Sur-name.	Chri- stian Name.	Ad- dress.	Occu- pation.	Num- ber of Shares held by existing Mem- bers at date of Re- turn.	Particulars of Shares transferred since the date of the last Return by Persons who are still Members.		Particulars of Shares transferred since the date of the last Return by Persons who have ceased to be Members.		Re- marks.
						Num- ber. +	Date of Registra- tion of Transfer.	Num- ber +	Date of Registra- tion of Transf.	

* The aggregate number of shares held, and not the distinctive numbers, must be stated, and the column must be set up throughout so as to make one total to agree with that stated in the summary to have been made up.

+ When the shares are of different classes these columns may be subdivided so that the number of each class transferred may be shown separately.

‡ The date of each transfer should be given as well as the number of shares transferred on each transfer. The particulars should be placed opposite the name of the transferor and not opposite the name of the transferee, but the name of the transferee may be inserted in the "Remarks" column immediately opposite the particulars of each transfer.

NAMES and Addresses of the persons who are the Directors of the — Limited on the — day of — 19—.

Names.

Addresses.

NOTE. Banking companies must add a list of all their places of business.

Signature —.

(State whether manager or secretary) —.

FORM F.

LICENCE to hold LANDS.

Section 20.

The Board of Trade hereby license the — to hold the lands hereunder described (insert description of lands) [or to hold lands not exceeding in the whole — acres].

The conditions of this licence are [insert conditions, if any].

Section 181.

FOURTH SCHEDULE.

PART I.

ORDERS PRONOUNCED IN VACATION IN SCOTLAND WHICH ARE TO BE FINAL.

Orders:—

- s. 169. As to time for proving claims.
- s. 174. As to the attendance of, and production of documents by, persons indebted to, or having property of, or information as to the affairs or property of, a company.
- s. 219. As to meetings for ascertaining wishes of creditors or contributories.
- s. 120. As to summoning meetings of creditors or contributories where a compromise is proposed.
- s. 227. As to the examination of witnesses in regard to the property or affairs of a company.

PART II.

ORDERS PRONOUNCED IN VACATION IN SCOTLAND WHICH ARE TO TAKE EFFECT UNTIL RECLAIMING NOTE DISPOSED OF.

Orders:—

- ss. 140, 142, 144, 266, 270, 271. Restraining or permitting commencement or continuance of legal proceedings.
- ss. 149, 186, 202. Appointing an official liquidator to fill a vacancy, or appointing (except to fill a vacancy caused by the removal of a liquidator by the Court) a liquidator for a winding up voluntarily or under supervision.
- s. 151. Sanctioning the exercise of any power by an official liquidator other than the power to appoint a law agent or to sell property.
- s. 164. Requiring the delivery of property or documents to the official liquidator.
- s. 176. As to the arrest and detention of an absconding contributory and his property.
- s. 151, 155. Limiting the powers of provisional official liquidators.
- s. 199. For continuance of winding-up under supervision.

FIFTH SCHEDULE.

Section 281.

PROVISIONS REFERRED TO IN SECTION 281 OF THE ACT.

Provisions relating to—

- s. 17. The conclusiveness of certificates of incorporation ;
- s. 72. Restrictions on appointments or advertisement of directors
- s. 87. Restrictions on commencement of business ;
- s. 88. Returns as to allotments ;
- s. 65. Statutory meetings ;
- s. 26. The particulars as to directors and mortgage debt and the statement in the form of a balance sheet in the annual summary ;
- ss. 112, 113. The appointment and remuneration, and powers and duties, of auditors ;
- s. 82. Obligations of companies where no prospectus is issued ;
- s. 93. Registration of mortgages and charges in England and Ireland ;
- s. 95. Filing of accounts of receiver and manager ;
- s. 187. Notice by liquidator in voluntary winding-up of his appointment ;
- s. 188. Rights of creditors in a voluntary winding-up ;
- s. 274. Requirements as to companies established outside the United Kingdom ; and
- s. 283. Annual report by Board of Trade.

SIXTH SCHEDULE.

PART I.

ENACTMENTS REPEALED.

Section 296

Session and Chapter.	Short Title of Act.	Extent of Repeal.
25 & 26 Vict. c. 89.	The Companies Act, 1862..	The whole Act.
27 Vict. c. 19.	The Companies Seals Act, 1864.	The whole Act.
30 & 31 Vict. c. 131.	The Companies Act, 1867..	The whole Act.
32 & 33 Vict. c. 19.	The Stannaries Act, 1869..	Sections twenty-five, twenty-six, and thirty-four.
33 & 34 Vict. c. 104.	The Joint Stock Companies Arrangement Act, 1870.	The whole Act.
37 & 38 Vict. c. 94.	Conveyancing (Scotland) Act, 1874.	Section fifty-six.
38 & 39 Vict. c. 77.	The Supreme Court of Judicature Act, 1875.	Section ten, so far as relates to the winding up of companies.
40 & 41 Vict. c. 26.	The Companies Act, 1877..	The whole Act.
40 & 41 Vict. c. 57.	The Supreme Court of Judicature (Ireland) Act, 1877.	Sub-section (1) of section twenty-eight, so far as relates to the winding up of companies.
42 & 43 Vict. c. 76.	The Companies Act, 1879..	The whole Act.
43 Vict. c. 19.	The Companies Act, 1880..	The whole Act.
46 & 47 Vict. c. 30.	The Companies (Colonial Registers) Act, 1883.	The whole Act.
49 Vict. c. 23.	The Companies Act, 1886..	The whole Act.
50 & 51 Vict. c. 43.	The Stannaries Act, 1887..	Sections nine and ten : section thirteen from "Upon the winding up" to the end of the section (being paragraph (2)); and section thirty-one.
50 & 51 Vict. c. 47.	The Trustee Savings Banks Act, 1887.	Section three.
51 & 52 Vict. c. 62.	The Preferential Payments in Bankruptcy Act, 1888.	Sections one, two, and three, so far as they relate to companies.

Session and Chapter.	Short Title of Act.	Extent of Repeal.
52 & 53 Vict. c. 42.	The Revenue Act, 1889 ..	Section eighteen.
52 & 53 Vict. c. 60.	The Preferential Payments in Bankruptcy (Ireland) Act, 1889.	Section four, so far as relates to companies.
53 & 54 Vict. c. 62.	The Companies (Memorandum of Association) Act, 1890.	The whole Act.
53 & 54 Vict. c. 63.	The Companies (Winding-up) Act, 1890.	The whole Act.
53 & 54 Vict. c. 64.	The Directors Liability Act, 1890.	The whole Act.
56 & 57 Vict. c. 58.	The Companies (Winding-up) Act, 1893.	The whole Act.
60 & 61 Vict. c. 19.	The Preferential Payments in Bankruptcy Amendment Act, 1897.	The whole Act.
61 & 62 Vict. c. 26.	The Companies Act, 1898..	The whole Act.
63 & 64 Vict. c. 48.	The Companies Act, 1900..	The whole Act.
7 Edw. 7, c. 24.	The Limited Partnerships Act, 1907.	Sub-section (4) of section six.
7 Edw. 7, c. 50.	The Companies Act, 1907..	The whole Act.
8 Edw. 7, c. 12.	The Companies Act, 1908 ..	The whole Act.

PART II.

Section 286. AN ACT TO REGULATE JOINT STOCK BANKS IN ENGLAND (7 & 8 VICT. c. 113), s. 47.

Existing companies to have the powers of suing and being sued.

Every company of more than six persons established on the sixth day of May one thousand eight hundred and forty-four, for the purpose of carrying on the trade or business of bankers within the distance of sixty-five miles from London, and not within the provisions of the Act passed in the session of the seventh and eighth years of Queen Victoria, chapter one hundred and thirteen, intituled "An Act to regulate Joint Stock Banks in England," shall have the same powers and privileges of suing and being sued in the name of any one of the public officers of such co-partnership as the nominal plaintiff, petitioner, or defendant on behalf of such co-partnership; and all judgments, decrees, and orders made and obtained in any such suit may be enforced in like manner as is provided with respect to such companies carrying on the said trade or business at any place in England

exceeding the distance of sixty-five miles from London under the provisions of the Country Bankers Act, 1826, provided that such first-mentioned company shall make out and deliver from time to time to the Commissioners of Inland Revenue the several accounts or returns required by the last-mentioned Act, and all the provisions of the last-recited Act as to such accounts or returns shall be taken to apply to the accounts or returns so made out and delivered by such first-mentioned companies as if they had been originally included in the provisions of the last-recited Act.

THE JOINT STOCK BANKING COMPANIES ACT, 1857.

PART OF S. 12.

Notwithstanding anything contained in any Act, passed in the Session holden in the seventh and eighth years of Queen Victoria, chapter one hundred and thirteen, and intitled "An Act to regulate Joint Stock Banks in England," or in any other Act, it shall be lawful for any number of persons, not exceeding ten, to carry on in partnership the business of banking, in the same manner and upon the same conditions in all respects as any company of not more than six persons could before the passing of the Joint Stock Banking Companies Act, 1857, have carried on such business.

Power to form
banking part-
nerships of
ten persons.

NOTE ON CAPITAL DUTY.

By sect. 112 of the Stamp Act, 1891, a statement of the amount which is to form the nominal share capital of any company to be registered with limited liability shall be delivered to the registrar of joint stock companies in England, Scotland, or Ireland, and a statement of the amount of any increase of registered capital of any company now registered or to be registered with limited liability shall be delivered to the said registrar, and every such statement shall be charged with an *ad valorem* stamp duty of 2s. for every 100*l.*, and any fraction of 100*l.* over any multiple of 100*l.* of the amount of such capital or increase of capital as the case may be.

By the Finance Act, 1899 (62 & 63 Vict. c. 9), s. 7, 5*s.* is substituted for 2*s.* as the *ad valorem* stamp duty by sects. 112 and 113 of the Stamp Act, 1891.

Sect. 12 of the Finance Act, 1896 (59 & 60 Vict. c. 28), extends the provisions of sect. 113 of the Stamp Act, 1891, to certain other corporations and companies.

The Revenue Act, 1903 (3 Edw. 7. c. 46), s. 5, provides that the statement of the amount of any increase of registered capital of any company registered under the Companies Acts, 1862 to 1900, which is required by sect. 112 of the Stamp Act, 1891, to be delivered to the registrar of joint stock companies, shall be delivered, duly stamped with the duty charged thereon, within fourteen days after the passing of the resolution by which the registered capital is increased.

In *Att.-Gen. v. Anglo-Argentine Tramways Co., Ltd.*, [1909, 1 K. B. 677, the company had passed a special resolution authorizing the directors to increase the capital by a sum not exceeding 5,000,000*l.* by the creation and issue from time to time of new ordinary shares of 5*l.* each, and it was held that the whole of such 5,000,000*l.* was chargeable with *ad valorem* duty as an increase of registered capital, though in fact the directors had, pursuant to the resolution, only created and issued capital to the amount of 2,000,000*l.* The grounds on which the learned judge

(Channell, J.) arrived at this conclusion appear to be based on a complete misapprehension of the scheme of operation of the Companies Act, 1862, in regard to a company's capital. The learned judge appears to have thought that the capital of a company was not a mass of shares created and existing, but merely a figure denoting the maximum beyond which the company might not go. It is submitted that this is not the correct view, and that a company's capital is not increased until it is brought into actual existence, and that a mere authority to increase does not operate as an increase until that authority is exercised. See *Campbell's Case*, 9 Ch. 1.

THE ASSURANCE COMPANIES ACT, 1909.

9 EDW. 7, c. 49.

An Act to consolidate and amend and extend to other Companies carrying on Assurance or Insurance business the Law relating to Life Assurance Companies and for other purposes connected therewith.

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Companies to which Act applies.

S. 2 of
Assurance
Act, 1870.
Companies
to which Act
applies.

1. This Act shall apply to all persons or bodies of persons, whether corporate or unincorporate, not being registered under the Acts relating to friendly societies or to trade unions (which persons and bodies of persons are hereinafter referred to as assurance companies), whether established before or after the commencement of this Act and whether established within or without the United Kingdom, who carry on within the United Kingdom assurance business of all or any of the following classes:—

- (a) Life assurance business; that is to say, the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life;
- (b) Fire insurance business; that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire;
- (c) Accident insurance business; that is to say, the issue of, or the undertaking of liability under, policies of insurance upon the happening of personal accidents, whether fatal or not, disease, or sickness, or any class of personal accidents, disease, or sickness;
- (d) Employers' liability insurance business; that is to say, the issue of, or the undertaking of liability under, policies insuring employers against liability to pay compensation or damages to workmen in their employment;
- (e) Bond investment business; that is to say, the business of issuing bonds or endowment certificates by which the company, in return for subscriptions payable at periodical intervals of two months or less, contract to pay the bondholder a sum at a future date and not being life assurance business as hereinbefore defined;

subject as respects any class of assurance business to the special provisions of this Act relating to business of that class:

A company registered under the Companies Acts which transacts assurance business of any such class as aforesaid in any part of the world shall for the purposes of this provision be deemed to be a company transacting such business within the United Kingdom.

General.

S. 2 of 1870.
Deposit.

2.—(1) Every assurance company shall deposit and keep deposited with the Paymaster-General for and on behalf of the Supreme Court the sum of twenty thousand pounds.

(2) The sum so deposited shall be invested by the Paymaster-General in such of the securities usually accepted by the Court for the investment of funds placed under its administration as the company may select, and the interest accruing due on any such securities shall be paid to the company.

(3) The deposit may be made by the subscribers of the memorandum of association of the company, or any of them, in the name of the proposed company, and, upon the incorporation of the company, shall be deemed to have been made by, and to be part of the assets of, the company, and the registrar shall not issue a certificate of incorporation of the company until the deposit has been made.

(4) Where a company carries on, or intends to carry on, assurance business of more

than one class, a separate sum of twenty thousand pounds shall be deposited and kept deposited under this section as respects each class of business, and the deposit made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund, and all interest accruing due on any such deposit or the securities in which it is for the time being invested shall be carried by the company to that fund.

(5) The Paymaster-General shall not accept a deposit except on a warrant of the Board of Trade.

(6) The Board of Trade may make rules with respect to applications for warrants, the payment of deposits, and the investment thereof or dealing therewith, the deposit of stocks or other securities in lieu of money, the payment of the interest or dividends from time to time accruing due on any securities in which deposits are for the time being invested, and the withdrawal and transfer of deposits, and the rules so made shall have effect as if they were enacted in this Act, and shall be laid before Parliament as soon as may be after they are made.

(7) This section shall apply to an assurance company registered or having its head office in Ireland, subject to the following modifications:

References to the Supreme Court shall be construed as references to the Supreme Court of Judicature in Ireland, and references to the Paymaster-General shall be construed as references to the Accountant-General of the last-mentioned Court.

3.—(1) In the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund with an appropriate name:

Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund.

(2) A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable.

4. Every assurance company shall, at the expiration of each financial year of the company, prepare—

- A revenue account for the year in the form or forms set forth in the First Schedule to this Act and applicable to the class or classes of assurance business carried on by the company;
- A profit and loss account in the form set forth in the Second Schedule to this Act, except where the company carries on assurance business of one class only and no other business;
- A balance sheet in the form set forth in the Third Schedule to this Act.

5.—(1) Every assurance company shall, once in every five years, or at such shorter intervals as may be prescribed by the instrument constituting the company, or by its regulations or by-laws, cause an investigation to be made into its financial condition, including a valuation of its liabilities, by an actuary, and shall cause an abstract of the report of such actuary to be made in the form or forms set forth in the Fourth Schedule to this Act and applicable to the class or classes of assurance business carried on by the company.

(2) The foregoing provisions of this section shall also apply whenever at any other time an investigation into the financial condition of an assurance company is made with a view to the distribution of profits, or the results of which are made public.

6. Every assurance company shall prepare a statement of its assurance business at the date to which the accounts of the company are made up for the purposes of any such investigation as aforesaid in the form or forms set forth in the Fifth Schedule to this Act and applicable to the class or classes of assurance business carried on by the company: Provided that, if the investigation is made annually by any company, the company may prepare such a statement at any time, so that it be made at least once in every five years.

S. 4 of 1870.
Separation
of funds.

S. 5 of 1870.
Accounts
and balance
sheets.

S. 70 of 1870.
Actuarial
report and
abstract.

S. 8 of 1870.
Statement
of assurance
business.

S. 5 of 1870.

Deposit of
accounts, &c.
with Board
of Trade.

7.—(1) Every account, balance sheet, abstract, or statement heretofore required to be made shall be printed, and four copies thereof, one of which shall be signed by the chairman and two directors of the company and by the principal officer of the company and, if the company has a managing director, by the managing director, shall be deposited at the Board of Trade within six months after the close of the period to which the account, balance sheet, abstract, or statement relates: Provided that, if in any case it is made to appear to the Board of Trade that the circumstances are such that a longer period than six months should be allowed, the Board may extend that period by such period not exceeding three months as they think fit.

(2) The Board of Trade shall consider the accounts, balance sheets, abstracts, and statements so deposited, and, if any such account, balance sheet, abstract, or statement appears to the Board to be inaccurate or incomplete in any respect, the Board shall communicate with the company with a view to the correction of any such inaccuracies and the supply of deficiencies.

(3) There shall be deposited with every revenue account and balance sheet of a company any report on the affairs of the company submitted to the shareholders or policy holders of the company in respect of the financial year to which the account and balance sheet relates.

(4) Where an assurance company registered under the Companies Acts in any year deposits its accounts and balance sheet in accordance with the provisions of this section, the company may, at the same time, send to the registrar a copy of such accounts and balance sheet; and, where such copy is so sent, it shall not be necessary for the company to send to the registrar a statement in the form of a balance sheet as required by sub-section (3) of section twenty-six of the Companies (Consolidation) Act, 1908, and the copy of the accounts and balance sheet so sent shall be dealt with in all respects as if it were a statement sent in accordance with that sub-section.

S. Edw. 7,
c. 69.

S. 6 of 1870.

Right of share-
holders, &c. to
copies of
accounts, &c.
Audit of
accounts.
S & 9 Vict. c. 10.

8. A printed copy of the last-deposited accounts, balance sheet, abstract, or statement, shall on the application of any shareholder or policy holder of the company be forwarded to him by the company by post or otherwise.

9. Where the accounts of an assurance company are not subject to audit in accordance with the provisions of the Companies (Consolidation) Act, 1908, or the Companies Clauses Consolidation Act, 1845, relating to audit, the accounts of the company shall be audited annually in such manner as the Board of Trade may prescribe, and the regulations made for the purpose may apply to any such company the provisions of the Companies (Consolidation) Act, 1908, relating to audit, subject to such adaptations and modifications as may appear necessary or expedient.

S. 7 of 1870.

List of
shareholders.

10. Every assurance company which is not registered under the Companies Acts, or which has not incorporated in its deed of settlement section ten of the Companies Clauses Consolidation Act, 1845, shall keep a "Shareholders' Address Book," in accordance with the provisions of that section, and shall, on the application of any shareholder or policy holder of the company, furnish to him a copy of such book, on payment of a sum not exceeding sixpence for every hundred words required to be copied.

S. 13 of 1870.

Deed of
settlement.

11. Every assurance company which is not registered under the Companies Acts shall cause a sufficient number of copies of its deed of settlement or other instrument constituting the company to be printed, and shall, on the application of any shareholder or policy holder of the company, furnish to him a copy of such deed of settlement or other instrument on payment of a sum not exceeding one shilling.

Publication of
authorized, sub-
scribed, and
paid up capital.

12. Where any notice, advertisement, or other official publication of an assurance company contains a statement of the amount of the authorized capital of the company, the publication shall also contain a statement of the amount of the capital which has been subscribed and the amount paid up.

S. 14 of 1870.

Amalgamation
or transfer.

p. 538

13.—(1) Where it is intended to amalgamate two or more assurance companies, or to transfer the assurance business of any class from one assurance company to another company, the directors of any one or more of such companies may apply to the Court, by petition, to sanction the proposed arrangement.

(2) The Court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may sanction the arrangement if it is satisfied that no sufficient objection to the arrangement has been established.

(3) Before any such application is made to the Court—

(a) notice of the intention to make the application shall be published in the *Gazette*; and

- (b) a statement of the nature of the amalgamation or transfer, as the case may be, together with an abstract containing the material facts embodied in the agreement or deed under which the amalgamation or transfer is proposed to be effected, and copies of the actuarial or other reports upon which the agreement or deed is founded, including a report by an independent actuary, shall, unless the Court otherwise directs, be transmitted to each policy holder of each company in manner provided by section one hundred and thirty-six of the Companies Clauses Consolidation Act 1845, for the transmission to shareholders of notices not requiring to be served personally: Provided that it shall not be necessary to transmit such statement and other documents to policy holders other than life, endowment, sinking fund, or bond investment policy holders, nor in the case of a transfer to such policy holders if the business transferred is not life assurance business or bond investment business: and
- (c) the agreement or deed under which the amalgamation or transfer is effected shall be open for the inspection of the policy holders and shareholders at the offices of the companies for a period of fifteen days after the publication of the notice in the Gazette.

(4) No assurance company shall amalgamate with another, or transfer its business to another, unless the amalgamation or transfer is sanctioned by the Court in accordance with this section.

14. Where an amalgamation takes place between any assurance companies, or where any assurance business of one such company is transferred to another company, the combined company or the purchasing company, as the case may be, shall, within ten days from the date of the completion of the amalgamation or transfer, deposit with the Board of Trade

S. 15 of 1870
Statements in case of amalgamation or transfer.

- (a) certified copies of statements of the assets and liabilities of the companies concerned in such amalgamation or transfer, together with a statement of the nature and terms of the amalgamation or transfer; and
- (b) a certified copy of the agreement or deed under which the amalgamation or transfer is effected: and
- (c) certified copies of the actuarial or other reports upon which that agreement or deed is founded: and
- (d) a declaration under the hand of the chairman of each company, and the principal officer of each company, that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is therein fully set forth, and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities, or other property by or with the knowledge of any parties to the amalgamation or transfer.

15. The Court may order the winding up of an assurance company, in accordance with the Companies (Consolidation) Act, 1908, and the provisions of that Act shall apply accordingly, subject, however, to the following modification:

The company may be ordered to be wound up on the petition of ten or more policy holders owning policies of an aggregate value of not less than ten thousand pounds:

Provided that such a petition shall not be presented except by the leave of the Court, and leave shall not be granted until a *prima facie* case has been established to the satisfaction of the Court, and until security for costs for such amount as the Court may think reasonable has been given.

S. 21 of 1870
Special provisions as to winding up of assurance companies

16.—(1) Where the assurance business or any part of the assurance business of an assurance company has been transferred to another company under an arrangement in pursuance of which the first-mentioned company (in this section called the subsidiary company) or the creditors thereof has or have claims against the company to which such transfer was made (in this section called the principal company), then, if the principal company is being wound up by or under the supervision of the Court, the Court shall (subject as hereinafter mentioned) order the subsidiary company to be wound up in conjunction with the principal company, and may by the same or any subsequent order appoint the same person to be liquidator for the two companies, and make provision for such other matters as may seem to the Court necessary, with a view to the companies being wound up as if they were one company.

S. 4 of 1870
Winding up of subsidiary companies

2. The commencement of the winding up of the principal company shall, save as otherwise ordered by the Court, be the commencement of the winding up of the subsidiary company.

3. In adjusting the rights and liabilities of the members of the several companies between themselves, the Court shall have regard to the constitution of the companies, and to the arrangements entered into between the companies, in the same manner as the Court has regard to the rights and liabilities of different classes of contributories in the case of the winding up of a single company, or as near thereto as circumstances admit.

4. Where any company alleged to be subsidiary is not in process of being wound up at the same time as the principal company to which it is subsidiary, the Court shall not direct the subsidiary company to be wound up unless, after hearing all objections, if any, that may be urged by or on behalf of the company against its being wound up, the Court is of opinion that the company is subsidiary to the principal company, and that the winding up of the company in conjunction with the principal company is just and equitable.

5. An application may be made in relation to the winding up of any subsidiary company in conjunction with a principal company by any creditor of, or person interested in, the principal or subsidiary company.

6. Where a company stands in the relation of a principal company to one subsidiary company, and in the relation of a subsidiary company to some other company, or where there are several companies standing in the relation of subsidiary companies to one principal company, the Court may deal with any number of such companies together or in separate groups, as it thinks most expedient, upon the principles laid down in this section.

S. 5 of 1872.
Valuation of
annuities and
policies.

17. — (1) Where an assurance company is being wound up by the Court, subject to the supervision of the Court, or voluntarily, the value of any annuity class or of a liability under such a policy requiring to be valued in such winding up shall be estimated in manner applicable to policies and liabilities of that class provided by the Sixth Schedule to this Act.

(2) The rules in the Sixth and Seventh Schedules to this Act shall be of the same force, and may be repealed, altered, or amended, as if they were rules made in pursuance of section two hundred and thirty-eight of the Companies Consolidation Act, 1908, and rules may be made under that section for the purpose of carrying into effect the provisions of this Act with respect to the winding up of assurance companies.

S. 22 of 1870.
Power to Court
to reduce con-
tracts.

18. The Court, in the case of an assurance company which has been proved to be unable to pay its debts, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such conditions as the Court thinks just, in place of making a winding-up order.

Extension of
s. 274, to all
assurance com-
panies estab-
lished outside
the United
Kingdom.

19. Section two hundred and seventy-four of the Companies (Consolidation) Act, 1908 (which contains provisions as to companies incorporated outside the United Kingdom) shall apply to every assurance company constituted outside the United Kingdom which carries on assurance business within the United Kingdom, whether incorporated or not.

S. 22 of 1870.
Custody and
inspection of
documents
deposited with
Board of Trade.
S. 17 of 1870.
Evidence of
documents.

20. The Board of Trade may direct any documents deposited with them under this Act, or certified copies thereof, to be kept by the registrar or by any other officer of the Board of Trade; and any such documents and copies may be inspected, and copies thereof may be procured by any person on payment of such fees as the Board of Trade may direct.

21. — (1) Every document deposited under this Act with the Board of Trade, and certified by the registrar or by any person appointed in that behalf by the President of the Board of Trade to be a document so deposited, shall be deemed to be a document so deposited.

(2) Every document purporting to be certified by the registrar, or by any person appointed in that behalf by the President of the Board of Trade, to be a copy of a document so deposited shall be deemed to be a copy of that document and shall be received in evidence as if it were the original document, unless some variation between it and the original document be proved.

S. 9 of 1870.
Alteration
of forms.

22. The Board of Trade may, on the application of or with the sanction of the assurance company, alter the forms contained in the schedules to this Act in respect of that company, for the purpose of adapting them to the circumstances of that company.

23. Any assurance company which makes default in compliance with the requirements of this Act shall be liable to a penalty not exceeding one hundred pounds, or, in the case of a continuing default, to a penalty not exceeding fifty pounds for every day during which the default continues, and every director, manager, or secretary, or other officer or agent of the company who knowingly a party to the default shall be liable to the same penalty, and, if default continues for a period of three months after notice of default by the Board of Trade, which notice shall be published in one or more newspapers as the Board of Trade may, upon the application of one or more policy holders or shareholders, direct the default shall be a ground on which the Court may order the winding up of the company, in accordance with the Companies (Consolidation) Act, 1905.

24. If any account, balance sheet, abstract, statement, or other document required by this Act is false in any particular to the knowledge of any person who signs it, that person shall be guilty of a misdemeanour and shall be liable on conviction on indictment to fine and imprisonment, or on summary conviction to a fine not exceeding fifty pounds.

25. Every penalty imposed by this Act shall be recovered and applied in the same manner as penalties imposed by the Companies Consolidation Act, 1905, are recoverable and applicable.

26. Any notice which is by this Act required to be sent to any policy holder may be addressed and sent to the person to whom it is respecting such policy or policy holder, and any notice so addressed and sent shall be deemed and taken to be notice to the holder of such policy.

Provided that where any person claiming to be interested in a policy has given to the company notice of the death of his interest, any notice which is by this Act required to be sent to policy holders shall also be sent to such person at the address stated in the notice so given.

27. The Board of Trade shall lay annually before Parliament the accounts, reports, and other documents under this Act accepted by the company, and shall cause to be printed and published with them, during the preceding year, the accounts, reports, and other documents submitted to the Board of Trade by policy holders, the proof, and other documents required to be submitted to such accounts, balance sheets, abstracts, statements, or other documents, and the report of the Board of Trade thereon, and any other documents in relation to the business of the company.

28. (1) This Act shall not apply to the National Debt Commissioners or the Postmaster-General, acting under the powers and duties vested in them respectively by the Government Annuities Acts, 1829 to 1887, and the Post Office Savings Bank Acts, 1861 to 1887.

(2) This Act shall not apply to a member of Lloyd's, or of any other association of underwriters approved by the Board of Trade, who carries on assurance business of any class, provided that he complies with the requirements set forth in the regulations made by the Board of Trade under the powers conferred by this Act, and applicable to business of that class.

Provided that, unless otherwise expressly provided by this Act, nothing in this Act shall apply to any assurance business of any class other than one of the classes specified in the regulations made by the Board of Trade under the powers conferred by this Act, and a policy shall not be deemed to be a policy of fire by reason only that loss by fire is one of the various risks covered by the

provisions of this Act, unless the context otherwise requires.

Interpretation.—In this Act, unless the context otherwise requires, the expression "chairman" means the person for the time being presiding over the board of directors or other governing body of the assurance company;

the expression "annuities on human life" does not include superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade, or employment, or of the dependants of such persons;

The expression "policy holder" means the person who for the time being is the legal holder of the policy for securing the contract with the assurance company;

The expression "underwriter" includes any person named in a policy or other contract of insurance as liable to pay or contribute towards the payment of the sum secured by such policy or contract.

The expression "financial year" means each period of twelve months at the end of which the balance of the accounts of the assurance company is struck, or, if no such balance is struck, then the calendar year;

The expression "Court" means the High Court of Justice in England, except that in the case of an assurance company registered or having its head office in Ireland it means, in the provisions of this Act, the High Court of Justice in Ireland, and in the case of an assurance company registered or having its head office in Scotland it means, in the provisions of this Act other than those relating to deposits, the Court of Session, in either division thereof;

The expression "Companies Acts" includes the Companies (Consolidation) Act, 1908, and any enactment repealed by that Act;

The expression "registrar" means the Registrar of Joint Stock Companies;

The expression "actuary" means an actuary possessing such qualifications as may be prescribed by rules made by the Board of Trade;

The expression "Gazette" means the London, Edinburgh, or Dublin Gazette, as the case may be.

Application to Special Classes of Business.

Application
to life assur-
ance com-
panies.

30. Where a company carries on life assurance business, this Act shall apply with respect to that business, subject to the following modifications:

- (a) "Policy on human life" shall mean any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life;
- (b) Where the company grant annuities upon human life, "policy" shall include the instrument evidencing the contract to pay such an annuity, and "policy holder" includes annuitant;
- (c) The obligation to deposit and keep deposited the sum of twenty thousand pounds shall apply notwithstanding that the company has previously made and withdrawn its deposit, or been exempted from making any deposit under any enactment hereby repealed;
- (d) Where the company intends to amalgamate with or to transfer its life assurance business to another assurance company, the Court shall not sanction the amalgamation or transfer in any case in which it appears to the Court that the life policy holders representing one-tenth or more of the total amount assured in the company dissent from the amalgamation or transfer;
- (e) Nothing in this Act providing that the life assurance fund shall not be liable for any contracts for which it would not have been liable had the business of the company been only that of life assurance shall affect the liability of that fund, in the case of a company established before the ninth day of August eighteen hundred and seventy, for contracts entered into by the company before that date;
- (f) In the case of a company carrying on life assurance business and established before the ninth day of August eighteen hundred and seventy, by the terms of whose deed of settlement the whole of the profits of all the business carried on by the company are paid exclusively to the life policy holders, and on the face of whose life policies the liability of the life assurance fund in respect of the other business distinctly appears, such of the provisions of this Act as require the separation of funds, and exempt the life assurance fund from liability for contracts to which it would not have been liable had the business of the company been only that of life assurance, shall not apply;
- (g) Any business carried on by an assurance company which under the provisions of any special Act relating to that company is to be treated as life assurance business shall continue to be so treated, and shall not be deemed to be other business or a separate class of assurance business within the meaning of this Act;
- (h) In the case of a mutual company whose profits are allocated to members wholly or mainly by annual abatements of premium, the abstract of the report of the actuary on the financial condition of the company, prepared in

accordance with the Fourth Schedule to this Act, may, notwithstanding anything in section 5 of this Act, be made and returned at intervals not exceeding five years, provided that, where such return is not made annually, it shall include particulars as to the rates of abatement of premiums applicable to different classes or series of assurances allowed in each year during the period which has elapsed since the previous return under the Fourth Schedule.

31. Where a company carries on fire insurance business, this Act shall apply with respect to that business, subject to the following modifications:—

Application
to fire insur-
ance com-
panies

- (a) It shall not be necessary for the company to prepare any statement of its fire insurance business in accordance with the Fourth and Fifth Schedules to this Act;
- b. Such of the provisions of this Act as relate to deposits to be made under this Act shall not apply with respect to the fire insurance business carried on by the company if the company has commenced to carry on that business within the United Kingdom before the passing of this Act;
- c. Such of the provisions of this Act as relate to deposits to be made under this Act shall not apply where the company is an association of owners or occupiers of buildings or other property which satisfies the Board of Trade that it is carrying on, or is about to carry on, business wholly or mainly for the purpose of the mutual insurance of its members against damage by or incidental to fire caused to the houses or other property owned or occupied by them;
- d. It shall not be necessary to make a deposit in respect of fire insurance business where the company has made a deposit in respect of any other class of assurance business, and, where a company, having made a deposit in respect of fire insurance business, commences to carry on life assurance business or employers' liability insurance business, the company may transfer the deposit so made to the account of that other business, and after such transfer the deposit shall be treated as if it had been made in respect of such other business;
- e. So much of this Act as requires an assurance company transacting other business besides assurance business, or more than one class of assurance business, to keep separate funds into which all receipts in respect of the assurance business or of each class of assurance business are to be paid shall not apply as respects fire insurance business;
- f. The provisions of this Act with respect to the amalgamation of companies shall not apply where the only classes of assurance business carried on by both of the companies are fire insurance business, or fire insurance business and accident insurance business, and the provisions of this Act with respect to the transfer of assurance business from one company to another shall not apply to fire insurance business.

32. Where a company carries on accident insurance business, this Act shall apply with respect to that business, subject to the following modifications:—

Application
to accident
insurance
companies.

- a) In lieu of the provisions of sections five and six of this Act the following provisions shall be substituted:—
“The company shall annually prepare a statement of its accident insurance business in the form set forth in the Fourth Schedule to this Act and applicable to accident insurance business, and the statement shall be printed, signed, and deposited at the Board of Trade in accordance with section seven of this Act”;
- b. Such of the provisions of this Act as relate to deposits to be made under this Act shall not apply with respect to the accident insurance business carried on by the company if the company has commenced to carry on that business in the United Kingdom before the passing of this Act;
- (c) It shall not be necessary to make or keep a deposit in respect of accident insurance business where the company has made a deposit in respect of any other class of assurance business, and, where a company, having made a deposit in respect of accident insurance business, commences to carry on life assurance business or employers' liability insurance business, the company may transfer the deposit so made to the account of that other business, and after such transfer the deposit shall be treated as if it had been made in respect of such other business;

- (d) So much of this Act as requires an assurance company transacting other business besides assurance business, or more than one class of assurance business, to keep separate funds into which all receipts in respect of the assurance business or of each class of assurance business are to be paid shall not apply as respects accident insurance business:
- (e) The provisions of this Act with respect to the amalgamation of companies shall not apply where the only classes of assurance business carried on by both of the companies are accident insurance business, or accident insurance business and fire insurance business, and the provisions of this Act with respect to the transfer of assurance business from one company to another shall not apply to accident insurance business:
- (f) The expression "policy" includes any policy under which there is for the time being an existing liability already accrued, or under which a liability may accrue:
- (g) Where a sum is due, or a weekly or other periodical payment is payable, under any policy, the expression "policy holder" includes the person to whom the sum is due or the weekly or other periodical payment payable.

Application
to employers'
liability
insurance
companies.

33.—(1) Where a company carries on employers' liability insurance business, this Act shall apply with respect to that business, subject to the following modifications:—

- a) This Act shall not apply where the company is an association of employers which satisfies the Board of Trade that it is carrying on, or is about to carry on, business wholly or mainly for the purpose of the mutual insurance of its members against liability to pay compensation or damages to workmen employed by them, either alone or in conjunction with insurance against any other risk incident to their trade or industry:
- b) This Act shall not apply where the company carries on the employers' liability insurance business as incidental only to the business of marine insurance by issuing marine policies, or policies in the form of marine policies, covering liability to pay compensation or damages to workmen as well as losses incident to marine adventure or adventure analogous thereto:
- c) In lieu of the provisions of sections five and six of this Act the following provisions shall be substituted:—
"The company shall annually prepare a statement of its employers' liability insurance business in the form set forth in the Fourth Schedule to this Act and applicable to employers' liability insurance business, and shall cause an investigation of its estimated liabilities to be made by an actuary so far as may be necessary to enable the provisions of that form to be complied with, and the statement shall be printed, signed, and deposited at the Board of Trade in accordance with section seven of this Act:"
- d) Such of the provisions of this Act as relate to deposits to be made under this Act shall not apply with respect to the employers' liability insurance business carried on by a company where the company had commenced to carry on that business within the United Kingdom before the twenty-eighth day of August nineteen hundred and seven:
- e) As soon as the employers' liability fund set apart and secured for the satisfaction of the claims of policy holders of that class amounts to forty thousand pounds, the Paymaster General shall, if the company has made a deposit in respect of any other class of assurance business, return to the company the money deposited in respect of its employers' liability insurance business, and it shall not thereafter be necessary for the company to keep any sum deposited in respect of that business, so long as the sum deposited in respect of any other class of assurance business is kept deposited:
- f) Where money is paid into a County Court under the provisions of the Eighth Schedule to this Act, the Court shall (unless the Court for special reason sees fit to direct otherwise) order the lump sum to be invested or applied in the purchase of an annuity or otherwise, in such manner that the duration of the benefit thereof may, as far as possible, correspond with the probable duration of the incapacity:
- g) The expression "policy" includes any policy under which there is for the time being an existing liability already accrued, or under which any liability may accrue

- h Where any sum is due, or a weekly payment is payable, under any policy, the expression "policy holder" includes the person to whom the sum is due or the weekly payment payable;
- i If the company carries on employers' liability insurance business outside the United Kingdom, that business shall not be treated as part of the employers' liability insurance business carried on by the company for the purposes of this Act.
- 2. In the application of this section to Scotland the expression "County Court" means Sheriff Court.

34. Where a company carries on bond investment business, this Act shall apply with respect to that business, subject to the following modifications:—

Application to bond investment companies

- a The expression "policy" includes any bond, certificate, receipt, or other instrument evidencing the contract with the company, and the expression "policy holder" means the person who for the time being is the legal holder of such instrument;
- b Such of the provisions of this Act as relate to deposits shall not apply with respect to the bond investment business carried on by the company, if the company has commenced to carry on that business in the United Kingdom before the passing of this Act;
- c As soon as the bond investment fund set apart and secured for the satisfaction of the claims of the policy holders of that class amounts to forty thousand pounds, the Paymaster-General shall, if the company has made a deposit in respect of any other class of assurance business, return to the company the money deposited in respect of its bond investment business, and it shall not thereafter be necessary for the company to keep any sum deposited in respect of that business, so long as the sum deposited in respect of any other class of business is kept deposited;
- d The first statement of the bond investment business of the company shall be deposited at the Board of Trade on or before the thirtieth day of June nineteen hundred and eleven;
- e The company shall not give the holder of any policy issued after the passing of this Act any advantage dependent on lot or chance, but this provision shall not be construed as in any wise prejudicing any question as to the application to any such transaction, whether in respect of a policy issued before or after the passing of this Act, of the law relating to lotteries.

35. The Board of Trade may, on the application of any unregistered trade union originally established more than twenty years before the commencement of this Act, extend to the trade union the exemption conferred by this Act on registered trade unions, and may, on the application of an unregistered friendly society, extend to the society the exemption conferred by this Act on registered friendly societies if it appears to the Board, after consulting the Chief Registrar of Friendly Societies, that the society is one to which it is inexpedient that the provisions of this Act should apply.

Power of Board of Trade to exempt unregistered trade union and friendly societies.

Provisions as to Collecting Societies and Industrial Assurance Companies.

36. (1) Amongst the purposes for which collecting societies and industrial assurance companies may issue policies of assurance there shall be included insuring money to be paid for the funeral expenses of a parent, grandparent, grandchild, brother, or sister.

Provisions as to collecting societies and industrial assurance companies

(2) No policy effected before the passing of this Act with a collecting society or industrial assurance company shall be deemed to be void by reason only that the person effecting the policy had not, at the time the policy was effected, an insurable interest in the life of the person assured, or that the name of the person interested, or for whose benefit or on whose account the policy was effected, was not inserted in the policy, or that the insurance was not one authorised by the Acts relating to friendly societies, if the policy was effected by or on account of a person who had at the time a *bona fide* expectation that he would incur expenses in connection with the death or funeral of the assured, and if the sum assured is not unreasonable for the purpose of covering those expenses, and any such policy shall enure for the benefit of the person for whose benefit it was effected or his assigns.

(3) Any collecting society or industrial insurance company which, after the passing of this Act, issues policies of insurance which are not within the legal

powers of such society or company shall be held to have made default in complying with the requirements of this Act; and the provisions of this Act with respect to such default shall apply to collecting societies, industrial insurance companies, and their officers, in like manner as they apply to assurance companies and their officers.

59 & 60 Vict.
c. 25.

(4) Without prejudice to the powers conferred by section seventy-one of the Friendly Societies Act, 1896, the committee of management or other governing body of a collecting society having more than one hundred thousand members may petition the Court to make an order for the conversion of the society into a mutual company under the Companies (Consolidation) Act, 1908, and the Court may make such an order if, after hearing the committee of management, or other governing body, and other persons whom the Court considers entitled to be heard on the petition, the Court is satisfied, on a poll being taken, that fifty-five per cent. at least of the members of the society over sixteen years of age agree to the conversion; and the Court may give such directions as it thinks fit for settling a proper memorandum and articles of association of the company; but, before any such petition is presented to the Court, notice of intention to present the petition shall be published in the Gazette, and in such newspapers as the Court may direct.

When a collecting society converts itself into a company in accordance with the provisions of this sub-section, sub-section 3) of section seventy-one of the Friendly Societies Act, 1896, shall apply in like manner as if the conversion were effected under that section.

59 & 60 Vict.
c. 26.

(5) In this section the expressions "collecting society" and "industrial assurance company" have the same meanings as in the Collecting Societies and Industrial Assurance Companies Act, 1896.

Supplemental.

Repeal.

37. The enactments mentioned in the Ninth Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule:

Provided that nothing in this repeal shall affect any investigation made, or any statement, abstract, or other document deposited, under any enactment hereby repealed, but every such investigation shall be deemed to have been made and every such document prepared and deposited under this Act.

Short title
and com-
mencement.

38. (1) This Act may be cited as the Assurance Companies Act, 1909.

(2) This Act shall come into operation on the first day of July nineteen hundred and ten, except that as respects section thirty-six it shall come into operation on the passing thereof.

Section 4.

SCHEDULES.

FIRST SCHEDULE.

N.B.—Where marine insurance business or sinking fund or capital redemption insurance business is carried on, the income and expenditure thereof to be stated in like manner in separate accounts. Any additional businesses including employers' liability insurance business transacted out of the United Kingdom to be shown in a separate inclusive general account.

(A.)—Form applicable to Life Assurance Business.

Revenue Account of the — for the Year ending — in respect of Life Assurance Business.

	Business within the United Kingdom.	Business out of the United Kingdom.	Total.
	£ s. d.	£ s. d.	£ s. d.
Amount of life assurance fund at the beginning of the year			
Premiums:—			
Consideration for annuities granted....			
Interests, dividends, and rents.	£ s. d.		
Less income tax thereon...			
Other receipts (accounts to be specified).			
	£		£
Claims under policies paid and outstanding			
By death			
By maturity			
Surrenders, including surrenders of bonus....			
Annuities			
Bonuses in cash			
Bonuses in reduction of premiums			
Commission			
Expenses of management			
Other payments accounts to be specified,			
Amount of life assurance fund at the end of the year, as per Third Schedule			
	£		£

NOTE 1.—Companies having separate accounts for annuities to return the particulars of their annuity business in a separate statement.
 NOTE 2.—Companies having both Ordinary and Industrial branches to return the particulars of the business in each department separately.
 NOTE 3.—Items in this Account to be net amounts after deduction of the amounts paid and received in respect of re-assurances of the Company's risks.
 NOTE 4.—If any sum has been deducted from the expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

NOTE 5.—Particulars of the new life assurances effected during the year of account to be appended to the above Account showing separately, as respects business within an business out of the United Kingdom, the number of policies, the total sums assured, the amount received by way of single premiums, and the amount of the yearly renewal premium income, the items to be net amounts after deduction of the amounts paid and received in respect of re-assurances of the company's risks. The particulars as to yearly renewal premium income need not be furnished in respect of industrial business.

NOTE 6.—The columns headed "Business out of the United Kingdom," in the case of companies having their head office in the United Kingdom, to apply only to business secured through Branch Offices or Agencies out of the United Kingdom.

(B).—Form applicable to Fire Insurance Business.

Revenue Account of the ——— for the Year ending — 19 —, in respect of Fire Insurance Business.

	£	s.	d.	£	s.	d.
Amount of fire insurance fund at the beginning of the year :—						
Reserve for unexpired risks						
Additional reserve if any						
Premiums						
Interest, dividends, and rents						
Less income tax thereon						
Other receipts accounts to be specified						
						£
Claims under policies paid and outstanding						
Commission						
Expenses of management						
Contributions to fire brigades						
Other payments (accounts to be specified)						
Amount of fire insurance fund at the end of the year as per Third Schedule :—						£ s. d.
Reserve for unexpired risks being per cent. of premium income for the year						
Additional reserve (if any)						
						£

NOTE 1.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Company's risks.

NOTE 2.—If any sum has been deducted from the Expenses of management account and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

deducted to be separately shown in the above Account

(C) Form applicable to Accident Insurance Business.

THE ASSURANCE COMPANIES ACT, 1909. Act of 1909 1639

Revenue Account of the for the Year ending 19—, in respect of Accident Insurance Business.

	£	s.	d.		£	s.	d.
Amount of accident insurance fund at the beginning of the year:—				Payments under policies, including medical and legal expenses in connection therewith			
Reserve for unexpired risks				Commission			
Total estimated liability in respect of outstanding claims				Expenses of management			
Additional reserve if any				Other payments (accounts to be specified)			
Premiums				Amount of accident insurance fund at the end of the year as per Third Schedule:—			
Interest, dividends, and rents				Reserve for unexpired risks, being — per cent. of premium income for the year			
Less income tax thereon				Total estimated liability in respect of outstanding claims as per Fourth Schedule (C)			
Other receipts: accounts to be specified				Additional reserve (if any)			

NOTE 1.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Company's risks.

NOTE 2. If any sum has been deducted from the expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account

(D.)—Form applicable to Employers' Liability Insurance Business.

Revenue Account of the — for the Year ending —, 19—, in respect of Employers' Liability Insurance Business transacted within the United Kingdom.

	£	s.	d.	£	s.	d.
Amount of employers' liability insurance fund at the beginning of the year :—						
Reserve for unexpired risks						
Total estimated liability in respect of outstanding claims						
Additional reserve if any						
Premiums						
Interests, dividends, and rents						
Less income tax thereon						
Other receipts accounts to be specified)						
						£
Payments under policies, including medical and legal expenses in connection therewith						
Commissions						
Expenses of management						
Other payments (accounts to be specified)						
Amount of employers' liability insurance fund at the end of the year, as per Third Schedule :—						£ s. d.
Reserved for unexpired risks, being — per cent. of premium income for the year						
Total estimated liability in respect of outstanding claims, as per Fourth Schedule (D)						
Additional reserve (if any)						
						£

NOTE 1.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Company's risks.

NOTE 2.—If any sum has been deducted from the expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

deducted to be separately shown in the above Account.

THE ASSURANCE COMPANIES ACT, 1909.

Act of 1909

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(E.)—Form applicable to Bond Investment Business.

Revenue Account of the — for the Year ending — 19—, in respect of Bond Investment and Endowment Certificate Business.

£	s.	d.	£	s.	d.
Amount of Bond Investment and Endowment Certificate Fund at the beginning of the year			Claims under bonds and certificates, paid and outstanding		
Additional reserve (if any)			Commission		
Premiums			Expenses of management		
Interest, dividends, and rents			Other payments (accounts to be specified)		
Less income tax thereon			Amount of Bond Investment and Endowment Certificate Fund at the end of the year as per Third Schedule		
Other receipts, accounts to be specified			Additional reserve (if any)		

NOTE 1. Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurers of the Company's risks.

NOTE 2.—If any sum has been deducted from the Expenses of management account and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account

Section 4.

SECOND SCHEDULE

PROFIT AND LOSS ACCOUNT OF THE		FOR THE YEAR ENDING	19
	£	s.	d.
Balance of last year's account			
Interest and dividends not carried to other accounts	£	s.	d.
Less income tax thereon			
Profit realized (accounts to be specified)			
Other receipts accounts to be specified			
	£		
</			

Section 4.
BALANCE SHEET of the — on the

THIRD SCHEDULE

LIABILITIES.	ASSETS.
Shareholders' capital paid up if any	Mortgages on property within the United Kingdom
Life assurance funds —	Do. do. out of the United Kingdom
Ordinary branch ..	Loans on parcels and other public rates
Industrial do.	Do. Life interests
Annuity fund	Do. Reversions
Fire insurance fund	Do. Stocks and shares
Accident insurance fund	Do. Company's policies within their surrender value
Employers' liability insurance fund	Do. Personal security
Flood investment and endowment certificate fund	Investments with the High Court securities to be specified
Marine insurance fund	Do. British government securities
Sinking fund and capital redemption fund	Do. Municipal and county securities, United Kingdom
Profit and loss account	Do. Indian and Colonial government securities
Other funds (if any) to be specified	Do. Provincial securities
	Do. Municipal do.
Claims admitted or intimated but not paid	Foreign government securities
Life insurance	Do. Provincial securities
Fire insurance	Do. Municipal do.
Bond investment	Railway and other debentures and debenture stocks — Home and Foreign
Annuities due and unpaid	Do. Preference and guaranteed stocks
Other sums owing by the company + (to be stated separately under each class of business).	Railway ordinary stocks
	Rent-houses
	Fleeted ground rents
	Leasehold do.
	House property
	Life interests
	Reversions
	Assets, balances
	Outstanding premiums
	Do. Interest, dividends, and rents
	Interest accrued but not payable
	Do. Payable
	Cash
	Do. Deposit
	Do. In hand and on current account
	Other assets (to be specified)

* Life companies having separate annuity fund to show amount thereof separately.
NOTE 1.—When part of the assets of the company are specifically deposited, under local laws, in various places, out of the United Kingdom, as security to holders of policies there issued, each such place and the amount compulsorily lodged thereon must be specified in respect of each class of business, over that, in the case of fire, accident or employers' liability insurance business, it shall be sufficient to state the fact that a part of the assets has been so deposited.

NOTE 2.—A Balance Sheet in the above form must be adopted in respect of each separate fund, in which separate investments are made, signed by the same persons as sign the Balance Sheet, to the effect that in their belief the assets set forth in the Balance Sheet are in the strictest conformity with the provisions of the Act, and that any investment made thereon is in accordance with the provisions of the Act, and that the company is not liable to any other person in respect of the same.

NOTE 3.—In the case of a company transacting life insurance business, the certificate to be given on the occasion of a withdrawal of money, or of a payment of a sum, shall be signed by the same persons as signed the Balance Sheet, to the effect that in their belief the assets set forth in the Balance Sheet are in the strictest conformity with the provisions of the Act, and that any investment made thereon is in accordance with the provisions of the Act, and that the company is not liable to any other person in respect of the same.

NOTE 4.—In the case of a company required to keep separate funds under section 4 of this Act, a certificate must be appended, signed by the same persons as signed the Balance Sheet, to the effect that in their belief the assets set forth in the Balance Sheet are in the strictest conformity with the provisions of the Act, and that any investment made thereon is in accordance with the provisions of the Act, and that the company is not liable to any other person in respect of the same.

FOURTH SCHEDULE.

Sections 6
10, 32 and
33.

N.B.—Where sinking fund or capital redemption insurance business is carried on, a separate statement signed by the actuary must be furnished, showing the total number of policies valued, the total sums assured, and the total office yearly premiums, and also showing the total net liability in respect of such business and the basis on which such liability is calculated.

(A.)—Form applicable to Life Assurance Companies.

STATEMENT respecting the VALUATION of the LIABILITIES under LIFE POLICIES and ANNUITIES of the _____, to be made and signed by the ACTUARY.

(The answers should be numbered to accord with the numbers of the corresponding questions.)

1. The date up to which the valuation is made.
2. The general principles adopted in the valuation, and the method followed in the valuation of particular classes of assurances, including a statement of the method by which the net premiums have been arrived at, and whether these principles were determined by the instrument constituting the company, or by its regulations or bylaws, or how otherwise; together with a statement of the manner in which policies on under average lives are dealt with.
3. The table or tables of mortality used in the valuation. In cases where the tables employed are not published, specimen policy values are to be given, at the rate of interest employed in the valuation, in respect of whole-life assurance policies effected at the respective ages of 20, 30, 40, and 50, and having been respectively in force for five years, ten years, and upwards at intervals of five years respectively; with similar specimen policy values in respect of endowment assurance policies, according to age at entry, original term of policy, and duration.
4. The rate or rates of interest assumed in the calculations.
5. The actual proportion of the annual premium income, if any, reserved as a provision for future expenses and profits, separately specified in respect of assurances with immediate profits, with deferred profits, and without profits. (If none, state how this provision is made.)
6. The consolidated revenue account since the last valuation, or, in case of a company which has made no valuation, since the commencement of the business. (This return should be made in the form annexed. No return under this heading will be required where a statement under this schedule is deposited annually.)
7. The liabilities of the company under life policies and annuities at the date of the valuation, showing the number of policies, the amount assured, and the amount of premiums payable annually under each class of policies, both with and without participation in profits, and also the net liabilities and assets of the company, with the amount of surplus or deficiency. (These returns to be made in the forms annexed.)
8. The principles upon which the distribution of profits among the shareholders and policy holders is made, and whether these principles were determined by the instrument constituting the company or by its regulations or bylaws or how otherwise, and the number of years' premiums to be paid before a bonus (a) is allotted, and (b) vests.

f. The results of the valuation, showing—

1. The total amount of profit made by the company, allocated as follows:—
 - (a) Among the policy holders, with immediate participation, and the number and amount of the policies which participated;
 - (b) Among policy holders with deferred participation, and the number and amount of the policies which participated;
 - (c) Among the shareholders;
 - (d) To reserve funds, or other accounts;
 - (e) Carried forward unappropriated.
2. Specimens of bonuses allotted to whole-life assurance policies for 100% effected at the respective ages of 20, 30, 40, and 50, and having been respectively in force for five years, ten years, and upwards, at intervals of five years respectively, together with the amounts apportioned under the various modes in which the bonus might be received; with similar specimen bonuses and particulars in respect of endowment assurance policies, according to age at entry, original term of policy, and duration.

NOTE.—Separate statements to be furnished throughout in respect of Ordinary and Industrial business respectively, the basis of the division being stated.

(Form referred to under heading No. 6 in Fourth Schedule 'A')

(CONSOLIDATED REVENUE ACCOUNT of the ——— for ——— years, commencing ——— and ending ———.

£	s.	d.	£	s.	d.
Amount of life assurance fund at the beginning of the period			(Claims under policies paid and outstanding		
Premiums			By death		
Consideration for annuities granted			By maturity		
Interest, dividends, and rents			Surrenders		
Less income tax thereon			Annuities		
Other receipts (accounts to be specified)			Bonuses in cash		
			" reduction of premiums		
			Commission		
			Expenses of management		
			Other payments (accounts to be specified,		
			Amount of life assurance fund at the end of the period		
			as per Third Schedule		

NOTE.—If any sum has been deducted from the expenses of management account and the sum so deducted to be separately shown in the statement of the Balance Sheet as an asset of the

(Form referred to under heading No. 7, in Fourth Schedule (A).)

VALUATION BALANCE SHEET of — as at —, 19—.

Dr.	£	Cr.	£
To net liability under life assurance and annuity transactions (as per summary statement provided in Fourth Schedule (A)).		By life assurance and annuity funds (as per balance sheet under Schedule 3).....	
To surplus (if any)		By deficiency (if any)	
			£

(C).—Form applicable to Accident Insurance Business.

STATEMENT of the ESTIMATED LIABILITY in respect of OUTSTANDING CLAIMS arising in the year of Account, and in the preceding year or years; computed as at the end of the year in which the claims arose, and as at the end of the year of Account; with particulars as to the number and amount of the claims actually paid in the intervening period.

I. Claims arising during the year of Account ending —, 19—.

(a) Particulars as to Claims arising, and settled, during the year of Account:—

Class of Claim.	No. of Claims.	Total amount paid.	
		By Sums insured.	By Weekly Allowance.
(1)	(2)	(3)	(4)
(i) Fatal claims			
(ii) Non-fatal claims			
Totals			

(b) Particulars as to Claims arising during and outstanding at the end of the year of Account:—

Class of Claim.	No. of Claims.	Amount paid during Year of Account.	Estimated Liability.
(1)	(2)	(3)	(4)
(i) Fatal claims			
(ii) Non-fatal claims, involving payment of sums insured			
iii) Non-fatal claims, involving payment of temporary weekly allowances			
With maximum duration, not exceeding 26 weeks.			
With maximum duration exceeding 26 weeks, but not exceeding 52 weeks.			
And so on, at intervals of 26 weeks, up to the longest period over which temporary weekly allowances are granted.			
iv) Non fatal claims, involving payment of yearly allowances during permanent total disablement.			
Totals			

11 OUTSTANDING CLAIMS which arose during the first year preceding the year of account, ending . . . 19 . . .

Particulars of Claims	Estimated Liability in respect of Claims Outstanding as at the above Date.		Claims paid during the Period of one Year between the above Date and the End of Year of Account.		Estimated Liability in respect of Claims Outstanding as at the End of Year of Account.		Totals of Columns (3), (4) and (6).	
	No.	Amount.	Terminated within such Period.	No.	Amount.	No.	Amount.	No.
	(2)		(3)		(4)	(5)		(6)
1								

- Fatal claims,
- ii Non-fatal claims, involving payment of sums insured,
- iii Non-fatal claims, involving payment of temporary weekly allowances,
- With maximum duration not exceeding 26 weeks.
- With maximum duration exceeding 26 weeks but not exceeding 52 weeks.
- And so on, at intervals of 26 weeks, up to the longest period over which temporary weekly allowances are granted.
- iv Non-fatal claims, involving payment of yearly allowances during permanent total disablement.

Totals

NOTE.—If temporary weekly allowances are granted by the company for periods exceeding 52 weeks, particulars are to be furnished, in a form of form sent to the Insurer, showing, in respect of each year involving such extended allowances, the estimated liability as at the end of the year in which such claims arose, and as at the end of the year of account, and the number and amount of such actual claims paid during the intervening period of two or more years, distinguished claims terminated, and not terminated, within such period.

III. SUMMARY OF ESTIMATED LIABILITY, in respect of CLAIMS OUTSTANDING as at the end of the Year of Account:—

As per column (4) of Statement I. (5) £

.. .. (5) II.....

.. .. (5) of further schedules in the form of Statement II. (if required).

In respect of yearly allowances during permanent total disablement, outstanding at the end of the year of account, but not included in the above Statements.... }

Total estimated liability, in respect of outstanding claims as at the end of the year of account, as per First Schedule (C.) } £

D.)—Form applicable to Employers' Liability Insurance Business.

STATEMENT OF THE ESTIMATED LIABILITY in respect of OUTSTANDING CLAIMS arising during each of the Five Years preceding the Year of Account, and in such Year; computed as at the end of the Year in which the Claims arose, and as at the end of the Year of Account; with Particulars as to the Number and Amount of the Claims actually paid in the intervening Period.

I.—Claims arising during the year of account, ending —, 19—.

a. Particulars as to claims arising and settled during the year of account:—

Class of Claim. (1)	Number. (2)	Amount paid. (3) £
Fatal claims		
Non-fatal claims		
Total		

b. Particulars as to claims arising during, and outstanding at end of, the year of account:—

Class of Claim. (1)	Number. (2)	Amount paid during year of account. (3)	Estimated Liability (4)
Fatal claims			
Non-fatal claims			
Total			

II.—Outstanding claims which arose during the first year preceding the year of account,
ending ———, 19—

Particulars of Claims.	Estimated Liability in respect of Claims outstanding as at the above date.		Claims paid during the period of 1 year between the above date and the end of the year of Account.		Estimated Liability in respect of Claims outstanding as at the end of the year of Account.		Total of Columns (3 and 4)	
	(2)				(4)		(5)	
	Number	Amount	Number	Amount	Number	Amount	Number	Amount
		£		£		£		£
Fatal claims								
Non-fatal claims—								
Terminated								
Not terminated								
Total								

III.—Outstanding claims which arose during the second year preceding the year of account,
ending the ———, 19—

Particulars of Claims.	Estimated Liability in respect of Claims outstanding as at the above date.		Claims paid during the period of 2 years between the above date and the end of the year of Account.		Estimated Liability in respect of Claims outstanding as at the end of the year of Account.		Total of Columns and (4)	
	(2)		(3)		(4)		(5)	
	Number	Amount	Number	Amount	Number	Amount	Number	Amount
		£		£		£		£
Fatal claims								
Non-fatal claims—								
Terminated								
Not terminated								
Total								

IV.—Outstanding claims which arose during the third year preceding the year of account ending the —, 19—.

Particulars of Claims.	Estimated Liability in respect of Claims outstanding as at the above date.		Claims paid during the period of 3 years between the above date and the end of the year of Account.		Estimated Liability in respect of Claims outstanding as at the end of the year of Account.		Total of Columns (2) and (4)	
	(2)		(3)		(4)			
	Number.	Amount.	Number.	Amount.	Number.	Amount.	Number.	Amount.
		£		£		£		
Fatal claims								
Non-fatal claims—								
Terminated								
Not terminated....								
Total.....								

Outstanding claims which arose during the fourth year preceding the year of account ending the —, 19—.

Particulars of Claims.	Estimated Liability in respect of Claims outstanding as at the above date.		Claims paid during the period of 4 years between the above date and the end of the year of Account.		Estimated Liability in respect of Claims outstanding as at the end of the year of Account.		Total of Columns (2) and (4)	
	(2)		(3)		(4)			
	Number.	Amount.	Number.	Amount.	Number.	Amount.	Number.	Amount.
		£		£		£		
Fatal claims								
Non-fatal claims—								
Terminated								
Not terminated....								
Total.....								

VI.—Outstanding claims which arose during the fifth year preceding the year of Account, ending the —, 19—.

Particulars of Claims.	Estimated Liability in respect of Claims outstanding as at the above date.		Claims paid during the period of 5 years between the above date and the end of the year of Account.		Estimated Liability (included in Statement VII. and valued by the method there specified) in respect of Claims outstanding as at the end of the year of Account.		Total of Columns (3) and (4).	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	Number.	Amount.	Number.	Amount.	Number.	Amount.	Number.	Amount.
		£		£		£		£
Total claims								
Non-fatal claims—								
Terminated								
Not terminated								
Total								

NOTE. In cases where the date at which the estimated liability required under column (2) in Forms IV, V, and VI, above would fall in any year prior to 1908, such estimated liability is to be returned as at the end of the year of account terminated in 1908, and the claims paid, required under column (3) of such forms, are to be in respect of the period between the end of the year of account terminated in 1908 and the end of the year of account rendered.

VII.—Statement respecting Claims of five years' duration and upwards outstanding as at the end of the year of Account. (To be made and signed by an Actuary.)

(1) The number of claims incumbent and having durations of five years and upwards as at the end of the year of account, including those separately returned under Form VI, above; and the amount of the weekly payment, and of the annual payment, due in respect of such claims; separately stated in respect of each year of life of the workmen, from the youngest to the oldest. (These particulars to be returned under columns 1 to (4) of the tabular statement given below.)

(2) The estimated liability in respect of the claims specified above, computed, as at the end of the year of account, on the basis of the amount which would be required to purchase from the National Debt Commissioners, through the Post Office Savings Bank, an immediate life annuity for the workmen equal to 75 per cent. of the value of the weekly payment, according to the sex and true age of the workers. (These particulars to be returned under column (5) of the tabular statement given below, in respect of each year of life of the workmen, from the youngest to the oldest.)

(3) If the estimated liability, as reserved under the First Schedule in respect of the claims specified above, is computed on any basis other than that specified under Heading No. (2) above, the whole of the particulars required under Headings (1)

and (2) above are to be returned in columns (1) to (5) of the tabular statement given below, together with the following additional particulars:—

(i) If the estimated liability is determined on the basis of the value of an immediate life annuity:—

(a) The table of mortality upon which such life annuity values are based;

(b) The rate of interest at which such life annuity values are computed;

(c) Whether such life annuity values are discriminated according to the sex of the workers;

(d) The proportion of such life annuity values representing the estimated liability;

(e) The modifications (if any) made in the true ages of the workmen, in deducing the estimated liability;

(f) The amount of the estimated liability. (To be returned, in respect of each year of life, in column (5) of the tabular statement given below.)

(ii) If the estimated liability is not determined on the basis of the value of an immediate life annuity, full particulars are to be specified as to the precise method adopted in deducing such estimated liability, and the total amount of estimated liability is to be returned under column (5) of the tabular statement given below.

Number of Claims.	Ages of the Workmen as at the end of the Year of Account.	Amount of Weekly Payment.	Amount of Annual Payment.	Estimated Liability computed on Basis of 75 per Cent. of Value of Life Annuity purchased through the Post Office.	Estimated Liability if computed on Basis other than that specified in Column 5
(1)	(2)	(3)	(4)	(5)	(6)

NOTE.—Separate particulars to be furnished in respect of male and female workers.

Summary of estimated liability in respect of outstanding claims as at the end of the year of account

As per column (1) of Statement I (b)	
.. .. (1) .. II	
.. .. (1) .. III	
.. .. (4) .. IV	
.. .. (4) .. V	
.. .. (3) or (6) .. VII	

Total estimated liability in respect of outstanding
claims as at the end of the year of account as per
First Schedule D)

£

(E.)—Form applicable to Bond Investment Business.

STATEMENT respecting the VALUATION of the LIABILITY under BONDS and ENDOWMENT CERTIFICATES of the _____, to be made and signed by the ACTUARY.

(The answers should be numbered to accord with the numbers of the corresponding questions.)

1. The date up to which the valuation is made.
2. The principles adopted in the valuation of the liabilities under bond investment policies and endowment certificates, and whether these principles were determined by the instrument constituting the company, or by its regulations or bylaws, or how otherwise.
3. The rate or rates of interest assumed in the calculations.
4. The actual proportion of the annual income from contributions, if any, reserved as a provision for future expenses and profits. (If none, state how this provision is made.)
5. The consolidated revenue account since the last valuation, or, in the case of a company which has made no valuation, since the commencement of the business. (This return should be made in the form annexed. No return under this heading will be required where the valuation is made annually.)
6. The liabilities of the company under bond investment policies and endowment certificates at the date of the valuation, showing the number of policies or certificates, the amounts assured, the amount of contribution payable annually, and the provision for future expenses and profits; also the net liabilities and assets of the company, with the amount of surplus or deficiency. (These returns should be made in the forms annexed.)
7. The principles upon which the distribution of profits among the bond and certificate holders and shareholders is made, and whether those principles are determined by the instrument constituting the company, or by its regulations or bylaws, or how otherwise, and the time during which a bond investment policy or endowment certificate must be in force to entitle it to share in the profits.
8. The results of the valuation, showing
 - (1) The total amount of profit made by the company, allocated as follows:
 - (a) among participating bond or certificate holders, with the number so participating and the total amount of their bonds or certificates
 - b) among the shareholders;
 - (c) to reserve funds, or other accounts;
 - (d) carried forward unappropriated.
 - (2) Specimens of profit allotted to policies or certificates for 100%, effected for different periods, and having been in force for different durations.

Form referred to under Heading No. 3 in Fourth Schedule E.

Consolidated Revenue Account of the ——— for ——— Years commencing ———, 19—, and ending ———, 19—.

	£	s.	d.	£	s.	d.
Amount of Bond Investment and Indemnity Certificate Fund at the beginning of the period						
Additional reserve (if any)						
Premiums						
Interest, dividends, and rents						
Less income tax thereon						
Other receipts, accounts to be specified						
Claims under bonds and certificates						
Commission						
Expenses of management						
Other payments (accounts to be specified)						
Amount of Bond Investment and Endowment Certificate Fund at the end of the period, as per Third Schedule ..						

Note. If any sum has been debited for the Expenses of management account and taken credit for in the Balance Sheet as an asset the sum so deducted to be separately shown in the above Statement

Forms referred to under Heading No. 4 in Fourth Schedule, E.
 SUMMARY AND VALUATION OF THE BOND INVESTMENT POLICIES OF ENDOWMENT CERTIFICATES OF THE — at —, 19—.

Description of Transactions	Particulars of the Policies or Certificates for Valuation.			Valuation (Interest at — per cent.		No. of Policies.
	Sums Assured and Bonuses if any.	Full Yearly Premiums.	Value of Sums Assured and Bonuses (if any).	Value of Full Yearly Premiums.	Provisions for future Expenses and Profits.	
With participation in profits						
Without participation in profits ..						
Totals						
Deduct re-assurances (to be specified according to class ..						
Net Totals						
Adjustments (if any)						
Total of the results						

(Form referred to under Heading No. 6 in Fourth Schedule (E)).

VALUATION BALANCE SHEET of the ——— as at ———, 19—

Dr.	£	Cr.	£
To net liability under bond investment and endowment certificate transactions (as per summary statement provided in Fourth Schedule (E))		By Bond Investment and Endowment Certificate Fund (as per balance sheet under Schedule 3)	
		By deficiency if any	
Ex surplus if any			
	£		£

FIFTH SCHEDULE.

Section 6

N.B. —Where sinking fund or capital redemption business is carried on, a separate statement, signed by the actuary, must be furnished showing the total sum assured maturing in each calendar year and the corresponding office premiums.

A.) Form applicable to Life Assurance Business.

STATEMENT of the LIFE ASSURANCE and ANNUITY BUSINESS of the ——— on the ———, 19—, to be signed by the Actuary.

The answers should be numbered to accord with the numbers of the corresponding questions. Statements of re-assurances corresponding to the statements in respect of assurances are to be given throughout. Separate statements are to be furnished in the replies to all the headings under this schedule for business at other than European rates. Separate statements are to be also furnished throughout in respect of ordinary and industrial business respectively.

1. The published table or tables of premiums for assurances for the whole term of life and for endowment assurances which are in use at the date above mentioned.

2. The total amount assured on lives for the whole term of life which are in existence at the date above mentioned, distinguishing the portions assured with immediate profits, with deferred profits, and without profits, stating separately the total reversionary bonuses and specifying the sums assured for each year of life from the youngest to the oldest ages, the basis of division as to immediate and deferred profits being stated.

3. The amount of premiums receivable annually for each year of life, after deducting the abatements made by the application of bonuses, in respect of the respective assurances mentioned under heading No. 2, distinguishing ordinary from extra premiums. A separate statement is to be given of premiums payable for a limited number of years, classified according to the number of years' payments remaining to be made.

4. The total amount assured under endowment assurances, specifying sums assured and office premiums separately in respect of each year in which such assurances will mature for payment. The reversionary bonuses must also be separately specified, and the sums assured with immediate profits, with deferred profits, and without profits, separately returned.

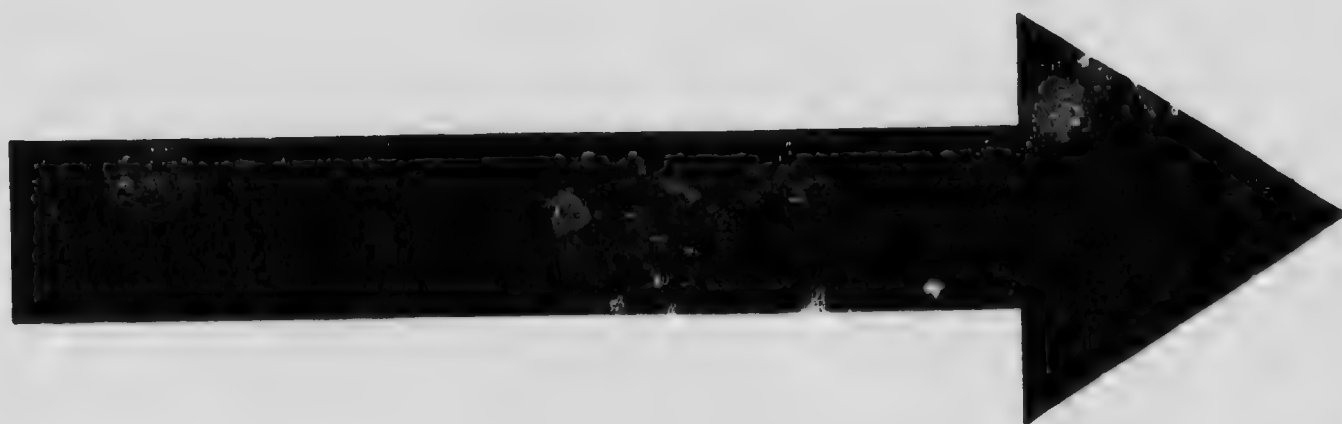
5. The total amount assured under classes of assurance business, other than assurances dealt with under Questions 2 and 4, distinguishing the sums assured under each class, and stating separately the amount assured with immediate profits, with deferred profits, and without profits, and the total amount of reversionary bonuses.

6. The amount of premiums receivable annually in respect of each such special class of assurances mentioned under heading No. 5, distinguishing ordinary from extra premiums.

7. The total amount of premiums which has been received from the commencement upon pure endowment policies which are in force at the date above mentioned.

8. The total amount of immediate annuities on lives, distinguishing the amounts for each year of life, and distinguishing male and female lives.

9. The amount of all annuities on lives other than those specified under heading No. 8, distinguishing the amount of annuities payable under each class, and the amount of premiums annually receivable.



10. The average rate of interest yielded by the assets, whether invested or uninvested, constituting the life assurance fund of the company, calculated upon the mean fund of each year during the period since the last investigation, without deduction of income tax.

It must be stated whether or not the mean fund upon which the average rate of interest is calculated includes reversionary investments.

11. A table of minimum values, if any, allowed for the surrender of policies for the whole term of life and for endowments and endowment assurances, or a statement of the method pursued in calculating such surrender values, with instances of the application of such method to policies of different standing and taken out at various interval ages from the youngest to the oldest. In the case of industrial policies, where free or paid up policies are granted in lieu of surrender values, the conditions under which such policies are granted must be stated, with specimens as prescribed for surrender values.

Form applicable to Bond Investment Business.

STATEMENT of the BOND INVESTMENT BUSINESS of the — on the —, 19—. To be signed by the Actuary.)

(The answers should be numbered to accord with the numbers of the corresponding questions. Statements of re-insurances, corresponding to the statements in respect of insurances, are throughout to be given.)

1. The published table or tables of rates of contribution for bond investment policies and endowment certificates which are in use at the date above-mentioned: with full particulars as to the terms and conditions on which advances are made under such policies or certificates, whether on security of house property or land, or otherwise.

2. The total amounts assured under policies or certificates which are in existence at the date above-mentioned, distinguishing the portions insured with and without profits, stating separately the total additions by way of bonus, and specifying such sums insured and bonuses respectively according to the number of complete years unexpired at such date.

3. The amount of premiums receivable annually, in respect of the respective insurances mentioned under Heading No. 2, separately specified according to the number of complete years unexpired at the date above mentioned.

4. The total amount of premiums which have been received from the commencement upon all policies or certificates mentioned under Headings Nos. 2 and 3, separately specified according to the number of complete years unexpired at the date above mentioned.

5. The average rate of interest realised by the assets, whether invested or uninvested, constituting the bond investment and endowment certificate fund of the company, calculated upon the mean fund of each year during the period since the last investigation, without deduction of income tax.

6. Full particulars as to the terms and conditions upon which surrenders of policies and certificates are granted, with specimens of the values allowed in respect of different durations, and different unexpired terms at the date of surrender.

7. Full particulars as to the terms and conditions upon which allowances are made on the death of a policy or certificate holder, with specimen values as required under Heading No. 6.

8. Full particulars as to the terms and conditions upon which transfers of the interest in a policy or certificate are granted, whether on the death of the policy or certificate holder, or during his lifetime.

9. Full particulars as to the terms and conditions upon which redemption of advances is granted, with specimens of redemption values in respect of bonds or certificates of different durations, and having different unexpired terms, at the date of redemption.

10. A tabular statement in respect of policies or certificates lapsed during the period since the last investigation, showing the number, the amount insured, the yearly premiums, and the total premiums received from the commencement: classified according to the year in which such policies or certificates were effected, and lapsed, respectively; with a similar tabular statement in respect of policies or certificates surrendered during the period: Provided that policies or certificates which have lapsed and been revived shall not be entered as lapses.

11. A statement of the total number of advances made under policies or certificates to the holders thereof, whether on the security of house property or land or otherwise, and the total amount of such advances outstanding at the date above mentioned, distinguishing the advances on first mortgage and those on second or subsequent mortgage.

SIXTH SCHEDULE

Section 17.

RULES FOR VALUING POLICIES AND LIABILITIES.

(A.)—*As respects Life Policies and Annuities.**Rule for Valuing an Annuity.*

An annuity shall be valued according to the tables used by the company which granted such annuity at the time of granting the same, and, where such tables cannot be ascertained or adopted to the satisfaction of the Court, then according to such rate of interest and table of mortality as the Court may direct.

Rule for Valuing a Policy.

The value of the policy is to be the difference between the present value of the reversion in the sum assured according to the contingency upon which it is payable, including any bonus or addition thereto made before the commencement of the winding-up, and the present value of the future annual premiums.

In calculating such present values interest is to be assumed at such rate, and the rate of mortality according to such tables, as the Court may direct.

The premium to be calculated is to be such premium as according to the said rate of interest and rate of mortality is sufficient to provide for the risk incurred by the office in issuing the policy, exclusive of any addition thereto for office expenses and other charges.

(B.)—*As respects Fire Policies.**Rule for Valuing a Policy.*

The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid.

(C.)—*As respects Accident Policies.**Rule for Valuing a Periodical Payment.*

The present value of a periodical payment shall, in the case of total permanent incapacity, be such an amount as would, if invested in the purchase of a life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity equal to seventy-five per centum of the annual value of the periodical payment, and, in any other case, shall be such proportion of such amount as may, under the circumstances of the case, be proper.

Rule for Valuing a Policy.

The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid.

(D.)—*As respects Employers' Liability Policies.**Rule for Valuing a Weekly Payment.*

The present value of a weekly payment shall, if the incapacity of the workman in respect of which it is payable is total permanent incapacity, be such an amount as would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to seventy-five per cent. of the annual value of the weekly payment, and in any other case shall be such proportion of such amount as may, under the circumstances of the case, be proper.

Rule for Valuing a Policy.

The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid, together with, in the case of a policy under which any weekly payment is payable, the present value of that weekly payment.

(E.)—*As respects Bonds or Certificates.**Rule for Valuing a Policy or Certificate.*

The value of a policy or certificate is to be the difference between the present value of the sum assured according to the date at which it is payable, including any bonus or addition thereto made before the commencement of the winding up, and the present value of the future annual premiums.

In calculating such present values, interest is to be assumed at such rate as the Court may direct.

The premium to be calculated is to be such premium as, according to the said rate of interest, is sufficient to provide for the sum assured by the policy or certificate, exclusive of any addition thereto for office expenses and other charges.

Section 17.

SEVENTH SCHEDULE.

Where an insurance company is being wound up by the Court or subject to the supervision of the Court, the liquidator in the case of all persons appearing by the books of the company to be entitled to or interested in policies granted by such company, is to ascertain the value of the liability of the company to each such person, and give notice of such value to such persons in such manner as the Court may direct, and any person to whom notice is so given shall be bound by the value so ascertained unless he gives notice of his intention to dispute such value in manner and within a time to be prescribed by a rule or order of the Court.

Sections 28
and 33.

EIGHTH SCHEDULE.

REQUIREMENTS TO BE COMPLIED WITH BY UNDERWRITERS BEING MEMBERS OF LLOYD'S OR OF ANY OTHER ASSOCIATION OF UNDERWRITERS APPROVED BY THE BOARD OF TRADE.

(A.)—*As respects Life Assurance Business.*

1. Every underwriter shall deposit and keep deposited in such manner as the Board of Trade may direct a sum of two thousand pounds. The Board of Trade may make rules as to the payment, repayment, investment of, and dealing with, a deposit, the payment of interest and dividends from any such investment, and for any other matters in respect of which they may make rules under section 2 (6) of this Act in relation to deposits made by assurance companies. The sum so deposited shall, so long as any liability under any policy issued by the underwriter remains unsatisfied, be available solely to meet claims under such policies.

2. The underwriter shall furnish every year to the Board of Trade a statement in such form as may be prescribed by the Board showing the extent and character of the life assurance business effected by him.

(B.) and (C.)—*As respects Fire and Accident Insurance Business.*

1. Except as hereinafter provided, every underwriter shall comply with the following requirements:—

(a) He shall deposit and keep deposited in such manner as the Board of Trade may direct a sum of two thousand pounds in respect of each class of business. The Board of Trade may make rules as to the payment, repayment, investment of, and dealing with, a deposit, the payment of interest and dividends from any such investment, and for any other matters in respect of which they may make rules under section 2 (6) of this Act in relation to deposits made by assurance companies. The sum so deposited shall, so long as any liability under any policy issued by the underwriter remains unsatisfied, be available solely to meet claims under such policies.

b He shall furnish every year to the Board of Trade a statement, in such form as may be prescribed by the Board, showing the extent and character of the fire or accident insurance business effected by him.

2. An underwriter who carries on fire insurance or accident insurance business, may, in lieu of complying with the above requirements, elect to comply with the under-mentioned conditions:—

(a) All premiums received by or on behalf of the underwriter in respect of fire and accident insurance or re-insurance business carried on by him, either alone or in conjunction with any other insurance business for which special requirements are not laid down in this schedule, shall without any apportionment be placed in a trust fund in accordance with the provisions of a trust deed approved by the Board of Trade:

(b) He shall also furnish security to the satisfaction of the Board of Trade (or, if the Board so direct, to the satisfaction of the committee of the association), which shall be available solely to meet claims under policies issued by him in connection with fire and accident business and any other non-marine business carried on by him for which special requirements are not laid down in this schedule.

The security may be furnished in the form of either a deposit or a guarantee, or partly in the one form and partly in the other.

The amount of the security to be furnished shall never be less than the aggregate of the premiums received or receivable by the underwriter in the last preceding year in connection with such fire and accident and other non-marine business:

(c) The accounts of every underwriter shall be audited annually by an accountant approved by the committee of the association, who shall furnish a certificate to the committee of the association and to the Board of Trade in a form prescribed by the Board of Trade:

- (d) For the purpose of these requirements "non-marine insurance business" means the business of issuing policies upon subject-matters of insurance other than the following, namely:—

Vessels of any description, including barges and dredgers, cargoes, freights, and other interests which may be legally insured by, in, or in relation to vessels, cargoes, and freights, goods, wares, merchandise, and property of whatever description insured for any transit by land or water, or both, and whether or not including warehouse risks or similar risks in addition or as incidental to such transit.

(D)—*As respects Employers' Liability Insurance Business.*

1. Every underwriter shall deposit and keep deposited in such manner as the Board of Trade may direct a sum of two thousand pounds. The Board of Trade may make rules as to the payment, repayment, investment of, and dealing with, a deposit, the payment of interest and dividends from any such investment, and for any other matters in respect of which they may make rules under this Act in relation to deposits made by assurance companies. The sum so deposited shall, so long as any liability under any policy issued by the underwriter remains unsatisfied, be available solely to meet claims under such policies.

2. Where the person insured by any policy issued by an underwriter is liable to make a weekly payment to any workman during the incapacity of the workman, and the weekly payment has continued for more than six months, the liability therefor shall before the expiration of twelve months from the commencement of the incapacity be redeemed by the payment of a lump sum in accordance with paragraph (17) of the First Schedule to the Workmen's Compensation Act, 1906, and the underwriter shall pay the lump sum into the County Court, and shall inform the Court that the redemption has been effected in pursuance of the provisions of this schedule.

3. The underwriter shall furnish every year to the Board of Trade a statement in such form as may be prescribed by the Board showing the extent and character of the employers' liability business effected by him.

4. For the purposes of this schedule "policy" means a policy insuring any employer against liability to pay compensation or damages to workmen in his employment.

(E)—*As respects Bond Investment Business.*

1. Every underwriter shall deposit and keep deposited in such manner as the Board of Trade may direct a sum of two thousand pounds. The Board of Trade may make rules as to the payment, repayment, investment of, and dealing with, a deposit, the payment of interest and dividends from any such investment, and for any other matters in respect of which they may make rules under section 2 (6) of this Act in relation to deposits made by assurance companies. The sum so deposited shall, so long as any liability under any policy issued by the underwriter remains unsatisfied, be available solely to meet claims under such policies.

2. The underwriter shall furnish every year to the Board of Trade a statement in such form as may be prescribed by the Board showing the extent and character of the bond investment business effected by him.

NINTH SCHEDULE.

ENACTMENTS REPEALED.

Section 37.

Session and Chapter.	Short Title.	Extent of repeal.
33 & 34 Vict. c. 61	The Life Assurance Companies Act, 1870....	The whole Act.
34 & 35 Vict. c. 58	The Life Assurance Companies Act, 1871....	The whole Act.
35 & 36 Vict. c. 41	The Life Assurance Companies Act, 1872....	The whole Act.
39 & 40 Vict. c. 22	The Trade Union Act Amendment Act, 1876..	Section seven.
7 Edw. 7, c. 46 ..	The Employers' Liability Insurance Companies Act, 1907.	The whole Act.

GENERAL ORDERS.

3 May, 1909.

REDUCTION OF CAPITAL.

PROCEDURE ON APPLICATIONS FOR CONFIRMATION BY THE COURT OF THE REDUCTION OF THE CAPITAL OF COMPANIES UNDER THE COMPANIES (CONSOLIDATION) ACT, 1908.

PRELIMINARY.

pp. 1266
et seq.
Commencement
of order.

1. This order shall take effect and come into operation on the 1st day of April, 1909, and shall apply to all proceedings in the High Court of Justice with relation to the confirmation by the Court of the reduction of the capital of companies whether commenced before or after that day, but every such proceeding taken before that day shall have the same validity as it would have had if this order had not been made.

Revocation of
former orders.

2. The general orders of the Court of Chancery of the 21st day of March, 1868, and the 2nd day of March, 1869, and the forms thereby prescribed are hereby revoked and annulled provided that such revocation and annulment shall not prejudice or affect anything done or suffered before the date on which this order comes into operation under any order or rule which is hereby revoked and annulled.

Interpretation.

3. In this order—

“The Act” means the Companies (Consolidation) Act, 1908, and sects. 46 to 56 thereof are particularly referred to.

“The Court” includes any judge of the High Court of Justice having for the time being jurisdiction to confirm the reduction of the capital of companies.

“Judge” means any judge of the High Court having for the time being jurisdiction to confirm the reduction of the capital of companies, and includes any registrar, master, or other officer exercising the powers of any such judge.

“The petition” means the petition presented by the company for the confirmation by the Court of the reduction of the capital of the company.

“The company” means the company which presents the petition for reduction of its capital.

Application
of rules of
Supreme Court.

4. The rules of the Supreme Court for the time being in force, and the general practice of that Court, including the course of procedure and practice in chambers, shall apply as regards all proceedings in relation to the confirmation of any reduction of capital by the Court so far as may be practicable, except if and so far as by the Act or this order otherwise provided. In particular, if and when the Court is for the time being a judge of the Chancery Division, the provisions of Ord. V., rule 9 (A), shall apply to all such proceedings as being business assigned within the meaning of that rule.

Title of petition.

5. The petition and all notices, affidavits and other proceedings under the petition shall be intitled in the matter of the company, and in the matter of “The Companies (Consolidation) Act, 1908.”

6.—(1.) When the petition has been presented, an application shall, in every case, be made, *ex parte*, by summons in chambers, to the judge, for directions as to the proceedings to be taken preliminary to the hearing of the petition or otherwise with reference thereto. Summons for directions.

(2.) Upon the hearing of the summons, or upon any adjourned hearing or hearing thereof, or any subsequent application, the judge may make such order or orders, and give such directions as he may think fit as to all the proceedings to be taken on and with reference to the petition, and more particularly with respect to the following matters, that is to say—

(a) The publication of notice of the presentation of the petition ;

(b) In cases within sect. 49 (1) of the Act, the proceedings to be taken for settling the list of creditors entitled to object to the proposed reduction ; fixing the date with reference to which the list of such creditors is to be made out, pursuant to that section ; and generally fixing a time for and giving directions as to all other necessary or proper steps in the matter of the petition, whether expressly mentioned in any of the rules of this order or not.

3. In cases within sect. 49 (1) of the Act, the first insertion in a newspaper of the notice of presentation of the petition and fixing the date with reference to which the list of creditors is to be made out, shall be directed to be made at such time before the date so fixed as the judge shall think fit, not being, unless for special reasons shown to the satisfaction of the judge, less than one calendar month before the date so fixed, and in such cases the first order upon the summons for directions may be in the Form No. 1 in the Schedule hereto, with such variations as the circumstances of the case may require.

7. Notice of the presentation of the petition shall be published at such times, and in such newspapers as the judge shall direct, and may be in the Form No. 2 in the Schedule hereto, with such variations as the circumstances of the case may require. Advertisement of petition.

8. In cases within sect. 49 (1) of the Act the company shall, within such time as the judge shall direct, file in the central office of the High Court of Justice an affidavit made by some officer or officers of the company competent to make the same, verifying a list containing so far as possible the names and addresses of the creditors of the company as defined by that section at the date fixed as mentioned in Rule 6 (2) (b) of this order, and the amounts due to them respectively, or in the case of any debt payable on a contingency or not ascertained or any claim admissible to proof in a winding-up of the company the value, so far as can be justly estimated of such debt or claim, and leave the said list and an office copy of such affidavit at the chambers of the judge. Affidavit as to creditors.

9. The person making such affidavit shall state therein his belief that such list is correct, and that there was not at the date so fixed as aforesaid any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, except the debts and claims set forth in such list, and shall state his means of knowledge of the matters deposed to in such affidavit. Such affidavit may be in the Form No. 3 in the schedule hereto, with such variations as the circumstances of the case may require. Form of affidavit.

10. Copies of such list containing the names and addresses of the creditors, and the total amount due to them (including the value of any debts or claims estimated as aforesaid), but omitting the amounts due to them respectively, or (as the judge shall think fit) complete copies of such list, shall be kept at the registered office of the company and at the offices of their solicitors and London agents (if any) and any person desirous of inspecting the same may at any time during the ordinary hours of business inspect and take extracts from the same on payment of the sum of one shilling. Inspection of list of creditors.

11. The company shall, within seven days after the filing of such affidavit, or such further or other time as the judge may allow, send to each creditor whose name is entered in the said list a notice stating the amount of the proposed reduction of capital, and the amount or estimated value of the debt or the contingent debt or claim or both for which such creditor is entered in the said list, and the time (such time to be fixed by the judge) within which, if he claims to be a Notice to creditors.

creditor for a larger amount, he must send in his name and address, and the particulars of his debt or claim, and the name and address of his solicitor (if any) to the solicitor of the company; and such notice shall be sent through the post in a prepaid letter addressed to each creditor at his last known address or place of abode, and may be in the form or to the effect of the Form No. 1 set forth in the schedule hereto, with such variations as the circumstances of the case may require.

Advertisement
as to list of
creditors.

12. Notice of the list of creditors shall, after the filing of the affidavit mentioned in Rule 8 of this order, be published at such times, and in such newspapers, as the judge shall direct. Every such notice shall state the amount of the proposed reduction of capital, and the places where the aforesaid list of creditors may be inspected, and the time within which creditors of the company who are not entered on the said list, and are desirous of being entered therein, must send in their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors (if any) to the solicitor of the company; and such notice may be in the Form No. 5 set forth in the schedule hereto, with such variations as the circumstances of the case may require.

Affidavit as
to result of
Rules 11 and 12.

13. The company shall, within such time as the judge shall direct, file in the Central Office of the High Court of Justice an affidavit made by the person to whom the particulars of debts or claims are, by such notices as are mentioned in Rules 11 and 12 of this order, required to be sent in, stating the result of such notices respectively, and verifying a list containing the names and addresses of persons (if any) who shall have sent in the particulars of their debts or claims in pursuance of such notices respectively, and the amounts of such debts or claims, and some competent officer or officers of the company shall join in such affidavit, and shall in such list distinguish which (if any) of such debts and claims are wholly, or as to any and what part thereof, admitted by the company, and which (if any) of such debts and claims are wholly, or as to any and what part thereof, disputed by the company. Such affidavit may be in the Form No. 6 in the schedule hereto, with such variations as the circumstances of the case may require; and such list and an office copy of such affidavit shall, within such time as the judge shall direct be left at the chambers of the judge.

Proceedings
where claim not
admitted.

14. If any debt or claim, the particulars of which are so sent in, shall not be admitted by the company at its full amount, then and in every such case, unless the company are willing to appropriate in such manner as the judge shall direct the full amount of such debt or claim, the company shall, if the judge think fit so to direct, send to the creditor a notice that he is required to come in and prove such debt or claim, or such part thereof as is not admitted by the company, by a day to be therein named, being not less than four clear days after such notice, and being the time appointed by the judge for adjudicating upon such debts and claims, and such notice shall be sent in the manner mentioned in Rule 11 of this order, and may be in the Form No. 7 in the schedule hereto, with such variations as the circumstances of the case may require.

Costs of proof.

15. Such creditors as come in to prove their debts or claims in pursuance of any such notice as is mentioned in Rule 14 of this order shall be allowed their costs of proof against the company, and be answerable for costs, in the same manner as in the case of persons coming in to prove debts under an administration judgment.

Certificate as
to creditors.

16. The result of the settlement of the list of creditors shall be stated in a certificate by the Master in the case of an application to the Chancery Division or by the Registrar in the case of an application to the judge in companies winding-up, and such certificate shall state what debts or claims (if any) have been disallowed, and shall distinguish the debts or claims the full amount of which the company are willing to appropriate, and the debts or claims (if any) the amount of which has been fixed by inquiry and adjudication in manner provided by sect. 49 (3) of the Act, and this order, and the debts or claims (if any) the full amount of which is not admitted by the company, nor such as the company are willing to appropriate and the amount of which has not been fixed by inquiry and adjudication as aforesaid; and shall show which of the creditors have consented to the proposed reduction, and the total amount of the debts due to them, and the total amount of the debts or claims the payment of which has been secured in manner provided by sect. 49 (3) of the Act and the persons to or by whom the same are due or claimed; but it shall not be necessary to show in such certificate the several amounts of the debts or claims

of any persons who have consented to the proposed reduction or the payment of whose debts or claims has been secured as aforesaid.

17. The consent of any creditor, whether in respect of a debt due or presently due or a debt payable on a contingency or not ascertained or a claim admissible to proof in a winding-up of the company, may be evidenced in any manner which the judge shall think reasonably sufficient having regard both to the amount of his debt or claim and all the circumstances of the case.

Evidence of consent of creditor.

18. In any case within sect. 49 (1) of the Act, the petition shall not be heard until the expiration of at least eight clear days from the filing of such certificate as is mentioned in Rule 16 of this order.

Certificate before hearing of petition.

19. Before the hearing of the petition, notices stating the day on which the same is appointed to be heard shall be published at such times and in such newspapers as the judge shall direct. Such notices may be in the Form No. 8 in the schedule hereto, with such variations as the circumstances of the case may require.

Advertisement of hearing.

20. Any creditor settled on the said list whose debt or claim has not, before the hearing of the petition, been discharged or determined, or been secured in manner provided by sect. 49 (3) of the Act, and who has not before the hearing consented to the proposed reduction of capital, may, if he think fit, upon giving two clear days' notice to the solicitor of the company of his intention so to do, appear at the hearing of the petition and oppose the application.

Who may appear.

21. Where a creditor who appears at the hearing under the last preceding rule is a creditor the full amount of whose debt or claim is not admitted by the company, and the validity of such debt or claim has not been inquired into and adjudicated upon under sect. 49 (3) of the Act, the costs of and occasioned by his appearance shall be dealt with as to the Court shall seem just, but in all other cases a creditor appearing under the last preceding rule shall be entitled to the costs of such appearance, unless the Court shall be of opinion that in the circumstances of the particular case his costs ought not to be allowed.

Costs of appearance.

22. When the petition comes on to be heard the Court may, if it shall so think fit, give such directions as may seem proper with reference to the securing in manner mentioned in sect. 49 (3) of the Act, the payment of the debts or claims of any creditors who do not consent to the proposed reduction; and the further hearing of the petition may, if the Court shall think fit, be adjourned for the purpose of allowing any steps to be taken with reference to the securing in manner aforesaid the payment of such debts or claims.

Directions at the hearing.

23. Where the Court makes an order confirming a reduction, such order shall give directions in what manner, and in what newspapers, and at what times, notice of the registration of the order and of such minute as mentioned in sect. 51 of the Act is to be published; and (unless it shall have dispensed altogether with the addition of the words "and Reduced" or shall then dispense with any further use thereof) shall fix the date until which the words "and Reduced" are to be deemed part of the name of the company as mentioned in sect. 48 of the Act.

Order confirming reduction.

FEEs.

24. Solicitors shall be entitled to charge and be allowed for duties performed under the Act in relation to matters dealt with by this order the same fees as they have heretofore been entitled to charge and be allowed for the like duties performed under the Companies Acts, 1862 to 1907, unless the Court or judge shall otherwise specially direct.

Solicitors' fees.

25. The same fees of Court shall be paid in relation to proceedings dealt with by this order as have heretofore been paid in relation to like proceedings dealt with by the General Orders of the 21st day of March, 1868, and the 2nd day of March, 1869, and such fees shall be collected by stamps in the like manner as the same have heretofore been collected or in such other manner as may from time to time be directed by the Lords Commissioners of His Majesty's Treasury in pursuance of the powers vested in them by the Public Officers' Fees Act 1879.

Court fees.

THE SCHEDULE.

Form 1.

No. 1. FORM OF ORDER. [RULE 6 (3).]

In the High Court of Justice,
Chancery Division.
Mr. Justice

or
Companies Winding-Up.
Mr. Justice

In the Matter of the Company, Limited and Reduced; and in the Matter
of "The Companies (Consolidation) Act, 1908."

Upon the application of the petitioners by summons dated , and upon
hearing the solicitor for the petitioners, and on reading the petition presented to the
High Court of Justice, it is ordered, that an inquiry be made what are the debts,
claims, and liabilities of or affecting the said company on the day of
19 , and that notice of the presentation of the said petition be inserted in [the
newspapers] on the day of , and [other times of insertion], and that a
list of the persons who are creditors of the company on the said day of ,
and an office copy of the affidavit verifying the same be left at the chambers of the
judge [or in the case of a petition to the judge in companies winding-up with the
registrar] on or before the day of .

Form 2.

No. 2. [See RULE 7.]

In the Matter of the Company, Limited and Reduced; and in the Matter
of "The Companies (Consolidation) Act, 1908."

Notice is hereby given that a petition for confirming a resolution reducing the
capital of the above company from £ to £ was on the day of
presented to the High Court of Justice, and is now pending; and that the list of
creditors of the company is to be made out as for the day of 19 .

C. & D., of

[Agents for A. & B., of]
Solicitors to the Company.

Form 3.

No. 3. AFFIDAVIT VERIFYING LIST OF CREDITORS.

[RULE 9.]

(Title of Court as in Form 1.)

In the Matter of the Company, Limited and Reduced; and in the Matter
of "The Companies (Consolidation) Act, 1908."

I, A. B., of , make oath and say as follows:—

1. The paper writing now produced and shown to me, and marked with the
letter A, contains a list of the creditors of and persons having claims upon the said
company on the day of 19 (the date fixed by the order in this matter
dated), together with their respective addresses, and the nature and amount
of their respective debts or claims, and such list is, to the best of my knowledge,
information, and belief, a true and accurate list of such creditors and persons having
claims on the day aforesaid.

2. To the best of my knowledge and belief there was not, at the date aforesaid,
any debt, claim, or liability which, if such date were the commencement of the
winding-up of the said company, would be admissible in proof against the said
company other than and except the debts and claims set forth in the said list. I
am enabled to make this statement from facts within my knowledge as the of
the said company, and from information derived upon investigation of the affairs
and the books, documents, and papers of the said company.

Sworn, &c.

1467

A.

X. Y., &c.

Names, Addresses, and Descriptions of the Creditors.	Nature of Debt or Claim.	Amount or estimated Value of Debt or Claim.
-----	-----	-----

Form 1

A. B.,
Solicitor for the said company.

Form 5.

Any person who claims to have been on the last-mentioned day and still to be a creditor of the company, and who is not entered on the said list and claims to be so

entered, must on or before the day of send in his name and address, and the particulars of his claim, and the name and address of his solicitor (if any) to the undersigned at , or in default thereof he will be precluded from objecting to the proposed reduction of capital.

Dated this day of 19 .

A. B.,
Solicitor for the said company.

Form

No. 6. [RULE 13.]

(Title of Court as in Form 1.)

In the Matter of the Company, Limited and Reduced: and in the Matter of "The Companies (Consolidation) Act, 1908."

We, C. D., &c. [the secretary of the said company], E. F., of, &c. [the solicitor of the said company], and A. B., of, &c. [the managing director of the said company], severally make oath and say as follows:

Rule 11.

I, the said C. D., for myself say as follows:

1. I did, on the day of 19 , in the manner hereinafter mentioned, serve a true copy of the notice now produced and shown to me and marked B, upon each of the respective persons whose names, addresses, and descriptions appear in the first column of the list of creditors, marked A, referred to in the affidavit of filed on the day of 19 .

2. I served the said respective copies of the said notice by putting such copies respectively duly addressed to such persons respectively, according to their respective names and addresses appearing in the said list (being the last known addresses or places of abode of such persons respectively), and with the proper postage stamps affixed thereto as prepaid letters, into the post office receiving house, No. in Street, in the county of , between the hours of and of the clock, in the noon of the said day of .

And I, the said E. F., for myself say as follows:—

If notice is
issued under
Rule 12.

3. A true copy of the notice now produced and shown to me, and marked C, has appeared in the of the day of 19 , the of the day of 19 , &c.

Rule 13.

4. I have, in the paper writing now produced and shown to me, and marked D, set forth a list of all claims, the particulars of which have been sent in to me pursuant to the said notice B, now produced and shown to me by persons claiming to be creditors of the said company for larger amounts than are stated in the list of creditors, marked A, referred to in the affidavit of , filed on the day of 19 .

If notice is
issued under
Rule 12.

5. I have, in the paper writing now produced and shown to me, marked E, set forth a list of all claims, the particulars of which have been sent in to me pursuant to the notice referred to in the third paragraph of this affidavit by persons claiming to be creditors of the said company on the day of 19 , not appearing on the said list of creditors marked A, and who claimed to be entered thereon.

And we, C. D. and A. B., for ourselves say as follows:—

Rule 13.

6. We have, in the first part of the said paper writing marked D (now produced and shown to us), and also in the first part of the said paper writing, marked E (also produced and shown to us), respectively set forth such of the said debts and claims as are admitted by the said company to be due wholly or in part, and how much is admitted to be due in respect of such of the same debts and claims respectively as are not wholly admitted.

Rule 13.]

7. We have, in the second part of each of the said paper writings, marked D and E, set forth such of the said debts and claims as are wholly disputed by the said company.

8. In the said exhibits D and E are distinguished such of the debts the full amounts whereof are proposed to be appropriated in such manner as the Judge shall direct.

Sworn, &c.

Exhibit D., referred to in the last-mentioned Affidavit.

D.

In the Matter of

List of debts and claims of which the particulars have been sent in to by persons claiming to be creditors of the said company for larger amounts than are stated in list of creditors made out by the company.

This paper writing, marked D., was produced and shown to C. D., E. F., and A. B. respectively, and is the same as is referred to in their affidavit sworn before me this day of 19 .

X. Y. &c.

FIRST PART

Debts and Claims wholly or partly admitted by the Company.

Names, Addresses, and Descriptions of Creditors.	Particulars of Debt or Claim.	Amount claimed.	Amount admitted by the Company to be owing to Creditor.	Debts proposed to be appropriated in full, although disputed.
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SECOND PART.

Debts and Claims wholly disputed by the Company.

Names, Addresses, and Descriptions of Claimants.	Particulars of Claim.	Amount claimed.	Debts proposed to be appropriated in full although disputed.
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Exhibit E., referred to in the last Affidavit.

E.

In the Matter, &c.

List of debts and claims of which the particulars have been sent in to Mr. by persons claiming to be creditors of the company, and to be entered on the list of the creditors made out by the company.

This paper writing marked E. was produced and shown to C. D., E. F., and A. B. respectively, and is the same as is referred to in their affidavit sworn before me this day of 19 .

X. Y. &c.

APPENDIX.

FIRST PART.

[Same as in Exhibit D.]

SECOND PART.

[Same as in Exhibit D.]

NOTE.—The names are to be inserted alphabetically.

Form 7.

No. 7. [See RULE 14.]

In the Matter of the Company, Limited and Reduced; and in the Matter
of "The Companies (Consolidation) Act, 1908."

To Mr. .

You are hereby required to come in and prove the debt claimed by you against the above company, by filing your affidavit and giving notice thereof to Mr. , the solicitor of the company, on or before the day of next; and you are to attend by your solicitor at the chambers of Mr. Justice , Room No. , Royal Courts of Justice, Strand, in the County of London (or at the chambers of the Registrar at) on the day of , 19 , at o'clock in the noon, being the time appointed for hearing and adjudicating upon the claim, and produce any securities or documents relating to your claim.

In default of your complying with the above directions, you will [be precluded from objecting to the proposed reduction of the capital of the company] or [in all proceedings relative to the proposed reduction of the capital of the company be treated as a creditor for such amount only as is set against your name in the list of creditors].

Dated this day of , 19 .

A. B.,
Solicitor for the said Company.

No. 8. [See RULE 19.]

In the Matter of the Company, Limited and Reduced; and in the Matter
of "The Companies (Consolidation) Act, 1908."

Notice is hereby given, that a petition presented to the High Court of Justice on the day of , for confirming a resolution reducing the capital of the above company from £ to £ , is directed to be heard before Mr. Justice on the day of , 19 .

C. & D., of ,
[Agents for E. & F., of],
Solicitors for the Company.

3rd May, 1909.

THE COMPANIES (WINDING-UP) RULES, 1909.

[These are set out in full in the Appendix to Part II. of this work.]

PREVENTION OF CORRUPTION ACT, 1906.

6 EDW. 7, c. 34.

An Act for the better Prevention of Corruption.

[4th August, 1906.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

- 1.—(1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business: or

Punishment of corrupt transactions with agents.

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal:

he shall be guilty of a misdemeanour, and shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine, or on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding fifty pounds, or to both such imprisonment and such fine.

(2) For the purposes of this Act the expression "consideration" includes valuable consideration of any kind: the expression "agent" includes any person employed by or acting for another; and the expression "principal" includes an employer.

(3) A person serving under the Crown or under any corporation or any municipal borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act.

2.—(1) A prosecution for an offence under this Act shall not be instituted without the consent, in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland.

Prosecution of offences.

(2) The Vexatious Indictments Act, 1859, as amended by any subsequent enactment, shall apply to offences under this Act as if they were included among the offences mentioned in section one of that Act.

22 & 23 Vict. c. 17.

(3) Every information for any offence under this Act shall be upon oath.

(4) The expenses of any prosecution on indictment under this Act shall be defrayed as in cases of indictment for felony.

(5) A court of quarter sessions shall not have jurisdiction to inquire of, hear, and determine prosecutions on indictments for offences under this Act.

(6) Any person aggrieved by a summary conviction under this Act may appeal to a court of quarter sessions.

Application
to Scotland.

3. This Act shall extend to Scotland, subject to the following modifications :—

(1) Section two shall not extend to Scotland :

(2) In Scotland all offences which are punishable under this Act on summary conviction shall be prosecuted before the sheriff in manner provided by the Summary Jurisdiction (Scotland) Acts.

Short title
and com-
mencement.

4.—(1) This Act may be cited as the Prevention of Corruption Act, 1906.

(2) This Act shall come into operation on the first day of January nineteen hundred and seven.

[“A person serving under . . . any corporation . . . is an agent within the meaning of this Act.” Sect. 1 (3). Accordingly, directors, managers, superintendents, travellers, and other employes of companies should bear the Act in mind. The Act is far-reaching in its operation. It makes the payment or acceptance of a bribe a misdemeanour, that is, a criminal offence, punishable by imprisonment or fine. Both the person who gives and the person who accepts a bribe is punishable, and it matters not how carefully the transaction is veiled, or how roundabout is the procedure adopted ; and although, under sect. 2, “A prosecution for an offence under the Act is not to be instituted without the consent in England of the Attorney-General or the Solicitor-General . . .” and some people who pay or accept bribes regard this as a fetter and safeguard, it must not be forgotten that without any such consent, several persons implicated may be prosecuted for conspiracy to commit the statutory offence. *Re v. Porter*, (1910) 1 K. B. 369.]

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